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THE
PACIFIC REPORTER
VOLUME 201

STATE ex rel. HANSON et al. v. SUPERIOR COURT OF WASHINGTON IN AND FOR YAKIMA COUNTY et al. (No. 16734.)

(Supreme Court of Washington. Oct. 24, 1921.)

Eminent domain \S 68—Order of necessity by supervisor of highways held justifiable.

Under Laws 1921, c. 32, amending Rem. Code 1915, \S 5872, and providing that on condemnation to secure lands for the Inland Empire Highway, selection of lands by the supervisor shall be conclusive in absence of bad faith, arbitrary, capricious, or fraudulent action, his selection was conclusive where the evidence showed that the condemnation was for the purpose of avoiding two bad existing curves, and that the road, if condemned, would decrease the length of the highway and avoid congestion.

Department 2.

Certiorari by the State, on the relation of William Hanson and others against the Superior Court in and for Yakima County and others to review order of necessity of condemnation. Order affirmed.

McAulay & Melgs, of Yakima, for plaintiffs.

Lindsay L. Thompson, of Olympia, and John A. Homer, of Seattle, for respondents.

PER CURIAM. Certiorari to review the order of necessity in a condemnation by the state of a short strip of land for the construction of a part of the Inland Empire Highway.

Chapter 32, Laws 1921, amending section 5872, Rem. Code, provides:

"In case of condemnation to secure such lands, the action shall be brought in the name of the state * * * and in such action the selection of the lands by the supervisor of highways shall, in the absence of bad faith, arbitrary, capricious or fraudulent action, be conclusive upon the court and judge before which such action is brought that said lands are necessary for the purpose sought."

The evidence in this case shows that the condemnation is sought for the purpose of avoiding two bad curves that at present

exist in the public roads and streets, and that the road, as condemned, will decrease the length of the highway, prevent bad curvature, and avoid considerable congestion. These facts, far from establishing the bad faith, arbitrariness, capriciousness, and fraudulent action required by the statute to be shown in order to nullify the selection, vindicate the selection of such land, and confirm the finding of necessity made by the lower court. State of Washington v. Superior Court of Adams County, 111 Wash. 542, 191 Pac. 418; State ex rel. Urquhart v. Superior Court for Grant County, 112 Wash. 84, 191 Pac. 416.

Order affirmed.

SMITH v. ANDERSON et al. (No. 16338.)

(Supreme Court of Washington. Oct. 8, 1921.)

Boundaries \S 30—Owners outside section involved held not necessary parties to suit to establish.

In an action between the owners of two quarter sections of land within the same section to establish a boundary between them, the fact that it became necessary to establish the two easterly corners of the section did not make it necessary or proper to make owners of other lands to the east and outside of the section parties to the action.

Department 1.

Appeal from Superior Court, Stevens County; Hugo E. Oswald, Judge.

Action by Edward I. Smith against Louis H. Anderson and others to establish boundary line. From decree confirming the line established by the commissioner, defendants appeal. Affirmed.

Zent & Jesseph, of Spokane, for appellants. John M. Cannon and Ferris & Ferris, all of Spokane, for respondent.

FULLERTON, J. The respondent, Smith, owns the northwest quarter of section 30 in township 30 north of range 39 east of the Willamette meridian, and the appellants Anderson and Leetsch own the northeast quar-

January, 1916, present action sections 947- alleging that the several tracts of were and uncertain, and proprietors, could not agreement, and prayed appoint a commissioner to and properly mark the The appellants answered, ad- allegations of the complaint, and the prayer for the appointment of Pursuant thereto the court a commissioner to survey and the line, who in due time made the and returned into court a plat and field notes thereof. The appellants ex- to the report, and a hearing was had thereon, during the course of which it de- veloped that no actual survey of the town- ship had ever been made by the surveyors of the government; that while the exterior boundaries of the township had been run and properly marked on the ground, the interior surveys had not been so run and marked, al- though the surveyor appointed for that pur- pose had so reported, returning to the gov- ernment with his report field notes purport- ing showing a proper survey. This fact be- came known to the commissioner appointed by the court during the course of his work, and to establish the disputed boundary line he found it necessary to determine the proper location of the southwest and the northeast corners of section 30. In the course of the hearing it developed also that the lands in the sections adjoining section 30 had passed into private ownership, and the appellants, conceiving that these adjoining proprietors had an interest in the matter in litigation between the parties, moved the court to re- quire them to be brought into the case and made parties thereto before proceeding fur- ther therewith. This motion the court de- nied, and after further hearing rendered and entered a decree, confirming the line estab- lished by the commissioner as the true divid- ing line between the premises of the parties.

On the appeal the sole error assigned is the refusal of the court to require the owners of the surrounding tracts of land to be made parties to the action. But it would seem that the question requires no extended dis- cussion. Manifestly, these parties have no in- terest in the actual controversy before the court. It is a matter of indifference to them where the line in dispute is located, as their rights are in no manner affected thereby. It is possible, as the appellants argue, that a controversy may subsequently arise between the appellants and the adjoining proprietors as to the true location of the corners of the section in controversy, and it is possible that in the determination of the controversy the

corners may be located at a different place than the place where the commissioner found them to be, and it is possible that the loca- tion so determined upon may make the sec- tion of lesser area than the commissioner made it, and thus operate to the injury of the appellants. But it is at once apparent that the opposite of these possibilities is equally probable; that is to say, no controversy over the proper location of the corners may ever arise, or, if it does arise, the parties may be able to agree as to the proper location, or, if the controversy proceeds to a determination by the court, it may be found that the sec- tion is of greater area than the commissioner found it to be, and the appellants thus be gainers rather than losers by the determina- tion. The correct answer, however, is, we think, that these adjoining proprietors have no interest in the controversy now before the court, and their presence is not necessary to its complete determination. It is clear that to bring the parties in would introduce a new controversy which possibly could not be determined without the introduction of others. And it could be that the circle would so widen as to involve all landowners in the township, many of whom may be satisfied with the existing lines. In the determination of controversies a court is not required to borrow trouble. It does its full duty when it determines the immediate controversy be- fore it. In this instance the court had before it only the duty of properly locating the dis- puted boundary line, and the parties im- mediately affected were the only necessary or proper parties.

There was no error in the judgment, and it will stand affirmed.

PARKER, C. J., and MACKINTOSH, BRIDGES, and HOLCOMB, JJ., concur.

STATE ex rel. GREAT NORTHERN RY. CO.
v. HERSCHBERGER et al. (No. 16330.)

(Supreme Court of Washington. Oct. 8, 1921.)

Municipal corporations §33(4)—Failure to publish notice with accurate description of boundaries of proposed village invalidates the proceeding.

A proceeding to organize a proposed vil- lage is void where there is an inaccurate de- scription of the boundaries in the published notice of the proceeding before the county commissioners; the statutory requirement that such publication be made being a positive man- date.

Department 1.

Appeal from Superior Court, Okanogan County; C. H. Neal, Judge.

Application for writ of review by the State on the relation of Great Northern Railway

Company, against F. B. Herschberger and others. Writ dismissed, and relator appeals. Reversed and remanded.

Chas. S. Albert and Ernest M. Sargeant, both of Spokane, and A. J. Laughon, of Seattle, for appellant.

W. O. Gresham, of Okanogan, for respondents.

FULLERTON, J. On December 1, 1919, certain electors of a portion of the county of Okanogan filed a petition with the board of county commissioners of that county, praying that a portion thereof be incorporated as a municipal corporation under the name of the town of Molson. The petition contained an accurate description of the boundaries of the proposed corporation, and was in other respects sufficiently regular. On the presentation of the petition the board of county commissioners fixed January 6, 1920, at 10 o'clock a. m., in the rooms of the board in the courthouse at the city of Okanogan, as a time and place for hearing the petition, and directed that the petition be published together with the notice of the hearing, for at least two weeks preceding the hearing in the *Molson Leader*, a newspaper printed and published in the county of Okanogan. An attempt was made to comply with the order of the board, but the petition as published in describing the boundaries of the proposed corporation did not follow the petition, but so described the boundaries as to exclude a considerable part of the territory which the boundaries as set forth in the petition included, even if the description can be said to be otherwise intelligible. The board of county commissioners found at the hearing, notwithstanding this defect in the publication, the proceedings to be in all respects regular, and submitted the question of incorporation to the electors of the proposed corporation, and thereafter, the election being favorable, entered an order declaring the territory as described in the original petition to be duly incorporated as a town of the fourth class under the name and style of the town of Molson. The appellant now before us thereupon applied to the superior court of Okanogan county for a writ seeking a review of the several orders of the board of county commissioners. In its petition it set forth in substance the entire proceedings had with relation to the incorporation. The board on its appearance in the proceeding moved to quash the writ on the ground that the application did not state the facts sufficient to constitute a cause of action, or grounds sufficient to entitle the applicant to the relief sought. The court sustained the motion, and, after the applicant had elected to stand on its petition, entered a judgment of dismissal.

The single question presented here is whether the failure of the published notice to correctly describe the boundaries of the

proposed corporation is fatal to the proceedings. It is our conclusion that it is so. The publication of the petition together with notice of the time of the hearing therein is the jurisdictional process by which the persons affected by the incorporation are brought into the proceedings. The requirement that such publication be made is the positive mandate of the statute. The object of the requirement is to give persons affected by the proposed corporation an opportunity to appear and oppose or favor the incorporation as they may deem their interests require, and manifestly this right is denied them unless they be given notice of the true boundaries of the proposed corporation. No question with respect to the forming of a municipal corporation is more important to the property holder than the question of its boundaries. It is conceivable that a property holder may have no objection to the incorporation if it included only the territory described in the notice given him, while he would seriously oppose it if it included less or different territory. To say, therefore, that a notice need not describe the territory is not only to deny the mandate of the statute, but it is to open the doors to opportunity for fraud.

No principle of law is better settled than the principle that notice must be given of the organization of a municipal corporation in the form prescribed by statute. Abbott, in his work on *Municipal Corporations*, p. 34, uses this language:

"It is a fundamental rule of law that before action or proceedings of any character can be legally taken affecting the rights, either property or political, of an individual, he must have notice of the pendency of such proposed action or proceedings. This rule of law applies to the present question. A proposed municipal or quasi public corporation necessarily includes the property of a large number of individuals. The law gives them a right to be heard upon all matters pertaining to or affecting their rights. The necessary petition preliminary to the organization of a public corporation, under authority of law, must be brought home either by actual or constructive notice to the attention of all possessing rights within the limits of the territory included."

So this court, in *Territory ex rel. Kelly v. Stewart*, 1 Wash. 98, 23 Pac. 405, 8 L. R. A. 106, said:

"There are few, if any, acts of state bearing upon individuals more important than those which determine their liability to be included in particular municipalities; and the cases are rare in which they have not been allowed an opportunity of being heard in every step of the proceedings."

In *State ex rel. Blum v. Port of Bayocean*, 65 Or. 506, 138 Pac. 85, the question was on the sufficiency of an election notice held to determine whether a port should be organized. The statute required the description of

the territory proposed to be included therein to be published in the notice of the election. In the description a call of a course was omitted, and the question was whether this invalidated the proceedings. The court said:

"We do not believe the notice of election sufficiently describes the exterior boundaries of the proposed port. The omission of one call from the description of the boundary leaves a hiatus to be supplied by the imagination of the person reading the notice. A defective description of a boundary in a deed may be corrected by a suit to have it reformed according to the true intent of the parties, but a misdescription in an election notice cannot be corrected nor reformed by any sort of proceeding. It must be absolutely definite in itself. This notice lacks that quality, and the proceeding is void."

But the authorities need not be multiplied. They are in substantial accord on the proposition that the notice is jurisdictional and must be complied with if the proceedings are to have validity.

The judgment is reversed, and the cause remanded, with instructions to reinstate the case, and proceed in accordance with the prayer of the petition.

PARKER, C. J., and HOLCOMB, BRIDGES, and MACKINTOSH, JJ., concur.

NATIONAL FINANCE CO. v. EMERSON. (No. 16317.)

(Supreme Court of Washington. Oct. 6, 1921.)

1. Bills and notes §370—Want of consideration no defense as against holder in due course.

Want of consideration is no defense as against a holder of notes in due course.

2. Trial §141—Verdict properly directed for plaintiff where there was uncontradicted evidence supporting its claim.

In action on note, defended on the ground of want of consideration, where there was uncontradicted evidence on the part of plaintiff supporting its claim that it was a holder in due course, the court properly directed a verdict for the plaintiff.

3. Sales §161—Delivery to carrier is delivery to buyer.

Seller's delivery of goods to carrier constitutes delivery to buyer.

4. Sales §201(4)—Loss of goods in hands of carrier no defense in action for price.

In action on notes given for purchase price of goods, the loss of goods while in the hands of carrier was no defense, the seller having delivered the goods by delivery to carrier.

5. Evidence §441(9)—Parol evidence as to seller's agreement to deliver, varying written agreement, inadmissible.

Parol evidence that seller agreed to ship goods so they would arrive for Christmas trade held inadmissible, as tending to vary the written agreement.

6. Trial §60(1)—Parol evidence as to agreement to ship at certain time properly excluded in absence of offer to show loss suffered thereby.

In action on notes given for purchase price of phonographs, testimony that seller agreed to ship the phonographs in time for the Christmas trade, but failed to do so, was properly excluded where the offer of such testimony was not accompanied by an offer to show that a loss was suffered thereby.

Department 1.

Appeal from Superior Court, Adams County; John Truax, Judge.

Action by the National Finance Company against L. D. Emerson. A verdict was directed for the plaintiff, and from an order granting a motion for a new trial, the plaintiff appeals. Order reversed and cause remanded, with instructions.

Adams & Miller, of Ritzville, for appellant.
Wm. O. Lewis, of Ritzville, for respondent.

PER CURIAM. This was an action brought to recover upon three promissory notes, executed and delivered by the respondent to the Ramona Trading & Manufacturing Company, and by that company indorsed to the appellant before maturity. The defense set up was want of consideration. On the trial, at the conclusion of all of the evidence, the court instructed a verdict for the appellant. Thereafter, on motion of the respondent, a new trial was granted, and the present appeal is from the order granting a new trial.

[1, 2] It is our opinion that the court was in error in granting a new trial. The evidence on the part of the appellant supported its claim that it was a holder of the notes in due course, and nothing contradictory thereof appears in the record.

[3, 4] Nor are we able to find that the respondent sustained his claim of want of consideration. The notes were given as the purchase price of three phonographs. The order for the phonographs was in writing, and directed the seller to "deliver to me [the respondent] at your earliest convenience f. o. b. Los Angeles, or your distributing point, the articles mentioned" in the order. The respondent testified that one of the phonographs did not reach him, but his further evidence tended to show that it had been shipped, and the bill of lading forwarded him. This being the fact, delivery was made when the articles were delivered to the carrier, and it is not a defense to the notes to

show that a part of the property had been lost while in the hands of the carrier.

[5, 6] The respondent also offered testimony to the effect that it was orally agreed as a part of the order that the phonographs should be shipped so as to arrive in time for the Christmas trade, and that they were not so shipped. The court rejected the evidence, and it may be that it afterwards concluded that it was in error in so doing. But the evidence was rightly rejected, for the reasons: First, that it tended to vary the written agreement; and, second, because the offer was not accompanied by an offer to show that a loss was suffered thereby.

In whatever aspect, therefore, the case is viewed, no defense to the action is shown. The order granting a new trial is reversed, and the cause remanded, with instructions to enter a judgment for the plaintiff in accordance with the prayer of its complaint.

HANAN et al. v. CITY OF WENATCHEE. (No. 16451.)

(Supreme Court of Washington. Oct. 6, 1921.)

1. Municipal corporations \S 812(6) — Following the requirements of a statute a condition precedent to bringing action against city.

Requirements in the statute (Rem. Code 1915, \S 7998), regulating the method of presenting claims to a city council, are mandatory, and a substantial compliance is a condition precedent to an action against a city.

2. Municipal corporations \S 812(7). — Claim that accident was caused by defective sidewalk on northerly side of a street not a sufficient description.

A recital in the notice of claim against a city, as required by Rem. Code 1915, \S 7998, that the injury was caused "by defective sidewalk located on the northerly side" of a named street, is not a compliance with the statute requiring that claims accurately locate and describe the defect.

Department 1.

Appeal from Superior Court, Chelan County; Wm. A. Grimshaw, Judge.

Action by Katie Hanan and another against the City of Wenatchee. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

D. A. Shiner, of Wenatchee, for appellant.
Barrows & Hanna, of Wenatchee, for respondents.

FULLERTON, J. On July 19, 1919, the respondent Katie Hanan, while walking

upon a sidewalk in the city of Wenatchee, fell thereon and was injured. Conceiving that the city was liable for her injury, she presented to the city, on August 14, 1919, a claim for damages in the following form:

"Katie Hanan, claimant, hereby presents and files her claim for damages against the city of Wenatchee for personal injuries caused by defective sidewalk located on the northerly side of Yakima street about 80 feet westerly of the intersection of Yakima street with Oregon street, which injury consisting of wounding, straining, bruising, and injuring claimant's right leg, and other bodily injuries, which injury occurred on the 19th day of July, 1919. Claimant's residence for six months last past has been No. 522 Yakima street, Wenatchee, Chelan county, Washington; for which personal injuries aforesaid claimant claims damages for the sum of \$5,000, and expenses of medical attention, physician's services, and nursing heretofore incurred and prospective, \$500; total, \$5,500."

The city in due time rejected the claim, and later the respondent began the present action to recover for the damages suffered. At the trial judgment went for the respondent, and the city appeals. At appropriate times during the course of the trial, both before and after the return of the verdict, the appellant questioned the sufficiency of the evidence to sustain a recovery. The objections were directed particularly to the sufficiency of the notice of claim presented to the city. It is objected that it does not accurately locate and describe the defect that caused the injury; in fact, does not describe the defect at all. This is the principal question presented on the appeal, and is the only question we have found it necessary to notice.

The requirement that a claim for damages against a city must be presented to the city council of the city for rejection or allowance as a condition precedent to the maintenance of an action against a city is statutory. The Legislature has seen fit to prescribe that (Rem. Code, \S 7998)—

"All claims for damages against any city or town of the second, third or fourth class must be presented to the city or town council and filed with the city or town clerk within thirty days after the time when such claim for damages accrued. * * * No ordinance or resolution shall be passed allowing such claim or any part thereof, or appropriating any money or other property to pay or satisfy the same or any part thereof, until such claim has first been referred to the proper department or committee, nor until such department or committee has made its report to the council thereon pursuant to such reference. All such claims for damages must accurately locate and describe the defect that caused the injury, reasonably describe the injury and state the time when the same occurred, give the residence for six months last past of claimant, contain the items

of damages claimed and be sworn to by the claimant or a relative, attorney or agent of the claimant. No action shall be maintained against any such city or town for any claim for damages until the same has been presented to the council and sixty days have elapsed after such presentation."

[1] Requirements of this sort in statutes and ordinances are constitutional, reasonable, and in the furtherance of justice. *Cole v. City of Seattle*, 64 Wash. 1, 116 Pac. 257, 34 L. R. A. (N. S.) 1166, Ann. Cas. 1913A, 344. They are also mandatory; and a substantial compliance with the conditions imposed is a condition precedent to the maintenance of an action against a municipality. *Collins v. Spokane*, 64 Wash. 153, 116 Pac. 663, 35 L. R. A. (N. S.) 840.

[2] Turning to the claim here in question, it seems to us to be at once apparent that there is no description of the defect which caused the injury. The recital is that the injury was caused "by defective sidewalk located on the northerly side" of a named street. This is not to accurately describe a defect; it is but to state a general ground on which a recovery can be predicated. Plainly, therefore, there was no compliance with the technical requirement of the statute. We think, furthermore, there was not a compliance with the purposes and intent of the statute. Statutes of this sort have a number of purposes. One of these is to give the municipal officers notice of the nature of the defect which caused the injury on which the claim for damages is founded in order that they may pay or otherwise settle the claim before the municipality is mulct in costs. This right is denied them unless the particular defect is pointed out to them. It is a matter of common knowledge that many of the sidewalks in the municipalities are defective in some respects; in fact it is common knowledge that few, if any, of them are perfect. Not all of these defects, however, will give rise to a cause of action, even though they cause an injury. To say, therefore, that a sidewalk is defective at a particular place and that the defect caused an injury, without anything more, does not give the city that information the law contemplates it should have before suit is instituted against it.

The notice in question here is wholly insufficient, and the trial court should have sustained some one of the numerous challenges interposed to its sufficiency.

The judgment is reversed and the cause remanded, with instruction to enter a judgment in favor of the defendant to the effect that the plaintiff take nothing by her action.

PARKER, C. J., and HOLCOMB, MACINTOSH, and BRIDGES, JJ., concur.

HUB CLOTHING CO. v. CITY OF SEATTLE. (No. 16500.)

(Supreme Court of Washington. Sept. 30, 1921.)

1. Waters and water courses \S 209—In action for damages for damage from defective water meter negligently maintained by defendant, instruction on burden of proof held erroneously refused.

In an action for damages resulting from the bursting of a water meter and flooding plaintiff's cellar, it was error to refuse an instruction that the burden of showing negligence rests with plaintiff, but when plaintiff has shown a situation that could not take place except by the operation of abnormal causes, the onus rests on defendant to prove the injury was caused without his fault.

2. Trial \S 219—"Reasonable inspection" of water meters should have been defined by instruction.

In action for damages resulting from the bursting of a water meter, it was error to refuse an instruction defining the duty of "reasonable inspection," as not confined to mere optical observation, but as includes test and examinations.

[Ed. Note.—For other definitions, see Words and Phrases, Reasonable Inspection.]

3. Municipal corporations \S 625—Ordinance regulating drainage of basements held valid.

Ordinance No. 22839, as amended by Ordinance No. 38792, City of Seattle, relating to the drainage of basements, held not unreasonable legislation.

4. Waters and water courses \S 209—Failure of city to prosecute for noncompliance with city ordinance not material in action for injury from bursting water meter.

In an action for damages for injury caused by bursting of a water meter and flooding plaintiff's cellar, it is not material that the city failed to prosecute plaintiffs for noncompliance with an ordinance regulating cellar drains.

Department 2.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by the Hub Clothing Company against the City of Seattle. Judgment for defendant, and plaintiff appeals. Reversed, and new trial granted.

Lucker & Hyland, of Seattle (Ford Q. Ellridge, of Seattle, of counsel), for appellant.

Walter F. Meier and Edwin C. Ewing, both of Seattle, for respondent.

TOLMAN, J. Appellant brought this action to recover from the respondent city damages alleged to have been sustained as a result of the bursting of a water meter installed by the city in the basement of the building occupied by it. The case was

tried to a jury, which returned a verdict for the defendant, respondent here, and from a judgment on the verdict the appellant brings the case here for review.

The defense interposed was that the city had exercised due care in the selection and maintenance of the meter, and also that the plaintiff had failed to comply with the city ordinance, requiring all drains in basements used for business purposes to be protected by means of a raised strainer not less than one foot in height, so perforated as to admit the full flow of water into the sewer, and forbidding the occupation or use of a basement not so equipped.

[1] Many errors are assigned, but we find it unnecessary to discuss each in detail. There was evidence before the jury to the effect that the city bought this meter under a guaranty that it would withstand a pressure of 300 pounds to the square inch. Before its installation it was subjected to a test of 120 pounds only; no other test or inspection being made. After its installation the city sent its employees monthly to read the meter and report anything wrong which they might see, such as leaks, breaks, loose nuts, couplings, and the like. Each meter reader was expected to read from 300 to 450 meters each day, and it is apparent that there is room for a difference of opinion as to whether this was a sufficient inspection. Moreover, there was evidence introduced to the effect that this particular meter was defective in its construction, and there is ground for argument that the defect might have been discovered by a proper test or a proper inspection. The trial court instructed the jury that the burden of proof was upon the plaintiff to establish the specific negligence charged, but refused to go further and instruct as requested by appellant:

"You are instructed that, as a general proposition, the burden of showing negligence on the part of one occasioning an injury rests in the first instance upon the plaintiff, yet when it has shown a situation which could not have taken place except by the operation of abnormal causes, the onus rests upon the defendant to prove that the injury was caused without his fault."

This instruction should have been given, as it properly defines the rule applicable in such a case, as we have frequently held. *Abrams v. Seattle*, 60 Wash. 356, 111 Pac. 168, 140 Am. St. Rep. 916; *Vittucci Importing Co. v. Seattle*, 72 Wash. 192, 130 Pac. 109; *Briglio v. Holt & Jeffery*, 85 Wash. 155, 147 Pac. 877.

[2] Error is also assigned upon the refusal of the trial court to define what was meant by the use of the words "reasonable inspection," used in instructing the jury as to the duty of the city. Appellant requested that the following be given:

"You are instructed that the word 'inspection,' which I have heretofore used, is not confined to optical observation, but is ordinarily understood to embrace tests and examinations; and it is defined by Webster as follows: 'To look upon, to examine for the purpose of determining quality and detecting what is wrong and the like.'"

This instruction should also have been given in order that the jury might have before it some standard by which to determine whether or not that which the city did amounted, under the circumstances of this case, to the performance of the duty which the law imposed.

[3] The city by its answer pleaded its Ordinance No. 22839 as amended by Ordinance No. 36792, relating to the drainage of basements, and alleged that the plaintiff had failed to comply with the provisions of sections 33 and 33½ thereof, and that the damages suffered by it, if any, were occasioned solely by such failure. The reply to this answer was a general denial only. Appellant now for the first time attacks the amended ordinance upon the theory that it is unconstitutional. Assuming without deciding that this question may now be raised, we are of the opinion that this ordinance must be upheld under the authority of *Schlumpf v. Seattle*, 88 Wash. 192, 152 Pac. 673.

[4] Nor can the failure of the city to prosecute appellant for noncompliance with the terms of the ordinance affect the situation. *Fluckiger v. Seattle*, 103 Wash. 330, 174 Pac. 456, L. R. A. 1918F, 780.

Because of the errors in refusing the instructions as herein pointed out, the judgment must be reversed and a new trial granted. It is so ordered.

PARKER, C. J., and MITCHELL and MACKINTOSH, JJ., concur.

STATE ex rel. HART v. KELLY et al.
(Nos. 16627, 16628.)

(Supreme Court of Washington. Sept. 16, 1921.)

1. Appeal and error ⇐382—Mandamus ⇐187(5)—Supersedeas bonds required held not excessive.

Supersedeas bonds, each of \$50,000, in injunction and mandamus suits held not excessive as to trustees of corporate stock, worth respectively \$47,000 and \$37,000, in view of Rem. Code 1915, § 1722.

2. Appeal and error ⇐382—Loss sustainable to be considered in fixing amount of bond.

In fixing the amount of a bond it is necessary to take into consideration the amount of damages or loss that may be sustained by one whose action is sought to be superseded if an adequate bond is not given and that party should prevail upon an appeal.

Department 2.

Appeal from Superior Court, King County;
King Dykeman, Judge.

Suit by George Hart against Guy E. Kelly and another, with application by the State of Washington, on the relation of George Hart, for a writ of mandamus against the same defendants. Judgments for plaintiff in each case, and defendants appeal, and apply to Supreme Court to require the trial court to reduce amounts of supersedeas bonds. Applications denied.

Kelly & MacMahon, of Tacoma, for appellants.

Wright, Kelleher, Allen & Helen, of Seattle, for respondent.

MAIN, J. These two cases, while not formally consolidated in the trial court, are so closely allied that they will be considered as one. In each case there is an application to require the trial court to reduce the amount of a supersedeas bond. In one, George Hart petitioned the superior court for an injunction. In the other, he made application for a writ of mandamus. The cases came on for hearing in the trial court at the same time and resulted in the issuance of a permanent injunction in one case and a writ of mandate in the other. After the judgment was entered an application was made to fix the amount of the supersedeas bonds, which resulted in the trial court's fixing the amount of the bond in each case at \$50,000. It is claimed that these bonds are unreasonable in amount, and, as already stated, the applications here are to require the trial judge to fix bonds in a lesser sum. A somewhat comprehensible statement of the facts will be necessary in order to determine whether the trial court fixed the bonds in an unreasonable amount.

One David Hart, during his lifetime, caused to be incorporated under the laws of this state the David Hart Company, Inc., with a capital of \$50,000, divided into 500 shares of the par value of \$100 each. After this corporation was formed Hart transferred to it all of his property, both real and personal. Prior to his death he made a will by which he bequeathed the stock of this corporation to his children in various amounts. To the daughter, Bernice Hart Smith, he gave approximately one-half thereof. To the other five children there was bequeathed the balance of the stock in various amounts.

After the testator died and the will had been admitted to probate, and the estate was in process of administration, the children, other than Mrs. Smith, were dissatisfied with the provisions of the will. The instrument contained a provision that, if any of the beneficiaries thereunder should attempt to contest it, such beneficiary would thereby forfeit to the other beneficiaries all that he

or she was to receive under the will. While the estate was in process of administration, the children, other than Mrs. Smith, claimed that they entered an oral agreement with her whereby they would refrain from instituting a contest of the will providing that she would distribute a sufficient number of shares of the stock which went to her among the other children so that each would share equally. This agreement was not carried out, and after the time had expired when the contest of the will might be instituted, was repudiated by Mrs. Smith. Thereupon George Hart, one of the sons of David Hart, the testator, took an assignment from each of the other children and brought an action in his own behalf and on their behalf for damages against Mrs. Hart Smith on account of her failure to carry out the oral agreement. This action went to trial before the court and a jury, and resulted in a verdict in favor of the plaintiff in approximately the sum of \$37,000. At about the time judgment was entered upon the verdict, and prior to the levy of an execution, Mrs. Smith pledged her stock, 259 shares, to the Citizens' State Bank of Auburn, to secure an indebtedness of approximately \$9,000, and also to secure an indebtedness to Guy E. Kelly and E. S. McCord in approximately the sum of \$10,500. The certificate evidencing the ownership of the stock was placed in physical possession of the bank, where it has since remained. After the entry of judgment in the action brought by George Hart, and the issuance of an execution thereon, Messrs. Kelly and McCord brought an action to restrain the levy upon and sale of the certificate of stock which was then in the Auburn State Bank. This action was tried and injunctive relief was denied and no appeal was prosecuted.

The judgment in the principal action was entered on March 21, 1921. After the injunction suit referred to had been determined adversely to the plaintiffs the stock of Mrs. Smith was levied upon and sold on April 23, 1921, and was purchased by George Hart subject to the above-mentioned liens against it for the sum of \$10,000. After the execution sale, Mrs. Smith owned no stock in the company and Mr. Kelly owned one share. On April 25, 1921, and after the stock had been sold upon execution, George Hart, the plaintiff in the original action, brought an injunction suit against Guy E. Kelly and Bernice Hart Smith, the trustees of the David Hart Company, to restrain them from in any manner disposing of, dealing with, or changing any of the assets of that corporation. On April 26, 1921, George Hart instituted a mandamus action to require the trustees of the David Hart Company to call a meeting of the stockholders of the company, and on May 10, 1921, instituted another mandamus action to require them to issue to him a certificate of stock subject to the rights of the lien claimants above mentioned, and to make the prop-

er entries upon the corporation books. These actions all came on for hearing at the same time. In the injunction action the defendants, the trustees of the David Hart Company, consented that an injunction might be issued pending the litigation. An order was thereupon entered restraining the defendants from in any manner disposing of, dealing with, or changing the assets of the corporation. The mandamus actions were contested, and resulted in orders directing that writs issue as prayed for. Notices of appeal were given in the injunction action and in each of the mandamus actions.

[1] After the injunction decree had been entered and the writs of mandate directed to be issued, Mrs. Smith and Guy E. Kelly, the trustees of the corporation, made application to the trial court to have the amount of the supersedeas bonds fixed. This application resulted in an order of the trial court fixing the supersedeas bond in the injunction suit at \$50,000, and in the mandamus at \$50,000. The trustees of the corporation, being of the opinion that these bonds were excessive made the present applications to this court seeking an order directing the trial court to reduce them.

Without deciding, it will be assumed that, if the trial court arbitrarily or capriciously fixes a supersedeas bond in unreasonable amount, this court, in aid of its appellate jurisdiction, will cause the amount of the bond to be fixed in a reasonable sum. In the injunction suit, as above stated, the trustees of the corporation are restrained from disposing of or dealing with the assets of the corporation. The trial judge, in his return to the applications here made, states:

"Answering paragraph 11 thereof, the said Everett Smith alleges that, at the time of the trial of this cause in the court below, undisputed evidence disclosed that the liquid assets of David Hart, Inc. (outside of land owned by the said corporation) amounted to the total sum of approximately \$47,000 made up of mortgage loans, conditional sales contracts, Liberty Bonds, and about \$7,000 in cash. Undisputed testimony in said cause also further disclosed that the cash and securities had been removed from the banks where the corporation had transacted its business and had been deposited in places unknown to the petitioner George Hart or to any of his associates, and that any information with respect to said assets had been denied by the respondents herein to the petitioner and to all of his associates. Undisputed testimony further disclosed that the respondent Guy E. Kelly had, after the rendition of judgment in said cause, numbered 143340, advised Bernice Hart Smith, the other respondent herein, to place the assets of the corporation beyond the reach and control of the petitioner George Hart and his associates, so that their ownership of said corporation, even in the event of an affirmance of the judgment in the Supreme Court, would avail them nothing."

By this return it is shown that the liquid assets of the David Hart Company were ap-

proximately \$47,000, and that the trustees of that company, since the rendition of the judgment in the principal action, are removing such assets in order that, if the judgment against Mrs. Smith should be affirmed, it would not avail George Hart and his associates anything. It thus appears that the amount of damages which would be sustained by the disposition of the liquid assets would be the sum of \$47,000. In the mandamus action there is involved a certificate of stock for 250 shares of the corporation stock, which is subject to liens in approximately the sum of \$20,000. Based upon the finding of the jury as to the amount of damages in the principal action, the value of the stock is approximately \$200 per share. It would have been necessary for Mrs. Smith to distribute to her brothers and sisters approximately 173 shares of the stock, in order that each should share equally. For failure to do this the jury returned a verdict of approximately \$37,000. An appeal was taken from the judgment entered in the principal action, and no supersedeas bond has at any time been given. Under the statute (Rem. Code 1915, § 1722), had Mrs. Smith desired to supersede the judgment against her it would have been necessary for her to give a supersedeas bond in approximately the sum of \$74,000. The theory of the statute is that, where a money judgment is entered, in order to stay execution upon it, it is necessary for the judgment debtor to secure the judgment creditor by a bond in double the amount of the judgment. If, upon appeal in case of a money judgment, there should be an affirmance, the amount of the judgment creditor's recovery would be the amount specified in the judgment. And if he did not recover thereon his loss would be represented by the same amount. In the injunction action now before us the liquid assets of the corporation are \$47,000 and if these should be disputed and placed beyond the reach of the judgment creditor in the principal action his loss would be that sum. In the mandamus action, the stock being of approximately the value of \$200 per share, and there being liens against it to the extent of approximately \$20,000, there would remain value in the stock of about \$30,000. It is thus easy to be seen what might be the measure of the loss to the judgment creditor if adequate bonds should not be given, and he should be successful upon appeal. It would seem that there would be the same reason for fixing a bond in double the amount of the liquid assets of the corporation which might be dissipated as there would for fixing, as the statute requires, a bond in double the amount of a money judgment in order that there may be a supersedeas.

Taking the two actions together and considering all the attendant facts and circumstances, together with the amount of loss which may result to the plaintiff in the origi-

nal action if adequate supersedeas bonds are not required, it cannot be held that the trial court fixed the bonds in an unreasonable amount, and therefore acted in an arbitrary and capricious manner.

[2] In fixing the amount of a bond it is necessary to take into consideration, as already stated, the amount of damages or loss that may be sustained by one whose action is sought to be superseded if an adequate bond is not given and that party should prevail upon an appeal. In *Hillman v. Gordon*, 107 Wash. 249, 181 Pac. 677, there was an application to vacate a judgment of the superior court, from which there had been no appeal. The application was denied and notice of appeal given. Thereupon a petition was made to this court that it cause to be fixed the amount of a supersedeas bond. Reasoning by analogy in that case, the court directed that the supersedeas bond be fixed in the same amount that would have been necessary to supersede the judgment had there been an appeal prosecuted therefrom, stating that the appellants in that action should not be placed in a more advantageous position with reference to the amount of the bond than they then would have had, had they appealed directly from the judgment instead of from the order refusing to vacate it.

In the present case, had Mrs. Smith appealed from the judgment under the statute, she would have been required to give bond in the sum of \$72,000, but, as stated in the case cited, she should not be placed in a more advantageous position in attempting to supersede the injunction and the writs of mandate than she would have been had she superseded the judgment.

The application in each case will be denied.

PARKER, C. J., and BRIDGES, MITCHELL, and TOLMAN, JJ., concur.

HEMRICH v. HEMRICH et al. (No. 16484.)

(Supreme Court of Washington. Sept. 16, 1921.)

1. Trusts §283(2) — Trustee, taking title from cestui, must prove good faith.

Courts must scrutinize with caution transactions between trustees and the cestuis que trust, and must lay upon the trustee the burden of proving immaculate faith when title of the cestui is found in the trustee, especially where the cestui is of immature age, judgment, and experience.

2. Parent and child §9(1) — Unconscionable transactions between parent and child will be set aside.

The courts are alert to set aside unconscionable transactions between parent and child.

3. Trusts §283(2) — Conveyance of devised property to trustee void for undue influence and constructive fraud.

Where testator devised to his widow one-third of the estate, and the other two-thirds to his children, and all the children conveyed to the widow, the youngest, who was inexperienced and under his mother's influence, conveying his share shortly after attaining majority, held, in an action by the son's heir and administratrix to recover an interest in the estate, that the widow, as trustee, had not sustained the burden of showing that her acquisition of the son's interest was proper; the evidence disclosing undue influence and constructive fraud.

4. Trusts §288—Four years' delay in attacking cestui's deed to trustee, not laches.

Laches held not to bar an action by grantor's heir and administratrix to set aside, for undue influence and constructive fraud, a conveyance made in August, 1915, to his mother as trustee, though proceedings were not begun until after September, 1919.

5. Wills §740(3) — Deed, without consideration, to carry out testator's intention, not ground for recovery against grantees.

Where a devisee under his father's will conveyed his interest in certain property to his sister, such deed, although without consideration, could not be made the basis of a judgment in favor of the son's heir and administratrix against the sister; it being executed to perfect her title under a deed by the other heirs to carry out testator's expressed intention of giving her the property.

Department 2.

Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Freda W. Hemrich against Amelia Hemrich and others, to recover an interest in the estate of Andrew Hemrich, deceased. Judgment for plaintiff, and defendants appeal. Affirmed in part and reversed in part.

Greene & Henry and Peters & Powell, all of Seattle, for appellants.

John B. Hart and F. C. Rapp, both of Seattle, for respondent.

MACKINTOSH, J. This action is to recover an interest in the estate of Andrew Hemrich, deceased. Andrew Hemrich died in the city of Seattle on May 2, 1910, possessed of an estate which was worth in the neighborhood of \$600,000. There survived him his widow, Amelia Hemrich, and five children, John, Alvin, Ernest, Katherine and Carl. All of these except Carl are living, and are parties defendant in this action. Katherine is now married to Wilbur W. Scruby. By the terms of the will one-third of the estate was left to the widow and the other two-thirds were devised to the five children, to "be divided between the said children share and

share alike, each of said children to come into possession as follows: Each of my sons when he shall arrive at the age of 25 years and my daughter * * * when she shall arrive at the age of 21 years." Under the will the widow, deceased's brother, and the son John were appointed executors and trustees. The will further provided for the support, maintenance, and education of the children from the funds of the estate. Carl was the youngest of the children, and attained his twenty-first birthday on July 18, 1915. In May, 1917, he was married to the plaintiff in this case, and on November 28, 1918, Carl died, not yet having arrived at the age of 25 years. Carl's widow is claiming a two-fifteenths interest in the estate as heir and administratrix of her deceased husband. In 1911 all of the children except Carl, having then arrived at their majority, conveyed all their interest in their father's estate to their mother, and on August 28, 1915, which was 41 days after arriving at his majority, Carl conveyed his interest in his father's estate to his mother. The deed of conveyance was not filed for record until March 16, 1917. He conveyed to the Andrew Hemrich Investment Company, which was in effect a conveyance to his mother, as will appear by a further recitation of the facts in regard to the incorporation of this company. In November, 1910, the Andrew Hemrich Investment Company was incorporated, to which, as already stated, the widow and all the children except Carl conveyed their respective interests in their father's estate. The capital stock of the company was used in payment of these transfers, and the shares of stock which were issued to the children were indorsed by them and delivered to their mother. These conveyances and transfers vested the title of these children in their mother.

On November 8, 1911, the executors under the will filed their final account and petition for distribution, in which it appeared that the widow and the four children had transferred all their interest to the Andrew Hemrich Investment Company, and that the eldest child, John, was the only one who had then arrived at the age of 25 years. The petition asked that the one-third of the estate devised to the widow should go to the Andrew Hemrich Investment Company, as also should John's share, and that the shares of Alvin, Ernest, and Katherine, who were of age, but not yet 25 years, and Carl, who was not then of age, should be distributed to the trustees under the will; the shares of Alvin, Ernest, and Katherine to be held by these trustees until these children should each arrive at the age of 25 years, when their shares should be turned over to the Andrew Hemrich Investment Company, and as Carl was yet a minor and had made no transfer to the investment company, the disposition of his share of the estate was not referred to. The

order of distribution was made as prayed for on September 5, 1913. On August 10, 1915, 18 days before the conveyance by Carl to the investment company, he received from his mother two checks, aggregating \$5,260, and on September 16, 1915, he received a further check from his mother of \$2,840, which amount, however, he shortly afterwards repaid. All of this money was derived from income from the various properties of the estate.

On March 19, 1917, the investment company was dissolved, for the reason that it had served its purpose, and, the widow being the sole owner of all its stock, which represented the entire estate of her deceased husband, there existed no longer any reason for the continuance of the corporation, and its assets were turned over to her. This deed from the investment company was dated the same day the petition for dissolving the corporation was filed. In January, 1919, occurred the first denial of respondent's interest in the estate, which was followed by a formal demand in September, 1919, for that share.

The above is a recital of the main facts in the case, which show the manner in which the entire estate of Andrew Hemrich, deceased, came into possession of Amelia Hemrich, his widow, devisee, executrix, and trustee under the will, and are the facts upon which she now claims to be the sole owner in her own right of all the estate.

The complaint, among other things, alleges that the defendants through fraud and undue influence and conspiracy prevented the distribution to the respondent of Carl's share of his father's estate. It further alleges that the property was taken in trust for Carl by the defendants. The answer denies that there is any trust, and alleges that Carl, after arriving at the age of 21 years, and before his marriage to the plaintiff, conveyed all his interest to the Andrew Hemrich Investment Company, as a gift to his mother. The reply alleges that when Carl made his conveyance he was not yet 25 years of age, and consequently he had no interest in his father's estate vested in him at that time that he could alienate. The conveyance was therefore void. The allegation is repeated that the conveyances were obtained from Carl by fraud, misrepresentations, and undue influence, and that the conveyance by Carl was made in trust, and, further, that under the terms of the will the property was to be held for him by his mother in trust. There are a couple of other matters involved in this appeal which we will refer to at the close of this opinion, but the statement of them here would only complicate the examination at this point.

The trial, in which an enormous amount of evidence was produced, resulted in a decree awarding the respondent judgment against

the appellants, executrix and executors and trustees under the will in the sum of \$75,284.87, and directed that the conveyance made by Carl in his lifetime to the Andrew Hemrich Investment Company be canceled on the ground that it was void.

The first question presented by the pleadings and the evidence in the case is whether, at the time that the transfer was made by Carl, he had an interest in his father's estate, which had become vested, and which was alienable by him. The industry of counsel has resulted in the collection of a great many authorities bearing upon this question, but in view of the point upon which this case must ultimately turn, it is unnecessary to review them in this opinion, and we may here tentatively adopt the theory of the appellants that the language of the will is not ambiguous, and that under the sixth paragraph Carl took a vested interest immediately upon his father's death, which interest he could alienate before he arrived at the age of 25 years, and it may furthermore be assumed for the purpose of this case that there was no devise by implication to Carl's widow.

The contention by the respondent that the conveyance by Carl was an express trust conveyance to his mother may also be assumed for the purpose of this case to be unfounded, and it is therefore unnecessary to discuss the great number of authorities bearing upon the question of whether parol evidence was admissible to establish such a trust, and we may pass to the question that is determinative of the controversy.

The evidence shows that Carl, at the time he arrived at the age of 21 years, was residing with his mother in her home; that he had never been engaged in any self-supporting pursuit or vocation; that neither by mental attainment nor education was he fitted for any particular line of endeavor; that his business judgment and experience were nil; that he was what might be called the typical son of a self-made man, from whom he might inherit a fortune, but not the native ability which created it. He was dependent entirely upon his mother for whatever spending money he had, and was under her control and domination. He was, as she expressed it, "a good boy," having a true filial regard for his mother, obedient to her discipline and unquestioning her authority, which, although not asserted in any rigid manner, was possibly, on that account, the better observed. He was familiar with the fact that his brothers and sisters had placed their share of his father's estate in the mother's hands, and although death has deprived us of his testimony, it is only fair to believe that that the entire atmosphere of the family relationship compelled him to do likewise. His share, which amounted at the time well towards \$100,000, was transferred for nothing. If we are to believe the appellant's position,

transferred without any assurance that ultimately he might not be the subject of charity. In fact, if he was to continue living in the same manner in which he had been reared he must thereafter, of necessity, be the subject of his mother's bounty, and must await her death before receiving any independent resources, and take chances on what they might amount to. The receipt by Carl of some \$5,000 on or about the time of this conveyance is not contended by the appellants to have been a consideration for the transfer by him of his estate, and, in fact, it could not be so in face of the provisions of the will, which called for his support and maintenance, and from the further fact that the money was paid out of the income of the estate, which included Carl's share thereof, and from the further fact that the receipt of this money was not unlike the receipt by the other children of similar amounts. It is not necessary to characterize the lack of documentary evidence which might be of assistance in determining the matters in controversy, nor to analyze and determine the motives which prompted some palpable alterations in records which were actually produced, and the condition in which others appear among the exhibits, nor to speculate upon the conduct at the time of Carl's illness and death.

[1] The rule—and it is a salutary one—which compels courts to scrutinize with caution transactions between trustees and the cestuis que trust, and to lay upon the trustee the burden of proving immaculate faith, when title of the cestuis que trust is found in the trustees, and especially where that cestui que trust is of immature age and judgment and experience, is a rule to which the facts of this case imperatively demand the application.

Under this nonintervention will the mother become one of the trustees for Carl (*Newport v. Newport*, 5 Wash. 114, 31 Pac. 428; *Smith v. Smith*, 15 Wash. 239, 46 Pac. 249; *In re Cornett's Estate*, 102 Wash. 254, 173 Pac. 44), and under the decree of distribution she was referred to as a trustee. The rule which we have indicated is supported by a veritable Sinbad's treasure trove of legal authorities, and has been so well stated by so many courts and text-writers that it is difficult to refrain from extensive quotation.

The Supreme Court of Virginia, in *Branch v. Buckley*, 109 Va. 784, 65 S. E. 652, quoted from section 956 et seq., *Pomeroy's Equity Jurisprudence*, as follows:

"While equity does not deny the possibility of valid transactions between the two parties, yet because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon

that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption.

* * * The court will not allow the transaction between the parties to stand, unless there has been the fullest and fairest explanation and communication of every particular resting in the breast of the one who seeks to establish a contract with the person so intrusting him.*

* * * The transaction is not necessarily voidable. It may be valid; but a presumption of its invalidity arises, which can only be overcome, if at all, by clear evidence of good faith, of full knowledge, and of independent consent and action. * * * A purchase by a trustee from his cestui que trust, even for a fair price and without any undue advantage, or any other transaction between them by which the trustee obtains a benefit, is generally voidable, and will be set aside on behalf of the beneficiary; it is at least prima facie voidable upon the mere facts thus stated. There is, however, no imperative rule of equity that a transaction between the parties is necessarily, in every instance, voidable. It is possible for the trustee to overcome the presumption of invalidity. If the trustee can show by unimpeachable and convincing evidence that the beneficiary being sui juris had full information and complete understanding of all the facts concerning the property and the transaction itself, and the person with whom he was dealing, and gave a perfectly free consent, and that the price paid was fair and adequate, and that he made to the beneficiary a perfectly honest and complete disclosure of all the knowledge or information concerning the property possessed by himself, or which he might, with reasonable diligence, have possessed, and that he has obtained no undue or inequitable advantage, and especially if it appears that the beneficiary acted in the transaction upon the independent information and advice of some intelligent third person, competent to give such advice, then the transaction will be sustained by a court of equity. The doctrine is enforced with the utmost stringency when the transaction is in the nature of a bounty conferred upon the trustee—a gift or benefit without full consideration. Such a transaction will not be sustained, unless the trust relation was for the time being completely suspended, and the beneficiary acted throughout upon independent advice, and upon the fullest information and knowledge."

And the court in that case added:

"Under well-established principles of equity, independent of the question of actual fraud, transactions between parties occupying the relation to each other which existed between the appellant and complainant at the time the former acquired title to the trust subject are at least prima facie fraudulent."

Perry on Trusts (5th Ed.) §§ 194, 197, and 423, in a luminous presentation of this phase of the law, says, *inter alia*:

"Sec. 194. * * * Thus, if a parent buys property of his child, a guardian of his ward, a trustee of his cestui que trust, an attorney of his client, or an agent of his principal, equity will either avoid the contract altogether,

without proof, or it will throw the burden of proving the fairness of the transaction upon the purchaser; and, if the proof fails, the contract will be avoided, or the purchaser will be construed to be a trustee at the election of the other party. The ground of this rule is that the danger of allowing persons holding such relations of trust and influence with others to deal with them is so great that the presumption ought to be against the transaction, and the person holding the trust or influence ought to be required to vindicate it from all fraud, or to continue to hold the property in trust for the benefit of the ward, cestui que trust, or other person holding a similar relation. * * *"

"Sec. 195. These principles are applied in their full vigor to all contracts and sales between trustee and cestui que trust. The trustee is in such a position of confidence and influence over the cestui que trust that the contract or bargain will either be void or he will be a constructive trustee, at the election of the cestui que trust, unless the trustee can show that the contract was entirely fair and advantageous to the cestui que trust. The presumption is against the transaction. * * * The general rule is that the trustee shall not take beneficially by gift or purchase from the cestui que trust, even although the supposed trustee and purchaser is a mere intermeddler and not a regularly recognised trustee; the question is not whether or not there is fraud in fact, the law stamps the purchase by the trustee as fraudulent per se, to remove all temptation to collusion and prevent the necessity of intricate inquiries in which evil would often escape detection, and the cost of which would be great. The law looks only to the facts of the relation and the purchase. The trustee must not deal with the property for his own benefit. * * * And it may be said generally that it is difficult to find a case where such a transaction has been sustained. Any withholding of information, or ignorance of the facts or of his rights on the part of the cestui or any inadequacy of price, will make such a purchaser a constructive trustee. * * *"

"Sec. 197. It is thus seen that the rule against purchasing by trustees, of the cestui que trust amounts almost to prohibition. * * *"

"Sec. 427. * * * No other rule would be safe, nor would it be possible for courts to apply any other rule, as between trustee and cestui que trust. * * *"

"Sec. 428. * * * Nor can the trustee make any contract with the cestui que trust for any benefit, or for the trust property, nor can he accept a gift from the cestui que trust. The better opinion, however, is that a trustee may purchase of the cestui que trust, or accept a benefit from him, but the transaction must be beyond suspicion; and the burden is on the trustee to vindicate the bargain or gift from any shadow of suspicion, and to show that it was perfectly fair and reasonable in every respect, and courts will scrutinize the transaction with great severity."

The strength of the position indicated by these authorities cannot be increased by reciting from the legion of additional authorities. *Michoud v. Girod*, 45 U. S. (4 How.)

503, 11 L. Ed. 1076; *State v. Culhane*, 78 Conn. 622, 63 Atl. 636; *Butman v. Whipple*, 25 R. I. 578, 57 Atl. 379; *Keith v. Kellam* (C. C.) 35 Fed. 243; *Swift v. Craighead* (N. J.) 70 Atl. 666; *Reeder v. Meredith*, 78 Ark. 111, 93 S. W. 558, 115 Am. St. Rep. 22; *Gassert v. Strong*, 38 Mont. 18, 98 Pac. 497; *Clay v. Thomas*, 178 Ky. 199, 198 S. W. 762, 1 A. L. R. 738.

The principle has been recognized by this court in *Gardells v. Meeker*, 3 Wash. T. 178, 13 Pac. 709; *O'Neile v. Ternes*, 82 Wash. 528, 73 Pac. 692; *In re Goss' Estate*, 78 Wash. 330, 132 Pac. 409; *Stewart v. Baldwin*, 86 Wash. 63, 149 Pac. 662. Nor, as we read them, do the cases of *Couchman's Adm'r v. Couchman*, 98 Ky. 109, 32 S. W. 283, *Gifford v. Thorn*, 9 N. J. Eq. 702, and *Williams v. Canary*, 249 Fed. 344, 161 C. C. A. 352, establish any other principle.

Under this rule the fact that the trustee is found in possession of the property of her cestui que trust places upon her the burden of showing the utmost good faith. The testimony in this case establishes no such situation.

[2] However strong the rule may be in denying to the trustee the right to acquire the property of the cestui que trust without full consideration and free from the slightest taint of suspicion, the courts are just as alert to set aside unconscionable transactions between parent and child. The Supreme Court of Illinois, in the case of *White v. Ross*, 160 Ill. 56, 43 N. E. 336, had before it an action resembling the situation presented in this case, and at the expense of lengthening this opinion to an almost unwarranted length, we will quote from that decision:

"The third ground or proposition upon which the decree is sought to be sustained, and the one which we find is sustained by the evidence, and supported by abundant authority, may be stated thus: That at, and before, and after the time or times when the deeds in question were made and delivered, the relation of parent and child existed in its full vigor between the mother, Ann White, and the daughter, Annie C. White; that the position of the mother was one of dominance and authority over the daughter, and of the daughter of dependence upon the mother; that the daughter confided in and trusted her mother implicitly; that the mother was already possessed of an abundance of means for her own support—even of wealth—and that the property conveyed to the mother by the daughter was of large value, exceeding \$200,000, and embraced her entire estate, and substantially all her means of support; that the daughter was an invalid, without any business, occupation, or profession, wholly unacquainted with business affairs and the forms and instrumentalities by which conveyances of property are made from one person to another, and wholly unable, by reason not only of bad health, but of lack of business education, training, and experience, to earn her own living; that nothing was paid or agreed to be paid to the daughter, Annie C. White, for

all the vast property so conveyed; that she had no independent advice, and did not understand that she was divesting herself absolutely of all her property rights; that the gift was improvident and unreasonable on the part of the daughter to make, and unconscionable on the part of the mother to accept; and that under such circumstances the presumption of undue influence arises, and that the conveyances in question were obtained by undue influence of the mother over the daughter; and that the burden of proof is on the mother, and those claiming under her, to show that the daughter acted independently, advisedly, and of her own free, intelligent will and accord, uninfluenced by the recipient of so munificent a gift; and, no such proof having been made, that, independently of any question of actual fraud, the transaction must be held to be constructively fraudulent, and that a court of equity will raise a constructive trust, and fasten it upon the conscience of the holder of the legal title, and convert such holder into a trustee for the party who, in equity, is regarded as the beneficial owner.

"The ultimate facts stated in the last proposition are established by the evidence in this case, and are in substantial accordance with the findings of the two chancellors, who on different trials heard the case below on both oral and written testimony. That such conveyances of property, made under such circumstances, are presumptively voidable, there can be no reasonable doubt. This rule in equity is established by the great weight of authority, both in England and this country, and is founded on principles of justice and morality. * * * In such cases courts of equity will interfere upon grounds of public policy, or, as often stated, for the preservation of mankind; and, unless the donee can show affirmatively that the transaction is 'a righteous one,' it will be set aside. It is contended by appellants that such is not the rule in this country, but that the parental authority over the child is only a circumstance to be proved with others tending to establish undue influence; that, notwithstanding a conveyance or gift be shown to have been made by the child to the parent at a time, though of full age, when the child was under the dominion of the parent, still the transaction cannot be impeached without some affirmative proof of the exercise of undue influence on the part of the parent, or that the parent was guilty of some fraud, imposition, or wrongdoing in obtaining the advantage bestowed; and it is claimed that their contention is supported by the authority of the Supreme Court of the United States in *Jenkins v. Pye*, 12 Pet. 241. * * * In *Jenkins v. Pye* the father paid a valuable, though perhaps an inadequate, consideration for the property conveyed, and the doctrine of laches was also applied as a ground for denying relief. In a separate opinion, Mr. Justice Catron, while concurring in the decision of the case on the ground of laches, took issue with the opinion of the court delivered by Mr. Justice Thompson on the other branch of the case. In the subsequent cases of *Taylor v. Taylor*, 8 How. 184, and *Allore v. Jewell*, 94 U. S. 506, the doctrine as announced by the same court does not materially differ from the general current of authority on the subject, and the question of unreasonableness and un-

fairness in the transaction is made to cut an important figure. Judge Story, in his work on Equity Jurisprudence, Vol. 1, § 309, says: 'The natural and just influence which a parent has over a child renders it peculiarly important for courts of justice to watch over and protect the interests of the latter, and therefore all contracts and conveyances whereby benefits are secured by children to their parents are objects of jealousy, and, if they are not entered into with scrupulous good faith, and are not reasonable under the circumstances, they will be set aside, unless third persons have acquired an interest under them.' So in *Perry on Trusts* it is said that, while courts of equity will scrutinize conveyances of property by children to their parents, they are not *prima facie* void, but that there must be some affirmative proof of undue influence or other improper conduct to render the transaction void. But it is also said that: 'The position and influence of a parent over a child are so controlling that the transaction should be carefully examined, and sales by a child to a parent must appear to be fair and reasonable.' So, also, in *Hill, Trustees*, 157, it is said that, 'Every contract or conveyance whereby benefits are secured to parents by their children must be perfectly fair and reasonable in all its terms and circumstances, or otherwise it will be set aside.' It is true the author says that before this will be done it will be necessary to prove the exercise of undue influence, or to establish some other case of actual or constructive fraud against the parent. So, too, in the citation from *Newland on Contracts*, the author makes the reasonableness of the transaction an important element. It is there said that equity has refused to interfere because of the mere relation of parent and child, especially where the agreement was reasonable, or entered into to effect a laudable purpose. In *Oliphant v. Liversidge*, 142 Ill. 100, 30 N. E. 334, this court, in sustaining a deed of gift from father to child, said (page 170, 142 Ill. and page 334, 30 N. E.): 'Nor does any presumption of fraud arise from the fact that the grantor is the father of the grantees. In the case of a gift from a child to a parent undue influence may be inferred from the relation itself, but never where the gift is from the parent to the child.' In *Finucan v. Kendig*, 109 Ill. 198, and *Patterson v. Johnson*, 113 Ill. 559, this court distinctly recognizes the question of unreasonableness and improvidence in the transaction as an element to be considered in determining its binding force upon the parties. In the latter case such facts and circumstances were proved as showed the transaction a reasonable and proper one, and this court said (page 572): 'The record shows that there was no influence whatever used by the father to procure the deed, and that it was made by the daughters of their own volition. The making of the deed was a graceful tribute of filial affection.' If a child possessing wealth should, while under parental control, though past minority, make a deed of gift of property of substantial value to his indigent parent, sufficient to maintain such parent in comfort, and even elegance, the remainder of his life, but reserving sufficient for his own needs, thus eliminating from the transaction all improvidence, all unreasonableness, and all apparent unconscien-

tiousness on the part of the parent, it might be justly contended that the rule would be a harsh one that would cast the burden of proof on the parent, or on those claiming under him, to prove that no undue influence was resorted to to obtain the gift. But where, as in this case, the transaction appears to have been an improvident and unreasonable one for the child to enter into, and one apparently involving the taking of an unconscionable advantage by the parent in accepting and retaining the property, there can be no doubt, from the standpoint of any well-considered case, that the burden of proof is cast upon the parent to prove that the transaction was, in the language often used, 'a righteous one.'

See, also, *Taylor v. Taylor*, 8 How. 183, 12 L. Ed. 1040, where the Supreme Court of the United States in a long opinion, reviewed the theory involved here, and stated the rule with extreme clarity and force, saying:

"But when such a relation [the fiduciary one] does exist, courts of equity, acting upon this superinduced ground, in aid of general morals, will not suffer one party, standing in a situation of which he can avail himself against the other, to derive advantage from that circumstance.' * * * It is shown that the grantor in this deed, though of age, had little more than attained to majority; that she was living in the house with her parents, her only home, and may fairly be presumed to have been liable to the influence of feelings and habits which, in the absence of contravening evidence, would control the dispositions and conduct of a youthful female thus situated. She might be molded to almost anything, in compliance with the earnest wishes (with her habitually yielded to as commands) of her parents. * * * And it has been argued that, with her knowledge of the situation of her parents, the impulses of filial duty and affection might of themselves have formed a sufficient groundwork for the complainant's conveyance. However hazardous it might be to prescribe, as a rule of right or of property, imperfect obligations which the law does not originally enforce, this argument can be deemed satisfactory in instances only in which the motives supposed to enter into such obligations are shown to have been free and unconstrained in their operation. In the present instance, too, independently of the influences which will be shown to have been brought to bear upon the transaction, it is thought that the injunctions of filial duty and affection would have demanded something less than the surrender of all possessed by the grantor. * * * Nay, it would seem that proper parental tenderness, and solicitude for the welfare of the child, or the true principles of rectitude and fairness, would have permitted nothing beyond this. * * *"

See, also, *Ludington v. Patton*, 111 Wis. 208, 86 N. W. 571; *Walters v. Walters* (N. M.) 188 Pac. 1105, and this court's opinion in *Muzzy v. Thompson*, 2 Wash. 616, 27 Pac. 456, 28 Pac. 652. This appears in the *Muzzy Case*, supra:

"If we seek undue influence in this case, it is easily found. * * * Of reasonableness in

this arrangement there was none, unless it be considered reasonable in every case for a father to take from his child her real estate without consideration. * * *

[3] So here, the burden being upon Mrs. Hemrich to show that her acquisition of Carl's property was proper, she has not sustained it. The whole transaction, with all its surrounding circumstances, and the testimony offered in support of it, all must convince a court of equity that, while there may not have been actual fraud, there was undue influence and constructive fraud, and that the trial court was correct in determining that Carl's share of the estate should go to the respondent.

As to the value of that share, the record is bulging with testimony directed to the correct valuation of the estate, and after a painstaking review of it we cannot say that the trial court did not arrive at the correct amount, although there is considerable room for argument that it might correctly have been increased to a considerable extent.

[4] Laches are urged against the respondent's action, and the case of *Jenkins v. Pye*, 12 Pet. 241, 9 L. Ed. 1070, where there had been a 20-year delay, and *Ripple v. Kuehne*, 100 Md. 672, 60 Atl. 464, where one of 8 years had occurred, are cited as authorities, but we find here no delay in asserting Carl's rights, and no injury has been caused by not beginning an action earlier than was done.

We will now pass to two other questions which are presented by the record.

The lower court allowed a personal judgment against Amelia Hemrich in the sum of \$10,000, arising from the sale by her of what was known as the Capital Hill home property, the proceeds of which she distributed by giving each of the children the sum of \$10,000. The books show that the cash payments were made to all but Mrs. Scruby and Carl, and the testimony as to them is that they did not desire the cash, but allowed the mother to keep it and pay them 6 per cent. interest on it. This testimony is contradicted, but, as we read it, we are not inclined to disagree with the conclusion arrived at by the trial judge, who was more advantageously situated to pass upon its credibility than we.

[5] The next minor point urged by the appellant is that the judgment in favor of the respondent against Katherine Scruby and her husband, based upon a deed made by Carl after he arrived at his majority, to his sister, was erroneous. The court held this conveyance was without consideration and void. We are of the belief, from the testimony, that Andrew Hemrich had expressed during his lifetime his intention of giving a certain piece of property to his daughter,

and that in furtherance of this intention, the Andrew Hemrich Investment Company executed this deed, and Carl when he arrived at the age of 21, in order to complete his sister's title, gave his deed to her, and although this was without consideration, we do not think that it is the basis of a judgment against Mrs. Scruby, and the action of the trial court in granting such judgment is reversed.

Upon the whole record the superior court's judgment is affirmed, except as to the judgment against the Scrubys on the lot received by deed from Carl. The respondent is allowed costs against all the appellants except the Scrubys, who are awarded costs in the sum of \$100 against the appellant.

PARKER, C. J., and MITCHELL and TOLMAN, JJ., concur.

STEWART et al. v. ULRICH. (No. 16514.)

(Supreme Court of Washington. Sept. 15, 1921.)

1. Partnership §92—Renewal of lease taken by partner inures to benefit of firm.

Where one partner, without the knowledge of his copartner, takes for his own benefit a renewal of a lease held by the firm, the lease so taken inures to the benefit of the firm, the partner taking it holding as a constructive trustee, but such is not true where negotiations for the renewal of the lease are open and above board, and are incomplete at the time of dissolution of partnership.

2. Partnership §92—Agreement of partner to join lessor in business at termination of lease to firm held not to give other partners cause of action.

An agreement of defendant partner of a firm engaged in operating a billiard room, with the lessor and owner of the building, to engage in the billiard business at the expiration of the lease with the partnership, did not give to other members of the firm a cause of action against defendant, from the mere fact that defendant concealed such agreement from them, in the absence of any showing that the partnership would not terminate with the lease, or at will, without giving rise to a cause of action to recover damages for its disruption, or showing of fraudulent and wrongful acts of defendant to prevent a renewal of the lease, notwithstanding that assets of the partnership were sold to the lessor without knowledge that defendant was to enter into business with him.

Department 2.

Appeal from Superior Court, Spokane County; Joseph B. Lendsley, Judge.

Action by Grant A. Stewart and others against William P. Ulrich. Judgment for defendant, dismissing the action, and plaintiffs appeal. Affirmed.

Allen, Winston & Allen, of Spokane, for appellants.

Turner, Nuzum & Nuzum, and Wakefield & Witherspoon, all of Spokane, for respondent.

TOLMAN, J. From an order sustaining a demurrer to the second amended complaint, and judgment dismissing the action, this cause is brought here on appeal. The sole question to be determined is, Does the complaint state a cause of action?

After setting forth that the plaintiffs and the defendant had been copartners engaged in the operation of a billiard parlor, which had been very profitable financially, it is alleged that on January 9, 1919, the partners entered into a written agreement which is made a part of the complaint, by the terms of which Grant A. Stewart and Dayton H. Stewart, theretofore owners of a one-half interest in the business, sold to E. B. Stewart and William P. Ulrich one-half of their then interest, or a one-fourth interest in the business, and purported to lease to such grantees the remaining one-fourth interest which they retained, for a period of one year from January 5, 1919, for a consideration of \$600 per month for the term. The agreement further provided for an inventory, assumption of indebtedness by the purchasing partners, and means by which the several interests and rights could be determined at the end of the year, and—

"It is further understood and agreed by and between the parties hereto that the partnership heretofore existing between the parties hereto shall be terminated, and that, so long as the said parties of the first part shall maintain each an undivided one-eighth interest in said business, or either of the parties of the first part hereto shall own less than a one-fourth interest in said business than neither of the parties of the first part herein shall have any right to dictate the policy of said business or be employed in said business without the consent of the parties of the second part herein, and that the interest of said parties of the first part after January 5, 1920, shall only be that of an owner of an undivided one-fourth interest in and to the fixtures, stock and appliances of said business, as above stated and referred to, and the parties of the second part shall only account to said parties of the first part herein in that instance for an undivided one-fourth of the net profits of said business, after deducting a salary for each of the parties of the second part herein of thirty (\$30) dollars per week."

And also:

"It is further understood and agreed by and between the parties hereto that the parties have a lease to the premises in which said business is now located, and that the said first parties do hereby transfer and assign unto said parties of the second part herein an undivided one-fourth ($\frac{1}{4}$) interest in and to said lease, and do hereby retain an undivided one-fourth ($\frac{1}{4}$) interest in and to said lease; and in case

said parties of the second part herein shall obtain a renewal or extension of said lease prior to its expiration or upon the expiration, and said parties of the first part are still the owners of said undivided one-fourth ($\frac{1}{4}$) interest in said business, then and in that event said parties of the first part shall be entitled to an undivided one-fourth ($\frac{1}{4}$) interest in said lease."

It is further charged in the complaint:

"Some time prior to the 1st day of December, 1919, the defendant conceived and placed into operation a plan and scheme to cheat and defraud the plaintiffs out of their interest in the aforesaid billiard parlor, whereby he could avoid his agreement contained in Exhibit A to make the plaintiffs herein co-owners and jointly interested in any extension of the aforesaid lease.

"In pursuance of the said scheme and plan, he made and entered into an agreement either orally or in writing, the exact terms of which are to these plaintiffs unknown, whereby one James Durkin, the owner of and in charge of the property where the said business was being maintained and conducted, should refuse or fail to execute an extension of the old lease, and whereby the property belonging to the parties hereto should apparently be sold to the said James Durkin who should thereafter conduct the said business. Pursuant to said scheme he procured and caused the said Durkin to give a formal notice of the termination of said lease and of his refusal to extend or continue the same, or to grant a new lease, and notified plaintiffs that he desired possession of the premises. Pursuant to said scheme and plan to defraud, the defendant further urged and recommended to the plaintiffs that the parties hereto should sell to the said James Durkin at a low price the property of the parties hereto, situate in said billiard parlor, and by his insistent advice and urging, the said plaintiffs, being ignorant of the facts hereinafter alleged, did agree to sell and did sell apparently to James Durkin, the personal property in said place of business for a sum not exceeding its actual cash value as secondhand goods at forced sale, with no allowance for good will, or lease of said premises.

"(5) At all times since the time when defendant conceived the said scheme to defraud plaintiffs, defendant had an agreement, oral or in writing, with the said Durkin, the exact terms of which are unknown to plaintiffs, and plaintiffs on information and belief aver the fact to be that the said agreement was to the effect that the said Durkin would refuse to renew the said lease or make a new lease of said premises; that he should demand possession thereof from the plaintiffs hereto; that the said Durkin and the defendant should then, in reality, purchase from the parties hereto the property aforesaid and continue to operate the said business, thereby excluding the plaintiffs from their rightful interest therein.

"(6) That as a part and parcel of said scheme to defraud the defendant, by reason of the representations aforesaid, and not otherwise, procured the plaintiffs to enter into an agreement on the 22d day of December, 1919, a true and correct copy of which is hereto attached marked Exhibit B, and made a part

hereof, that the plaintiffs entered into said agreement solely and exclusively because of the fraudulent representations aforesaid, and relying thereon, and would not have entered into said agreement save and except for said representations."

Exhibit B referred to, and made a part of the complaint, omitting the formal parts, is as follows:

"Whereas, the parties of the first part herein are the owners of an undivided one-fourth interest in and to that certain business known as the Imperial Billiard Parlors, situate at No. 415 Main avenue, in the city of Spokane, county of Spokane, state of Washington;

"Whereas, the parties of the second part herein, have purchased from the parties of the first part herein, the entire interest in and to the said business and all property of every kind, character and description belonging to the said parties of the first part, as evidenced by bill of sale this day executed by the parties of the first part to the parties of the second part herein; and

"Whereas, it is the intention of the parties hereto to dissolve the partnership heretofore existing between the parties of the first part and the parties of the second part herein:

"Now, therefore, in consideration of the sum of one (\$1) dollar and other good and valuable considerations, the parties hereto do hereby agree that the partnership hereinbefore existing between the parties of the first part and the parties of the second part herein be, and the same is hereby dissolved, the parties of the second part herein assuming any partnership obligations as shown by the books of the company as of this date.

"It is further understood and agreed by and between William L. Ulrich and E. B. Stewart that, whereas a contract has been entered into for the sale of said business as of February 1, 1920, that the partnership existing between the said E. B. Stewart and William P. Ulrich shall be dissolved as of said date and that the assets of said copartnership, after paying all debts and liabilities, shall be distributed in equal portions to the said E. B. Stewart and William P. Ulrich."

The complaint charges the carrying out of the alleged scheme to defraud, and that the defendant and Durkin entered into possession of the business on February 1, 1920, as equal owners, and have since conducted the same as such, deriving large profits, the share of which realized by the defendant up to the time of the filing of the complaint being about \$100,000, and concludes with a prayer for an accounting; that the plaintiffs be decreed to be the owners of five-eighths of all profits accruing to the defendant from the business after February 1, 1920, and for general relief.

[1] It is the contention of appellants that, notwithstanding the language of the contract of January 9, 1919, the partnership was not thereby terminated, and, since the partners stood in a fiduciary relationship one to the

other, any rights thereafter obtained by the defendant for his individual benefit, to which the copartnership was entitled, would be by him held in trust for the copartnership, a principle which we have heretofore approved in *Shrader v. Downing*, 79 Wash. 476, 140 Pac. 558, 52 L. R. A. (N. S.) 389, where it was said:

"It is undoubtedly the rule, as the appellant contends, that one member of a partnership must act in the utmost good faith towards his copartners, and that, if he purchases property for his individual benefit when the firm itself is entitled to the advantage of such purchase, or secures a valuable contract for himself which it was his duty to obtain for the firm, he will be treated as a trustee for the firm with reference to the transaction, and be compelled to account to his copartners for the profits acquired by reason thereof. But the rule does not absolutely prohibit a member of a partnership from engaging in enterprises in his own behalf, nor does it make all property acquired by a member of a partnership during its existence the property of the firm. The applicability of the rule depends on the facts of the particular case. One partner may not make a profit for himself individually out of the partnership business, or out of the transactions which he conducts privately, which in justice and equity ought to have been conducted in the partnership name; but he may, without laying himself liable to account, buy and sell real estate or other property with his individual means, if the transaction is disconnected from the partnership business, is not conducted in competition or rivalry therewith, and he is under no duty to conduct the transaction on behalf of the firm. Any other rule would prevent a member of a partnership from investing his private funds."

The general rule with reference to the renewal of a lease by one partner is well stated in 16 R. C. L. 906, where it is said:

"413. *Partners.*—The doctrine now under consideration has been frequently applied in partnership cases where one partner, without the knowledge of his copartner, has taken for his own benefit a renewal of a lease held by the firm, and in such cases the lease so taken inures to the benefit of the firm, the partner taking it holding as a constructive trustee. When the lease is held by a partnership, the chance or opportunity of renewal is in itself a distinct asset of the partnership in which all the partners have an interest, and that one partner has no right as against his copartner to take a new lease to commence after the expiration of the partnership by its own limitations. Even if the old lease is in the name of one partner alone, he cannot, where it is affected with an equity in behalf of his copartner, secure a renewal to himself to the exclusion of his copartner, but the renewal is considered to be a graft upon the old stock. So where the rule is otherwise applicable it is immaterial that the new lease is on different terms from the old one, or for a larger rent. Even after dissolution of the partnership the equitable expectancy of renewal remains a partnership asset for the purpose of liquidation, to be taken into account and disposed

of for the common benefit of the partners, and hence a renewal after dissolution of the firm, taken by less than all of the partners, inures to the benefit of the firm. And where the dissolution of the partnership had been agreed upon, due to dissensions, the fact that the complaining partner had attempted, under a mistaken belief as to his right, to acquire a lease in his own name has been held not to deprive him of the right to demand that the new lease acquired by the other partner be treated as belonging to the partnership. On the other hand, it seems that, if the negotiations for the renewal of the lease by one partner in his own name, and for his own benefit, were open and above board, he will not be denied the benefit of the lease, and it has been held that where frank and open negotiations for a renewal were in progress, but were incomplete at the time of the dissolution of the partnership by the death of one of the partners, a renewal subsequently taken by the surviving partner in his own name did not inure to the benefit of the deceased partner's estate, and it was immaterial that the negotiations provided for the continuance of the lease to the surviving partner alone in case of the death of the other, there being no concealment or bad faith. Still it has been said that, although it cannot be laid down that in no case can a partner during the partnership contract for a new lease to himself exclusively of property let to a partnership, it is very difficult (and especially as regards a managing partner) to make out such a case, and the mere announcement to his partners of his intention to apply for such a lease after the dissolution is not sufficient to exclude their interest."

But while we are in accord with those principles they are not decisive of the point in issue, because it is not alleged that the respondent, Ulrich, had in fact secured a renewal of the lease, but from the complaint it appears that his possession of the premises in question is not an exclusive one but is a joint possession with the owner, for the purpose of conducting a business in which each are interested, the profits of which are to be divided between them.

[2] Respondent contends that it is one thing for a partner to take a renewal of a lease in his own name which ought to have been taken in the firm name, and quite another thing for him to defeat a renewal of the lease by inducing the landlord to deny a renewal; claiming that the averments of the complaint, when taken as a whole, charge the defendant with no more than defeating a renewal of the lease; arguing that, while equity will follow a renewal of a lease belonging to the partnership into the hands of one of the partners, and treat it as the lease of the partnership, that it will go no further, and that no court of equity, so far as the reported cases disclose, has ever treated the conduct of a partner in defeating a renewal of a partnership lease as the equivalent of the taking by him of a renewal lease. Industry of eminent counsel employed in the

case has wholly failed to produce any direct authority pro or con upon this point.

It is further contended that the transaction complained of constitutes no moral wrong and no equitable wrong, in that the respondent Ulrich was proceeding in direct conformity with his legal and equitable rights, because the lease mentioned in the complaint expired on February 1, 1920, and in the absence of allegations to the contrary the law will presume that the partnership was only for the duration of the lease. The complaint being silent as to the time when the partnership would terminate, we must assume that it would terminate with the lease. *Zimmerman v. Herding* (227 U. S. 489, 33 Sup. Ct. 387, 57 L. Ed. 608), or that it might be terminated at will without giving rise to a cause of action to recover damages for its disruption (20 R. C. L. 927, § 142). In either event, with the certainty that it must terminate February 1, 1920, or sooner, if respondent so willed, the gist of the complaint is that respondent concealed the fact that he had made an agreement to conduct a similar business in the premises with or for, Durkin, the owner, and thus procured the execution of the second contract, which definitely terminated the copartnership, and made disposition of its assets. Durkin is not a party here. He had an absolute right to renew the lease or refuse to renew the lease, and his motives cannot be examined into.

So, too, after the termination of the copartnership Ulrich had an absolute right to engage in any business he pleased, with whom he pleased, and owed no duty to advise his partners in advance of his affairs. All were equally advised as to the nature, extent, and value of the good will of the business, and to what extent that value was based upon the occupancy of the leased premises, and the effect thereon of the removal of the business to such other premises as might have been obtainable. Durkin's refusal to renew the lease was a known fact, and his reasons therefor, or what induced them, were immaterial. The complaining partners chose, under the conditions, to settle the partnership affairs as shown by the last agreement, rather than undertake to continue the business in a new location, or otherwise dispose of the partnership assets, presumably because they deemed such a course most profitable to them. At the most, even to permit a recovery of damages flowing from the wrongful act, it must be made to appear that Durkin was ready and willing to renew the lease, and would have done so but for some wrongful and fraudulent act or acts done by respondent for the purpose of preventing such a renewal, resulting as intended. No such acts being charged in the complaint, we are not here called upon to determine whether a cause of action could be based thereon, and nothing herein contained is intended to.

indicate any possible holding upon such a case.

In any event, there is in the complaint no averment of any fraudulent representations made by respondent to the appellants, or either of them, which induced them to enter into the contract of December 22, 1919. At the most he is charged with remaining silent as to his alleged agreement with Durkin, when it was his duty to have spoken. Is not the duty to speak always predicated upon the fact that silence may mislead others to their injury; and if no injury can or does follow the silence how can there have been a duty to speak? If respondent was silent, it resulted in what? In an agreement to terminate the copartnership then about to expire by limitation, or which could have been terminated at any time at the will of any partner without giving rise to a cause of action for damages resulting from its disruption, and in the disposal of certain personal property belonging to the copartnership for what is alleged to be no more than "its actual cash value as secondhand goods at forced sale, with no allowance for the good will of said business." Do these facts show a cause of action? The answer must be in the negative, because the opportunity to continue the business in other premises, if available, was equally open to all, and if the business could not be continued, there was no use for or value in the good will; and without a continuance of the business and the use of the good will, it cannot be assumed that the property sold was worth more than it is alleged to have been sold for.

If respondent had fully advised his partners of his agreement to enter into business relations with Durkin, and conduct a similar business in the same premises after the expiration of the lease and the partnership, how would their position have been altered, or what could they have done to bring about a better settlement? Knowledge of the facts could hardly have assisted them in inducing Durkin to renew the firm's lease; would not have enabled them to keep the partnership in being after February 1, 1920, or against the will of respondent; would not have enabled them to secure and retain the value of the good will of the business in any way except such as must have already been known to them, and consequently would not have enabled them to secure a greater price for their property sold. True, they might have refused to sell to respondent, or to Durkin, but there is no allegation or inference that they could have sold to better advantage to others.

We conclude that the complaint does not state a cause of action, and that the demurrer was properly sustained.

The judgment is affirmed.

PARKER, C. J., and HOLCOMB, MAIN, and MITCHELL, JJ., concur.

CAVERS v. HOME TELEPHONE & TELEGRAPH CO. OF SPOKANE.
(No. 16421.)

(Supreme Court of Washington. Oct. 8, 1921.)

Telegraphs and telephones 634—Payment of overcharges for residence telephone service held not recoverable.

Payments for residence telephone service cannot be recovered as overcharges, in the absence of a showing that the excess amounts were paid under mistake of fact, or were induced by fraud, or were made through the exigencies of business, amounting to compulsion.

Department 2.

Appeal from Superior Court, Spokane County; R. H. Back, Judge.

Action by Francis G. Cavers against the Home Telephone & Telegraph Company of Spokane. Judgment of dismissal, and plaintiff appeals. Affirmed.

Fred B. Morrill, of Spokane, for appellant.
Post, Russell & Higgins, of Spokane, for respondent.

MAIN, J. The plaintiff brought this action upon 28 assigned claims, seeking to recover what was alleged to be an overcharge for telephone service in the city of Spokane. After the issues were framed, the cause came on for trial before the court and a jury. At the conclusion of the plaintiff's evidence the defendant challenged the sufficiency thereof, and moved the court for a judgment in its behalf. This motion was sustained, and a judgment entered dismissing the action, from which the plaintiff appeals.

The respondent, the Home Telephone & Telegraph Company, is engaged in the business of operating a telephone exchange in the city of Spokane. Early in the year 1915 it acquired property of the Pacific Telephone & Telegraph Company, which, prior to that time, had operated an exchange in the same city. The franchise ordinance under which the respondent operated provided for a telephone charge for residence telephones of \$2 per month. After the respondent had taken over the property of the Pacific Telephone & Telegraph Company, it filed with the Public Service Commission a schedule of rates, and thereafter charged for services in accordance with the rates so filed. The Public Service Commission did not enter an order approving the rates, and in *State ex rel. Elbertsen v. Home Telephone & Telegraph Co.*, 102 Wash. 196, 172 Pac. 899, it was held that, in the absence of some affirmative action on the part of the commission, the franchise rate was not modified. After this decision was made the appellant took assignments of the claims of the individual subscribers for tele-

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phone service, and sought to recover the overcharge which had been paid. The appellant claimed the right to recover because under the rules and course of business established by the respondent telephone service would not have been rendered if the parties seeking the same had declined to pay the sums demanded, and that this amounted to payment under compulsion or duress. There is no evidence of the payments having been made on account of mistake of fact or fraud. If the appellant is entitled to go to the jury upon a question of fact, it is by reason alone that the payments were made in excess of the legal rate, and that under the rules of the course of business established by the respondent the service would not have been rendered had the payments not been made. The payments were not made under protest. The appellant relies upon a line of cases which hold that, where excess charges are exacted, and if not paid loss or destruction of profitable business will result, this is sufficient compulsion, and will sustain an action to recover back the excess, even though not paid under a mistake of fact or fraud. *Pin-gree v. Mutual Gas Co.*, 107 Mich. 156, 65 N. W. 6; *Helserman v. Burlington, C. R. & M. Railway Co.*, 63 Iowa, 732, 18 N. W. 903; *Swift Co. v. United States*, 111 U. S. 22, 4 Sup. Ct. 244, 28 L. Ed. 341; *Robertson v. Frank Bros. Co.*, 132 U. S. 17, 10 Sup. Ct. 5, 33 L. Ed. 236; *California Adjustment Co. v. Atchison, T. & S. F. Railway Co.*, 179 Cal. 140, 175 Pac. 682, 3 A. L. R. 274. Those are all cases wherein payments were made under the exigencies of business which would sustain loss or destruction if not made. They represent the relaxation of the old rule as applied to business, which was very much more strict than adhered to by the more modern authorities. As stated in *Brewing Co. v. St. Louis*, 187 Mo. 367, 86 S. W. 129, 2 Ann. Cas. 821:

"Among the instances of the relaxation of the strictness of the original rule is the case of payments constrained by business exigencies, that is, payments of illegal charges or exactions under apprehension on the part of the payors of being stopped in their business if the money is not paid."

The case of the *Olympia Brewing Co. v. State of Washington*, 102 Wash. 494, 173 Pac. 430, is within this class. It was there said:

"* * * It cannot be gainsaid that payments made to prevent the sacrifice of large capital investments are not voluntarily made, but are made as the result of compulsion."

So far as we are informed, no case has gone so far as to apply this rule to excess charges where business would not be affected thereby. As already stated, the excess charges sought to be recovered in this case were

for residence, and not business, telephones. In the *Illinois Glass Co. v. Chicago Telephone Co.*, 234 Ill. 535, 85 N. E. 200, 18 L. R. A. (N. S.) 124, a customer of the telephone company sought to recover excess charges for services voluntarily paid without fraud, mistake of fact, or other grounds for annulling the contract. There, the telephone company had previously been rendering service to the plaintiff, and made a contract agreeing to furnish an improved service at an advance rate which was in excess of the franchise charge permitted the company, and it was there held that since the excess payments were made without fraud, mistake of fact, or other ground for annulling the contract, no recovery could be had. It is true that in that case the plaintiff knew that it was making a contract for a greater rate than it had previously paid under the rate fixed in the franchise, but this can make no difference as applied to the facts in the present case, because the rate of the respondent company was fixed by the ordinance, and the customers seeking telephone service were charged with knowledge of the provisions of such ordinance. *Hope v. City of Alton*, 214 Ill. 102, 73 N. E. 406; *Jackson v. Grand Avenue Ry. Co.*, 118 Mo. 199, 24 S. W. 192. The charges not having been made under mistake of fact, induced by fraud, nor having been made through the exigencies of business, a cause of action was not made out, and the trial court correctly sustained the challenge to the sufficiency of the evidence at the conclusion of the appellant's case.

The judgment will be affirmed.

PARKER, C. J., and TOLMAN, HOL-COMB, and MITCHELL, JJ., concur.

UNITED RY. & LOGGING SUPPLY CO. v. SIBERIAN COMMERCIAL CO. (No. 16410.)

(Supreme Court of Washington. Oct. 15, 1921.)

Bills and notes \S 155—Failure to fill in year of maturity of trade acceptances rendered them nonnegotiable.

Under Rem. Code 1915, \S 3443, providing that a holder in due course is one taking an instrument "complete and regular on its face," trade acceptances, expressed as payable on November 1 and December 1, respectively, without specifying the year, were nonnegotiable, and the contention that they were negotiable as demand paper under section 3398, providing that an instrument is payable on demand in which no time of payment is expressed, could not be sustained.

Department 2.

Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by the United Railway & Logging Supply Company against the Siberian Commercial Company. From judgment for plaintiff, defendant appeals. Reversed and remanded.

C. H. Hanford, of Seattle, for appellant. Reynolds, Ballinger & Hutson and Elmer W. Leader, all of Seattle, for respondent.

MAIN, J. This action was brought to recover upon two written instruments called trade acceptances. The trial resulted in findings of fact, conclusions of law, and a judgment sustaining the right to recover. The defendant appeals. The trade acceptances were drawn on August 1, 1919, and delivered on or about the same date. In attempting to fix the due date in one it is recited: "On December 1, pay to the order of G. W. Laing." In the other recital is the same, except that November 1 is mentioned. In neither is the year specified. The acceptances were drawn by one G. W. Laing and were accepted by the appellant. They were subsequently transferred by Laing to the Ballard Lumber Company and from that company to the respondent. The appellant sought to interpose a defense which he would not have a right to make against one holding them in due course as was the respondent, if they are in fact negotiable instruments.

The controlling question then is whether the failure to fill in the year in an attempt to specify the due date renders them non-negotiable. The respondent takes the position that the omission of the year may be viewed in one of two ways, either the time of payment is certain or that no time of payment is fixed in the instruments and they are therefore payable on demand. According to the Negotiable Instrument Law (section 3398 of Remington's 1915 Code "an instrument is payable on demand * * * (2) in which no time for payment is expressed." By section 3443 "a holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face. * * * Those sections being both embodied in the Negotiable Instrument Law it is necessary to give effect to each. According to the section last quoted, a holder in due course must be one who has taken an instrument which is complete and regular on its face. As above stated in one of the trade acceptances in attempting to fix the due date only December 1 is mentioned, and in the other November 1. In each case there was an attempt to fix a due date, and it was not completed by reason of the fact that the year was omitted. In re Estate of Philpott, 169 Iowa, 555, 151 N. W. 825, Ann. Cas. 1917B, 839, the court had before it a note which provided that it was payable "on or before 4... after date." The question there arose, un-

der a similar provision of the statute, whether the note was complete and regular upon its face, and it was held not to be so. There was an apparent attempt to fix a due date, but it was not complete, owing to the fact that it did not specify whether it was payable four days, four months or four years after date. In the course of the opinion it was said:

"This note was not 'complete and regular' upon its face. It indicated upon its face that some word had been omitted in an attempt to specify the time of payment. * * * If the real intent of the parties in interest was to make this instrument payable in four years. it may be that the payee could have lawfully corrected the oversight by inserting the word 'years'; and it may be also that this would have rendered the note negotiable to a holder in due course as defined in the section above quoted. The question in that form is not now before us, and we need not pass upon it. We think it quite clear that this irregularity upon the face of the note prevented its taker from becoming a holder in due course. It could be deemed a demand note, unless the agreement of the parties was in fact otherwise. If otherwise, such fact was suggested by the incompleteness of the terms actually used.

"The controlling fact at this point is, not that the blank was not filled, but that it was filled imperfectly or irregularly. Though we grant that the note was presumptively good as a demand note, yet it was not 'complete and regular' within the requirements of section 3060a52, and therefore was not negotiable."

It is true that the omission in that case was not the same as in the present case, but in each case there was an attempt apparent upon the face of the instruments to fix a due date, and in each case there was an omission. Were it not for the section of the statute requiring a holder in due course to be one who has taken an instrument complete and regular upon its face it may be that the instruments here in question would be deemed to be payable on demand, but where there is an attempt to fix a due date which is not complete it would seem only reasonable to hold that the instrument is one not complete and regular on its face and the section of the statute requiring it to be such would prevail. In the case of Collins v. Trotter, 81 Mo. 275, the question was whether a note which was made payable on the "first day of March" omitting the year, was payable on demand and therefore negotiable, and it was there held to be such. But that case is rested upon the law merchant, and makes no mention of a requirement that a holder in due course must be one who has taken the instrument which is complete and regular upon its face. In view of the statutory requirement embodied in the Negotiable Instrument Law that case cannot be considered to be in point. In Selover on Negotiable Instruments (2d Ed.) p. 65, it is stated that an instrument payable

on the "first day of March," without mentioning the year, is payable on demand, but in support of the text only the case of *Collins v. Trotter*, supra, is cited.

Since the trade acceptances were not complete and regular on their faces, the appellant had a right to defend against them as non-negotiable instruments.

The judgment will be reversed, and the cause remanded.

PARKER, C. J., and MACKINTOSH and MITCHELL, JJ., concur.

PATRICK v. SPOKANE & E. RY. & POWER CO. (No. 16431.)

(Supreme Court of Washington. Oct. 8, 1921.)

1. Master and servant §265(5)—Happening of accident raises no inference of negligence.

No inference of negligence sufficient to make a prima facie case arises from the mere happening of an accident causing injury to an employee.

2. Master and servant §278(12)—Evidence held insufficient to show negligence in using crane.

Evidence held insufficient to charge defendant with liability for injury resulting from casting falling from traveling crane.

Department 1.

Appeal from Superior Court, Spokane County; D. W. Horn, Judge.

Action by W. G. Patrick against the Spokane & Eastern Railway & Power Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Graves, Kizer & Graves, of Spokane, for appellant.

Lustin & Chandler, of Spokane, for respondent.

FULLERTON, J. The appellant, Spokane & Eastern Railway & Power Company, is engaged in the business of operating a railway, and maintains a repair shop at the city of Spokane. This repair shop is of considerable size, and is equipped with an electrically operated traveling crane, used for the purpose of moving heavy articles from one part of the shop to another. Prior to October 3, 1919, the appellant had let a contract for the reconstruction of a bridge on its railway line, and on the day named the employees of the bridge contractor brought to the appellant's shop a number of iron castings upon which certain shop work was necessary to be done. The castings were brought to an entrance door of the shop on a push car. The machinery necessary to do the work the castings required was at the

opposite end of the shop, and to carry the castings across the building the traveling crane was brought into service. To sling the castings for carriage a rope some two inches in diameter was used. The method by which the rope was fastened to the castings and carried across the building was illustrated to the jury, and is not very clearly depicted in the record, but, as we gather it, the method was this: The rope was doubled and laid on the floor of the building; the castings, which were rectangular in shape, and some 4 feet in length, were laid across the doubled rope in a sufficient number to make a load; that two ends of the rope were then twisted, and the twisted end put through the loop at the double end and drawn tight; a chain with a hook on its end leading down from the crane was then fastened into the rope; the load was then drawn upwards towards the crane to a height of about 10 feet, and from thence was carried across the building by moving the crane. The crane was operated from the floor of the building by means of a rope or chain fastened to the electrical connections; the operator walking in front of the load and some 12 feet to one side. This walkway was kept clear at all times, and was a common passageway used by the appellant's employees in crossing the building.

The respondent was an employee of the appellant. At the time the castings were brought to the building he was working upon one of the appellant's electric engines. He had loosened the fastenings of a motor, and desired the use of the crane to lift the motor from the engine. On looking for the crane he saw it in use by the persons carrying the castings. It had just been started on its way with a load, and, thinking to obtain it when it reached its destination, he followed after it, walking in the usual walkway. As he reached a place about opposite the load, the castings slipped from the rope, and one of them, striking some object in its fall, glanced in his direction, striking him on one of his legs and severely injuring him. In this action the respondent seeks recovery for the injury suffered. He was successful in the court below, and this appeal is from the judgment rendered in his favor.

[1 The assignments of error question only the sufficiency of the evidence to justify the verdict. In his complaint the appellant alleged that the castings were "tied or bound together in a careless and negligent manner, rendering them loose and insecure in the sling in which they were contained," and that the appellant's foreman operated the crane "in a careless and negligent manner, jerking said sling," thereby causing the castings to fall therefrom. To sustain these allegations of negligence there is no direct evidence in the record. While the manner in which the castings were slung in the rope

was shown, no one testified that the method used was not the usual or ordinary method for slinging such articles for carriage, nor did any one testify that there was anything careless, negligent, or inherently dangerous in the manner in which the castings were tied or bound together. Nor did any one testify that the crane, after the load had been fastened thereto, was operated in a careless or negligent manner, causing it to jerk the sling, or in a careless or negligent manner in any other respect, on the contrary, the direct evidence is that the crane was operated in the usual and customary manner. If, therefore, there is evidence of negligence in the record, the proofs thereof are indirect; it is an inference arising from the fact that the castings fell from the sling while in the process of carriage. But this court has never heretofore held, and it is not the general rule, that an inference of negligence sufficient to make a *prima facie* case arises from the mere happening of an accident, although it causes an injury. We have held that such an inference may arise from proofs of an accident causing an injury when attended with certain circumstances, although there is no direct proof of specific negligence on the part of the master. For example, in *La Bee v. Sultan Logging Co.*, 47 Wash. 57, 91 Pac. 590, 20 L. R. A. (N. S.) 405; *Id.*, 51 Wash. 81, 97 Pac. 1104, the servant was injured by the breaking of a cable used for loading logs upon railway cars. In addition to the happening of the accident causing the injury it was shown that the cable was one furnished by the master for the servant's use, and that it broke while the servant was using it for the purpose for which it was furnished him and in the manner he was directed by the master to use it. It was held that the proofs made a *prima facie* case sufficient to sustain the verdict of the jury in favor of the servant, notwithstanding it was not shown that the master had failed to exercise reasonable care in the selection of the cable, or reasonable care in keeping it in a condition suitable for use. So in *Cleary v. General Contracting Co.*, 53 Wash. 254, 101 Pac. 888, it was held that a servant could recover for an injury caused by the fall of a scaffold on which he was working on a showing that the scaffold was furnished him by the master for his use, and that he was using it for the purposes intended and in the manner intended, although he did not show that the master had not exercised reasonable care in its construction and maintenance. To the same effect is *Riggs v. Northern Pac. R. Co.*, 60 Wash. 292, 111 Pac. 162. In these cases the doctrine known as *res ipsa loquitur* was applied. But the doctrine as there defined, and as it has elsewhere been defined by us, is not a rule of substantive law, but a rule of evidence merely. Nor is the rule one of universal application to be invoked in all cases of accident and injury. As we said

in *Lynch v. Ninemire Packing Co.*, 68 Wash. 423, 115 Pac. 838, L. R. A. 1917E, 178 (quoting from *Losie v. Delaware & H. Co.*, 142 App. Div. 214, 126 N. Y. Supp. 871):

"The doctrine of *res ipsa loquitur* was not intended to exempt the plaintiff from the burden of proving affirmatively negligence, or circumstances making negligence a legitimate, if not an irresistible, inference. In the language of Judge Cullen in *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630, its 'application presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversable or principal fact in issue, the defendant's negligence.' It is not the accident, but the manner and circumstances of the accident, that justified the application of the maxim. The fact of the casualty and the attending circumstances may themselves furnish all the proof of negligence that it is necessary to offer; but when, as in this case, they do not, a plaintiff must prove facts and circumstances from which the jury may fairly infer negligence as the cause of the accident. In no instance can the bare fact that an injury has happened, of itself and divorced from all surrounding circumstances, justify the inference that the injury was caused by negligence.' *Benedick v. Potts*, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478."

[2] Tested by these principles, we think it is at once manifest that the evidence was insufficient to charge the appellant with negligence. All that is shown that tends in that direction is the happening of the accident and the resultant injury. There is no showing that the instrumentality which gave way and caused the injury was furnished by the master for the respondent's use, nor was he in fact using it at the time of the injury. Nor is there any other circumstance that can be said to bring the facts within the rule stated. It might have been so had the respondent's place of work been rendered unsafe by the act of moving the castings. But it was not so rendered. When the castings started on their journey the respondent was in a place of safety, and he was injured because he voluntarily left this place of safety and entered into the zone of danger. Therefore to warrant a finding of negligence on the part of the master there should have been some proof other than the mere happening of the accident; some direct evidence independent of the accident reasonably indicating a neglect of duty.

We have not overlooked the argument of the respondent's learned counsel to the effect that the method of tying the castings was in itself gross negligence; that the rope in addition to being placed around the center of the castings should have been placed over their ends, so as to prevent them from slipping from the rope in case they became unbalanced. But this is but arguing from

effect to cause. Had they been so tied, and had they nevertheless slipped from the fastenings, the argument would be open that they were insecurely tied. Indeed, it would seem that no matter what method of carriage was used or what care was exercised in providing the carriage, if the carriage gave way it could be argued against the method used, with all the force of the argument against the method used here, that the carriage was insecure and thus implied negligence.

Our conclusion is that the judgment appealed from should be reversed, with instructions to enter a judgment that the plaintiff take nothing by his action. It is so ordered.

PARKER, C. J., and MACKINTOSH, BRIDGES, and HOLCOMB, JJ., concur.

STATE ex rel. SIMON v. SUPERIOR COURT FOR KING COUNTY et al. (No. 16647.)

(Supreme Court of Washington. Oct. 19, 1921.)

1. Executors and administrators §20(10)—Judgment of appellate court directing appointment of administrator should be followed without delay.

Where, on prior appeal, an administrator was directed to be appointed, a refusal by the trial court to enter an order substituting him for the acting administrators until they had fully settled their account is error.

2. Executors and administrators §496(1)—Where newly appointed administrator has only to make distribution, compensation should be only nominal.

In case a new administrator, directed to be appointed by the appellate court, finds nothing more to do than to make distribution, he should receive only nominal compensation.

Department 2.

Application for writs of mandamus and prohibition by the State, on the relation of Barney Simon, directed to the Superior Court for King County, Mitchell Gilliam, Judge thereof, and Zelma Levy and another, individually and as administrators of the estate of Louis Levy, deceased, to compel the appointment of the relator as the administrator of the estate of said decedent. Writs granted.

Arthur C. Bannon and Peters & Powell, all of Seattle, for relator.

Walter B. Allen and Chadwick, McMicken, Ramsey & Rupp, all of Seattle, for respondents.

HOVEY, J. [1] This is an application by the relator for writs of mandamus and prohibition, directed to the superior court for King county. Upon a prior appeal in a case between the same parties this court rendered judgment, directing that the relator herein be appointed by the superior court as administrator of the partnership estate of Louis Levy, deceased, and Barney Simon. The order of the superior court was not superseded, and no stay was asked for, either from that court or this court, pending the appeal. In the meantime the administrators originally appointed had proceeded with the administration of the estate, and now contend that the same is ready for distribution, and the trial court has declined to enter any order substituting the administrators until the administrators formerly appointed have fully settled their account, and has made his action dependent upon what the account develops.

In our opinion the superior court was in error in adopting this method. The judgment of this court should have been followed without delay. State ex rel. Smith v. Superior Court, 71 Wash. 354, 128 Pac. 648; 4 C. J. 1233; Galbreath v. Wallrich, 48 Colo. 127, 109 Pac. 417, 139 Am. St. Rep. 263. The person vested by law with the conduct of an estate is primarily and of right the executor or the administrator, and the duty of discovering the assets of an estate and properly caring for the same is upon him. The present procedure of the superior court has deprived him of this opportunity. The former opinion of this court made no reference to the action of the acting administrators pending the appeal, nor is it the intention at this time to disturb the same, so far as they are regular and comply with the law.

[2] The question of allowances for compensation of the administrator and his attorneys can be equitably adjusted by the superior court, and in case the new administrator should find nothing more to do than make distribution he should receive only nominal compensation. It is our conclusion that the superior court forthwith appoint the relator as administrator of the partnership estate of Louis Levy, deceased, and Barney Simon, and, upon his qualifying, that the superior court enter an order directing the former administrators to turn over to him all of the assets of the estate now in their hands, less such deductions for expenses of administration, including administrators' and counsel's fees, as shall be found proper.

The relator will recover costs from the respondents Zelma Levy and Bernhard Levinson.

PARKER, C. J., and HOLCOMB, TOLMAN, and MACKINTOSH, JJ., concur.

CONLAN v. SPOKANE HARDWARE CO.
(No. 16347.)

(Supreme Court of Washington. Oct. 21, 1921.)

1. Landlord and tenant §231(1)—Burden on lessee to prove oral modification as to rent.

In an action for unpaid rent, the burden is on defendant to prove an oral modification of the lease relative to the amount of rent.

2. Witnesses §142—Stockholder of corporate tenant cannot testify as to deceased landlord's agreement to accept less rent.

Under Rem. Code 1915, § 1211, excluding a party in interest from giving evidence of transactions with or statements by a deceased person, as whose legal representative the adverse party sues or defends, a stockholder of a corporate tenant was disqualified to testify as to an agreement of its deceased landlord to accept a lesser rental than that provided in the written lease.

3. Landlord and tenant §231(6)—Evidence held sufficient to show modification of written lease as to amount of rent.

In an action for unpaid rent, evidence held sufficient to show a modification of the written lease as to the amount of rent.

4. Landlord and tenant §209(2)—Agreement to reduce rent not void for want of consideration.

Since a landlord, on his tenant's refusal to pay rent according to the lease, may stand on the contract and take his legal remedies or treat it as abrogated and enter into a new contract with the tenant, an agreement during the term to reduce the rental is not void for want of consideration, the mutual promises of the parties being sufficient, the rule being that an obligee who agrees to accept something less than full satisfaction of an obligation, rather than take a doubtful chance of enforcing full performance, is bound by his agreement.

5. Frauds, statute of §139(4)—Neither party can repudiate executed oral contract for reduction of rent, though term longer than year.

Though an oral contract to reduce rentals under a lease for longer than one year may be repudiated by either party while executory, neither can repudiate it, so as to acquire additional rights thereunder, after it is executed by performance.

Department 2.

Appeal from Superior Court, Spokane County.

Action by Thomas F. Conlan, on whose death Ella P. Conlan, as executrix of his estate, was substituted, against the Spokane Hardware Company. Judgment for defendant, and plaintiff appeals. Affirmed.

McWilliams, Weller & Brown, and Ferris & Ferris, all of Spokane, for appellant.

Graves, Kizer & Graves, of Spokane, for respondent.

FULLERTON, J. On February 1, 1910, one Celia M. Conlan, being then the owner of a certain lot in the city of Spokane, on which there was a store building, leased the same to the respondent corporation, Spokane Hardware Company, for a term of 10 years, at a monthly rental of \$1,000, payable in advance on the first day of each and every month. The lease contained the usual covenants, one of which was that the failure to pay the rent reserved at the time it became due worked a forfeiture of the lease. The respondent entered into possession of the property pursuant to the authority conferred by the lease, and occupied it during the entire term. Shortly after the execution of the lease the lessor sold and conveyed the leased premises to one Thomas F. Conlan, and Conlan during the remainder of the term of the lease stood as landlord to the respondent. The rental was not paid according to the conditions of the lease. By the terms of the lease the rental reserved amounted to the sum of \$120,000. Of this sum the lessee actually paid \$87,400; and these payments were not made as they became due, but usually in lesser payments during the months in which they accrued, and occasionally long after their accrual. No forfeiture of the lease was ever declared. In two instances, during the earlier part of the term, agreements in writing were entered into between the landlord and the tenant by which a lesser sum than the rent reserved in the lease was agreed to be paid and accepted in full for rentals for stated periods, and thereafter, so it is contended by the respondent, oral agreements were entered into, similar in their purport and effect to the written agreements, under which lesser sums were paid and accepted in full satisfaction of the rental due; these sums varying in amount as business depressions and other causes lessened the earning capacity of the respondent as a business concern.

Shortly prior to the termination of the lease Thomas F. Conlan instituted the present action to recover the difference between the stipulated rental and the amount paid, except in so far as rental unpaid was covered by the written agreements mentioned. By a supplemental complaint, filed after the termination of the term, the amount demanded was made to include the full term, the sum for which judgment was asked being \$25,600, with interest. Before the cause was tried in the lower court, Thomas F. Conlan died, and, upon a showing of the fact, his executrix, Ella P. Conlan, was substituted as plaintiff in his stead. The cause was tried by the lower court sitting without a jury, and resulted in a judgment denying a recovery. This appeal is from the judgment so entered.

[1] The pleadings as framed by the par-

ties reduced the actual controversy to the single question whether there had been an oral modification of the terms of the lease relative to the amount of rent reserved. On the question the respondent had the burden of proof, and the evidence consists of that offered by the respondent, the appellant resting its side of the case on the record as it was thus made.

[2] In this court the appellant makes two principal contentions: First, that much of the evidence introduced on behalf of the respondent was inadmissible, and that, with this eliminated, there is not sufficient evidence remaining to show a modification of the written agreement; and, second, that the evidence fails to show a consideration sufficient to support the agreement to modify, conceding that such an agreement was made.

[3] As to the first of the contentions urged, we agree with the appellant that certain of the offered testimony was improperly admitted, and cannot be considered in determining the question of the sufficiency of the evidence. The transaction with Conlan, by which the agreement was to accept a lesser sum as rental than that provided for in the written lease, was had by an officer and stockholder of the respondent as its representative, and he was permitted to testify to the transaction and to statements made by Conlan in the course of the transaction. We think the stockholder was disqualified under the statute (Rem. Code, § 1211), which excludes a party in interest from giving evidence of transactions had with, or of statements made by, a deceased person, where the adverse party sues or defends as his executor, administrator, or as his legal representative. We cannot, however, agree with the contention that, excluding this evidence, enough does not remain to support the judgment. It would serve no useful purpose to review the evidence at length. Enough is shown to make it clear that without the reduction in the rental the defendant would early have been forced into insolvency, and would have ceased doing business as a going concern. It clearly appears also that the landlord knew of this condition, and knew that an attempt to enforce the agreement as written would result in the loss of the respondent as a tenant and the loss to him of any benefit from the contract of lease. The delinquencies, if they were such, extended over a long period of time. The payments made were by check, and these at stated intervals have the indorsement, "Rent in full to date." No protest against the indorsements was made, or demand for the contract rental made, until near the close of the term, and this only after a disagreement had arisen between the parties over a renewal of the lease. To our minds, the evidence points with unerring certainty to something more than mere forbearance; it points to a modification of the contract.

[4, 5] The objection that the agreement to reduce the rental was void for want of consideration is also without foundation. When a tenant refuses for any cause to pay rentals according to the terms of the contract of lease, the landlord has an option as to the course he will pursue. He may stand on the contract and take the remedies the law applicable to the contract affords him, or he may treat the contract as abrogated and enter into new contract with the tenant. If he does the latter, the mutual promises made by the one to the other furnish the consideration for the agreement. It may be that in this instance, since the contract of reduction was oral and since the term extended for a longer period than one year, either party could have repudiated its further operation so long as it was executory. But after it became an executed contract by performance, neither party could repudiate it so as to thereby acquire additional rights under it. *McInnis v. Watson*, 200 Pac. 578.

In the early case of *Brown v. Kern*, 21 Wash. 211, 57 Pac. 798, this court held that an agreement by a judgment creditor to accept from a judgment debtor who was financially embarrassed a less amount than was due upon the judgment in full satisfaction thereof was an obligatory agreement supported by a sufficient consideration. In the course of the opinion we said:

"The theory of the law doubtless is that no benefit accrued to the creditor in accepting a portion of a debt when the debtor was legally bound to pay the whole debt, and that, therefore, there was no consideration for the contract made and entered into by the creditor and debtor for the satisfaction of the judgment or debt by the payment of a part of the same. For many years, however, courts have been dissatisfied with this rule, and have refused to extend the doctrine, but have sought to restrict the operation of the rule whenever it was possible. It is certainly not in accordance with ethics, and ought not to be in accord with the rules of law, to allow a creditor to enter into a contract to compromise his debt or judgment, and by reason of that compromise receive an amount of money which he could not have received except through the medium of a compromise, and then allow him to violate his contract on the plea of want of consideration, and still retain the fruits of the agreement which he made to compromise. Pleas of want of consideration are not favored by the law, especially where the relative positions of the parties have been changed by the transaction. To avoid this rule, as we have before observed, courts have decided—and sometimes the logic of the discrimination is hard to perceive—that a consideration will be presumed, if a partial payment is made by the payment of a portion of the amount agreed upon and the note of a third person taken for the balance. Some courts have even gone so far as to hold that the acceptance of a check, or the note of the debtor for a portion of the debt, which check or note was afterwards paid, was sufficient to

raise presumption of a consideration; but it is difficult to understand why a check or a note would be any more valuable than money in the amount for which the note or check was drawn. This simply goes to show the disfavor in which the rule is held, and it might be better to change the rule in a straightforward manner than to seek to destroy its operation by illogical discriminations. However, in this case it is not necessary to go so far as to overturn the established doctrine, for the reason that, under the findings of fact, which are binding upon this court, it appears that the defendant Ridpath was unable to pay this judgment. The creditor then had a judgment which was worthless in the eyes of the law, and it was certainly a consideration to him to obtain a portion of that judgment."

To the same effect are the following cases: *Williams v. Blumenthal*, 27 Wash. 24, 87 Pac. 393; *Russell & Co. v. Stevenson*, 34 Wash. 166, 75 Pac. 627; *Hidden v. German Savings & Loan Society*, 48 Wash. 384, 93 Pac. 668; *Evans v. Oregon & Washington R. Co.*, 58 Wash. 429, 106 Pac. 1095, 28 L. R. A. (N. S.) 455; *Zindorf v. Tillotson*, 83 Wash. 472, 145 Pac. 587.

These cases cannot be differentiated in principle from the case before us. They lay down the rule that an obligee who agrees to accept and accepts something less from an obligor than full satisfaction of an obligation rather than take a doubtful chance of enforcing full performance is bound by his agreement.

The judgment is affirmed.

PARKER, C. J., and MAIN, TOLMAN, and MITCHELL, JJ., concur.

IN RE LANGILL'S ESTATE. (No. 16304.)

(Supreme Court of Washington. Oct. 6, 1921.)

1. Executors and administrators ~~§ 18~~—Unfit person not appointed administrator though first in order of those entitled, and not disqualified by statute.

Since the court, in appointing an administrator, acts judicially, and the right of any person to administer the estate is secondary to that of those interested to have it administered and distributed according to law, an application for letters of administration by one who is unfit, though he is first in order of those entitled to appointment, under Laws 1917, c. 156, § 61, and his disqualifications, are not among those described in section 87, will be refused, the statute, while it defines certain things as disqualifications, not saying or implying that there shall be no other.

2. Executors and administrators ~~§ 1~~—Administration being wholly statutory, court may construe statutes to best accord with their purpose and spirit.

The administration of estates being wholly statutory, the court may construe the statutes

so as to best accord with their purpose and spirit, without regard to the rigid rules of the common law.

Holcomb, J., Parker, C. J., and Mitchell, J., dissenting.

En Banc.

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Application by E. E. Langill for letters of administration on the estate of Levi M. Langill, deceased, opposed by Bessie Langill Stewart and others. From an order denying the application and appointing another as administrator, petitioner appeals. Affirmed.

Walter M. Harvey, of Tacoma, for appellant.

Guy E. Kelly and Thos. MacMahon, both of Tacoma, for respondents.

FULLERTON, J. On May 22, 1920, Levi M. Langill died intestate in Pierce county, Wash., leaving an estate therein subject to administration. The appellant, E. E. Langill, within 40 days after the death of Levi M. Langill applied for letters of administration upon his estate. His application was opposed by other heirs of the estate, and, after a hearing, the court denied the application, appointing one Harris G. Ward as administrator of the estate. E. E. Langill appeals.

The evidence need not be detailed at length. The applicant admits a misuse of a part of the estate, and the evidence otherwise convinces us that there is a grave probability that he has misappropriated another very considerable part. It shows, moreover, that his general character is such as to unfit him for the administration of any form of trust.

But the statute (Laws 1917, c. 156, § 61) prescribes the order in which persons are respectively entitled to administer upon an estate, and elsewhere (section 87) prescribes who are disqualified to act. The evidence shows that the appellant is first in order of the enumerated persons entitled to appointment, and shows further that the disqualifications he was found to possess are not among the statutory disqualifications. The appellant contends that these provisions of the statute are mandatory; that the enumeration of certain disqualifications by the statute precludes the idea that other disqualifications may exist; and that in determining who may be appointed as an executor or administrator, the courts are without power or right to adjudge a person disqualified on grounds which the statute does not make disqualifications.

[1] We are unable to agree with these contentions. The statute, while it defines certain things as disqualifications, does not say in terms, nor do we think by necessary implication, that there shall be no other. The

purpose of administration is to preserve the estate, and cause it to pass to the heirs and distributees without waste or loss, and without undue delay. In appointing an administrator the court acts judicially, not ministerially, and it is as much its judicial duty to guard an estate against possible waste and loss as it is to take action against waste and loss after it has occurred. It is true that the right to administer an estate is a valuable right. But, to paraphrase the language of Mr. Justice Woods in *Ex parte Small*, 69 S. C. 43, 48 S. E. 40, no right is arbitrary or unqualified by a correlative right. The right of those interested to have an estate administered and distributed in accordance with law is the dominant right; the right of any particular person to administer the estate is a secondary right. When the allowance of the claim to exercise this secondary right may result in defeating the primary right, it should be refused.

[2] It may be that our conclusion trenches upon the weight of judicial authority. But the cases, for the greater part, are based upon and follow the rigid rules of the common law. In this state, the administration of estates is wholly statutory, and we feel free to give the statutes that construction which in our judgment will best accord with their purpose and spirit.

The order is affirmed.

MAIN, BRIDGES, MACKINTOSH, and
TOLMAN, JJ., concur.

HOLCOMB, J. We dissent. By the majority decision the disintegration of the Probate Code of 1917 is begun. The majority say:

"The statute, while it defines certain things as disqualifications, does not say in terms, nor do we think by necessary implication, that there shall be no other."

And in conclusion the majority say:

"In this state, the administration of estates is wholly statutory, and we feel free to give the statutes that construction which in our judgment will best accord with their purpose and spirit."

This reasoning is wholly inconsistent and illogical. Furthermore it is not giving the statutes a construction to accord with their purpose and spirit. It is positively legislating and creating disqualifications which the statutes did not create. It may be granted that appellant is not a very admirable character, and not such a person as any court or judge would desire, if uncontrolled by statute, to grant any trust to; but we cannot disregard positive provisions of the probate statutes.

The record shows that appellant had used the sum of \$150, according to his own ad-

mission, of the ready funds of the estate after the death of his father, in making a visit to his sister, Emily Burchard, at Clinton, Iowa. He candidly admitted the use of this money; but, as he would be compelled to give bond if appointed administrator, the provisions of the statute requiring him to fully account for all of the estate and the terms of his bond would be amply sufficient to protect the persons interested in the estate.

The record also shows that Emily Burchard, the only other eligible on a parity with appellant for appointment as administrator, while at first objecting to his appointment afterwards withdrew her objection, and prayed for his appointment, leaving no others objecting except grandchildren, who were fourth in the order of eligibles.

The record also shows that Charlotte Langill, the wife of decedent, and who shortly before the death of Levi M. Langill had been adjudged by the superior court upon the certificates of two competent physicians as insane, had shortly thereafter been pronounced sane. Upon her being adjudged insane appellant was appointed guardian of her estate, and upon her discharge from custody his appointment had been annulled, and he had been ordered forthwith to report as guardian to the superior court. His attorney immediately moved to set aside the order discharging him as guardian, upon the ground that it was made without notice, and without any hearing, and without any testimony or evidence in support of the same, and that the court was without jurisdiction of the parties or the subject-matter. He made no report as guardian up to the time of the hearing upon the petition for appointment of administrator. Upon the conclusion of the hearing on the appellant's petition for appointment of administrator, the court orally announced that nothing had been shown upon the hearing to show that appellant was not a fit and proper person, except that he had failed to report and account as guardian of the estate of Charlotte Langill as directed by the superior court, and that his disobedience of such order was a very good indication that he ought not to be appointed administrator. It was adjudged, therefore, that appellant was not a fit and proper person to be appointed administrator. That is the only ground upon which the trial court refused to appoint him administrator, but the majority seem to find some other.

The Probate Code (chapter 156, Laws 1917, § 61) provides:

"Administration of the estate of the person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled to the following order: * * *

"Next of kin in the following order: 1. Child or children. * * *

Section 87 of the Code provides:

"The following persons are not qualified to act as executors or administrators. Corporations, nonresidents of this state, minors, persons of unsound mind, or who have been convicted of any felony or of a misdemeanor involving moral turpitude."

Appellant fell within none of the disqualified classes, and, while he may have been guilty of a felony or of a misdemeanor involving moral turpitude, he had not been convicted thereof. Yet the majority say that, because the appearances are that he has been guilty of such an offense, although not convicted, and although the statute specifies those who have been convicted of a felony or of a misdemeanor involving moral turpitude as being disqualified, they read into the statute that, if the court suspects that the applicant has been guilty of a felony or of a misdemeanor, etc., he shall not be appointed.

At common law eligibility was the rule, and disqualification for the granting of administration the exception. Illiteracy, ignorance, interest in the estate, immorality, and even criminality were not regarded as disqualifications; but idiocy and insanity were.

"In the United States the right to letters of administration is generally regulated by statute, and more or less elaborate provisions are made by such laws determining the priorities of the various relatives of different degrees." 11 R. C. L. p. 34, § 22.

"Next after husband and wife the preference as to letters of administration is usually given under modern statutes to the next of kin, or to the nearest relative of the deceased." 11 R. C. L. p. 37, § 26.

"Even under statutes regulating the priorities of those entitled to administer, considerable discretion is given the court in determining who shall be appointed. Where the statute provides that the surviving spouse or next of kin, or both, as the court may determine, must be appointed, if suitable and competent to discharge the trust, it is for the court to determine whether such persons are incompetent or unsuitable. A statute, one section of which empowers a court to appoint as executors persons named in a will *if they are fit persons*, and a subsequent section of which *enumerates the persons who are not deemed fit*, vests in the court a discretion to determine the existence of the particular causes of disability enumerated, *but does not vest a broad discretion to determine what are causes of disability*." 11 R. C. L. p. 42. (Italics ours.)

It will be noted that our statute does not read, as indicated in the text above, that certain persons must be appointed *if suitable and competent to discharge the trust*, but does specify certain persons in certain order who shall be appointed, and the subsequent section specifies certain persons who shall be disqualified; and since at common law and in many of the states it is generally true

that the moral fitness of a person to be appointed executor or administrator should not be inquired into by the court, and since our statute makes no such provision, but does make certain specific provisions disqualifying one from appointment, such moral qualifications are undoubtedly not required.

If courts having jurisdiction of probate matters can deviate from the order of eligibles as provided by statute in section 61, supra, and can find disqualifications not found in section 87, supra, the entire provisions are useless and ineffective, and the courts will be at liberty to appoint any person selected by them upon application for appointment of an administrator.

True, "the purpose of administration is to preserve the estate and cause it to pass to the heirs and distributees without waste or loss, and without undue delay," but as to all those matters, those interested would be amply protected by good and sufficient bond.

The majority opinion is manifestly wrong, and the order appealed from should be reversed.

PARKER, C. J., and MITCHELL, J., concur.

STATE ex rel. HART, Governor, et al. v. CLAUSEN, Auditor. (No. 16661.)

(Supreme Court of Washington. Oct. 4, 1921.)

1. States \Leftrightarrow 114—Public purpose for which debt was created by Equalization Compensation Act, to defend state in war.

The public purpose for which debt is created by Veterans' Equalized Compensation Act is to defend the state in war, for which authority is given by Const. art. 8, §§ 2, 3; and on the amount of which no limitation is imposed.

2 States \Leftrightarrow 148—Debt and authority to issue bonds in excess of \$11,000,000 created and given by Equalization Compensation Act.

A debt certain, in addition to \$11,000,000 (that being certain which is capable of being ascertained and made certain), is created, and authority for issuing bonds for the additional amount is given, by Veterans' Equalization Act, which, after providing for payment of a certain amount per month for time of service of each veteran of the World War, within certain limits, who at the time of enlistment was a resident of the state, provides that for the purpose of providing means for the payments, \$11,000,000 of bonds shall be issued: Provided, that if the proceeds thereof shall be insufficient, then enough additional bonds shall be issued, the issuance thereof to be under the general supervision and control of the State Board of Finance; there being no delegation of legislative power by the proviso but merely an authorization to ascertain that which may be made certain by public records, a mathematical propo-

sition, and to issue additional bonds on such determination.

En Banc.

Original mandamus proceeding by the State, on the relation of Louis F. Hart, Governor, and others, constituting the State Finance Committee, against C. W. Clausen, State Auditor. Writ granted.

See, also, 194 Pac. 793.

Lindsay L. Thompson, of Olympia, Fred J. Cunningham, of Spokane, and Nat U. Brown, of Olympia, for plaintiffs.

John A. Frater, of Seattle, for defendant.

HOLCOMB, J. The sole question in this case is whether or not chapter 1 of Laws Ex. Sess. 1920 is sufficient authorization for the issuance of bonds of the state in excess of \$11,000,000. The question arises by reason of section 6 of the act, which contains the following provisions:

"For the purpose of providing means for the payment of compensation hereunder and for paying the expenses of administration, there shall be issued and sold bonds of the state of Washington in the sum of eleven million dollars (\$11,000,000.00): Provided, that if the proceeds of the sale of such bonds be insufficient to pay the compensation herein allowed, then sufficient additional bonds to pay such compensation shall be issued and sold. The issuance, sale and retirement of said bonds shall be under the general supervision and control of the State Board of Finance."

Bonds to the amount of \$11,000,000 have been issued and sold by the state, and the funds derived therefrom have been practically exhausted in the payment of warrants. Additional bonds have been authorized, and a block of them bid in by the finance committee as an investment for the permanent school fund. The state auditor has refused to issue warrants on the school fund in payment of the bonds, and this action is brought to compel him so to do.

The respondent predicates his position upon the ground that there is a constitutional inhibition against the action of the committee.

The first three sections of article 8 of the state Constitution which have to do with "public indebtedness" are as follows, to wit:

"Sec. 1. The state may, to meet casual deficits or failure in revenues or for expenses not provided for, contract debts, but such debts, direct and contingent, singly or in the aggregate, shall not at any time exceed four hundred thousand dollars (\$400,000), and the moneys arising from the loans creating such debts shall be applied to the purpose for which they were obtained, or to repay the debts so contracted, and to no other purpose whatever.

"Sec. 2. In addition to the above-limited power to contract debts, the state may contract debts to repel invasion, suppress insurrection, or to defend the state in war, but the money arising from the contracting of such debts shall

be applied to the purpose for which it was raised, and to no other purpose whatever.

"Sec. 3. Except the debt specified in sections one and two of this article, no debts shall hereafter be contracted by or on behalf of this state, unless such debt shall be authorized by law for some single work or object to be distinctly specified therein, which law shall provide ways and means, exclusive of loans, for the payment of the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within twenty years from the time of the contracting thereof. No such law shall take effect, until it shall, at a general election, have been submitted to the people and have received a majority of all the votes cast for and against it at such election, and all moneys raised by authority of such law shall be applied only to the specific object therein stated, or to the payment of the debt thereby created, and such law shall be published in at least one newspaper in each county, if one be published therein, throughout the state, for three months next preceding the election at which it is submitted to the people."

It is conceded that section 1 of article 8 has nothing to do with the question involved, but respondent contends that the petitioners can find no authority for their acts under section 2 of article 8; and also contends that section 3 of article 8 prohibits the contracting of debts on behalf of the state unless they fall within the proviso of sections 1 and 2 and draw particular attention to the following parts of section 3:

"* * * Which law shall provide ways and means, exclusive of loans, for the payment of the interest on such debt as it falls due, and also to pay and discharge the principal of such debt within twenty years from the time of the contracting thereof. No such law shall take effect, until it shall, at a general election, have been submitted to the people and have received a majority of all the votes cast for and against it at such election. * * *"

Section 6 of the Veterans' Equalized Compensation Act provides for the issuance and sale of \$11,000,000 worth of bonds, and section 7 provides that the money arising from their sale be deposited in the state treasury to the credit of the special fund known as the Veterans' Compensation Fund. Section 7 also makes an appropriation of \$11,000,000 in the following language:

"For the purpose of carrying out the provisions of this Act there is hereby appropriated from the Veterans' Compensation Fund the sum of eleven million dollars (\$11,000,000.00)."

Section 8 of the act authorizes and directs the levy of a one mill tax for the purpose of creating a fund with which to retire the bonds and pay the interest thereon. Section 13 of the act directs its submission to the people for ratification at a general election.

Respondent therefore contends that, a definite amount of money, \$11,000,000 and no more, having been appropriated, and a def-

inite millage tax provided for the purpose of retiring the authorized indebtedness created, and the act having been passed by the Legislature having been legally referred to the people for their ratification, and further that the Legislature of 1920-1921 reappropriated the exact amount of \$11,000,000, petitioners are in effect seeking to incur a state indebtedness without a definite appropriation having been made therefor, and without the authority of a legislative act properly referred to and approved by the people at a general election.

[1] We have heretofore decided, in *State on the Relation of Hart v. Clausen*, 194 Pac. 793, that the act in question is valid as a constitutional act in that it was for a public purpose. While section 2 of article 8 of the Constitution of Washington was not particularly referred to as authority supporting the constitutionality of the law, it is manifest that when it was decided that the payment of the funds provided for by the Veterans' Compensation Act as being for a public purpose brought it within that section, and section 3 of article 8 having been conformed to, no other provision of the Constitution stood in the way.

[2] When the act was passed it was impossible to ascertain the exact number of veterans who would be entitled to the additional compensation or the exact amounts due to those entitled to it. Those matters, however, were matters of public record, to be determined according to the records of the government of the United States, and when determined the amount necessary to be raised by the sale of bonds was possible to determine. It is a general rule that that is certain which is capable of being ascertained and made certain. The debt therefore is already contracted by the Legislature.

Recalling that the proviso of section 6, chapter 1, of the Laws of 1920, is that, "if the proceeds of the sale of such bonds be insufficient to pay the compensation herein allowed, then sufficient additional bonds to pay such compensation shall be issued and sold," the conclusion is irresistible that when it is found that \$11,000,000, the sum appropriated by the act, is not sufficient for the compensation of all the veterans entitled to the benefits of the act, it is clear that the state board, under that proviso, has power and is directed to issue bonds in a sufficient amount to provide for the compensation of all the veterans entitled thereto. The authorization is clear and unequivocal.

There is no limitation imposed upon the amount of debt that may be contracted for the purposes contemplated by subdivision 2 of article 8 of the Constitution. The Legislature, the people approving at the referendum, contracted the indebtedness and the evident intention of the Legislature and the people was that every veteran entitled to the amount fixed by the act should be pro-

vided for. As was said by the Supreme Court of Minnesota in *Gustafson v. Rhinow*, 175 N. W. 908:

"No limitation is imposed upon the amount of debt that may be contracted for the purposes contemplated by section 7 of article 9 [Minnesota Constitution], nor is the evidence of such a debt restricted to any particular form. It seems to have been the purpose of the organic law to liberalize the application of this section in view of the vital character of the emergency it was designed to provide against. But such emergency is not to be considered the mere repelling of invasion or suppressing of insurrection in time of war, as we understand the appellant to contend. A public debt for a proper military purpose may be legally contracted in time of war, without reference to a state of invasion or insurrection. Conditions may exist, as recent history has shown, which call for active military operations of various kinds, though no hostile invasion be imminent or even probable. Such operations might require the borrowing of large sums of money, the amount of which would be dependent upon the existing circumstances, and could not, in the nature of things, be determined or limited in advance. *Franklin v. State Board of Examiners*, 23 Cal. 173, is directly in point. The constitution of California limited the state debt to \$300,000, 'except in case of war, to repel invasion or suppress insurrection,' etc. By an act of April 27, 1863 (St. Cal. 1863, p. 662), entitled 'An act for the relief of the enlisted men of the California Volunteers in the service of the United States,' the Legislature provided for the creation of a debt of \$600,000 to be used in the payment of an additional \$5 per month to enlisted men of the California Volunteers from the time of their entry into the service. The plaintiff entered service on November 25, 1861, and was discharged on July 25, 1863. The question was upon the constitutionality of the statute giving him \$5 per month for the period of his service; and the statute was held authorized under the provision of the California Constitution identical for practical purposes with section 7 of article 9 of our Constitution. This case is not distinguishable from the one before us. See, also, *People v. Pacheco*, 27 Cal. 175; *Reis v. State*, 133 Cal. 593, 65 Pac. 1102; *State v. Stewart*, 54 Mont. 504, 171 Pac. 755, Ann. Cas. 1918D, 1101."

The authorities upon the right of the state generally to issue bonds and create indebtedness are of little assistance in this case.

"The different states of the Union, in incurring indebtedness and issuing negotiable securities therefor, are subject to the specific limitations to be found in their several constitutions, either in respect to the amount to be issued or the purpose for which issued." *Abbott, Public Securities*, p. 157.

"Except as limited by constitutional provisions, the legislature has absolute control over the finances of the state and its power as to the creation of indebtedness or the expenditure of state funds, or making appropriations is plenary, and the exercise of this power cannot be controlled or reviewed by the courts." 36 Cyc. 882.

Having determined that the creation of the indebtedness involved in this act was valid under our constitutional limitations, we are confident that the proviso in section 6 of this act for the issuance of additional bonds, if the \$11,000,000 authorized be found insufficient, is also valid. There is no delegation of legislative power in that proviso, but merely an authorization to ascertain that which may be made certain by public records, and to issue additional bonds upon such determination. There is no exercise of discretion involved. It is simply a mathematical proposition and a mandate to issue sufficient bonds to satisfy all the demands. The authority is clear.

With the question of whether or not the proceeds of additional bonds can be paid out of the state treasury under the appropriation limiting the amount of \$11,000,000, we have no present concern.

The writ of mandate will issue.

PARKER, C. J., and TOLMAN, MITCHELL, BRIDGES, MAIN, HOVEY, and FULLERTON, JJ., concur.

STATE v. FARMER.

(Supreme Court of Idaho. Oct. 22, 1921.)

1. Witnesses \S 331½—Statutes prescribing the character of evidence and method of impeaching witnesses must be conformed to.

C. S. \S 8038, 8039, prescribe the character of evidence and the method to be followed in impeaching a witness, and in order to discredit a witness in this manner the requirements of the statute must be conformed to.

2. Witnesses \S 344(2)—In prosecution for statutory rape, evidence of prosecutrix's acts of unchastity are not admissible to discredit and impeach her.

In a prosecution for the crime of rape of a female under the age of consent, evidence of particular acts of unchastity on the part of the prosecutrix, sought to be introduced for the purpose of discrediting and impeaching her, is not admissible.

3. Criminal law \S 1156(1)—Granting a new trial rests in the court's discretion, and may be disturbed only for clear abuse.

The granting or refusing to grant a new trial rests largely in the discretion of the trial court, and in the absence of a clear abuse of such discretion an order granting a new trial will not be set aside on appeal.

Appeal from District Court, Bingham County; F. J. Cowen, Judge.

A. M. Farmer was convicted of statutory rape, and from an order granting a new trial the State appeals. Order affirmed.

Roy L. Black, Atty. Gen., and James L. Boone, Asst. Atty. Gen., for the State.

Hansbrough & Gagon, John W. Jones, and Thomas & Anderson, all of Blackfoot, for respondent.

BUDGE, J. Respondent was convicted of the crime commonly designated as statutory rape. This appeal is by the state from an order granting a new trial.

From the record it appears, *inter alia*, that the prosecutrix was a young girl, 14 years of age; that she lived with her parents at Blackfoot, Bingham county, Idaho; that respondent was her uncle by marriage; that this uncle did janitor work in the land office and a Mr. Jones' office in Blackfoot, Idaho; that on the morning of July 2, 1916, the prosecutrix accompanied respondent to the offices hereinbefore mentioned; that the assault is alleged to have been committed on the 2d day of July, 1916, in the land office; that a child was born to the prosecutrix as a result of said assault on the 24th day of March, 1917; that on the 6th day of May, 1918, upon application of the respondent, a new trial was granted. On the 29th day of June, 1918, counsel for the state petitioned the court for an order specifying the grounds for the granting of the new trial, and on the same day the court made a supplemental order, setting forth the reasons for the granting of said application, which are briefly stated as follows: That the court erred in excluding certain offers of evidence made on behalf of the respondent, to the effect that during the month of June, 1916, between the 15th and 29th days of said month, that respondent saw the prosecuting witness and one Jess Jones in a compromising position in the home of the prosecutrix; that during the month of June, 1916, respondent had a conversation with the prosecutrix with reference to her improper relations with Jones, in which conversation the prosecuting witness stated that she had had improper, illicit relations with the said Jones; that respondent offered to prove further by his wife, Harriet Farmer, that during the spring and summer of 1916, the prosecutrix and one of her brothers slept together in the same bed and room; second, that the evidence was insufficient to support the verdict of the jury.

[2] It is the contention of the state that the court erred in granting respondent's application for a new trial for the reason that error cannot be predicated upon the exclusion of evidence tending to show that some one other than the defendant in a prosecution for statutory rape may have been the father of the child of the prosecutrix, and that the evidence was sufficient to support the verdict in that it substantially established that the

prosecutrix was a female of the age of 14 years, that the defendant was not her husband, and that he had had unlawful sexual intercourse with her.

The court did not err in sustaining the objection to the offer of proof that the prosecutrix was seen by respondent in a compromising position with Jones. Neither did the court err in excluding the offer of proof that during the spring and summer of 1916 the prosecutrix and one of her brothers slept in the same room and bed. At most, if this evidence tended to prove anything, it was that the prosecutrix had an opportunity to commit illicit acts with persons other than the respondent. *State v. Henderson*, 19 Idaho, 524, 114 Pac. 30.

[1] No proper foundation was laid for the introduction of the alleged conversation had with respondent, wherein the prosecutrix stated in effect that she had had illicit relations with Jess Jones, and the action of the court in excluding this evidence was proper. C. S. §§ 8038, 8039, provide how a witness may be impeached. Moreover, a witness may not be impeached upon any immaterial matter.

The rule is well established in this jurisdiction that evidence of particular acts of unchastity, of a female under the age of consent, to discredit and impeach the prosecutrix, is not admissible. C. S. § 8038; *State v. Anthony*, 6 Idaho, 383, 55 Pac. 884; *State v. Anderson*, 6 Idaho, 706, 59 Pac. 180; 5 Am. & Eng. Ency. Law, 878; *State v. Lancaster*, 10 Idaho, 410, 78 Pac. 1081; *State v. Henderson*, supra; *State v. Pettit*, 33 Idaho, 326, 193 Pac. 1015.

[3] With respect to the insufficiency of the evidence to support the verdict, the record discloses a sharp conflict in the testimony. The trial court was in a position to observe the witnesses while upon the stand, their conduct and demeanor while testifying, and was therefore in a far better position than this court to pass upon the sufficiency of the evidence and determine whether in the interest of justice a new trial should be granted. The granting or refusing to grant a new trial rests largely in the discretion of the trial court, and in the absence of a clear abuse of such discretion this court will not set aside an order granting a new trial. *State v. Barber*, 15 Idaho, 96, 96 Pac. 118; *State v. Driskell*, 12 Idaho, 245, 85 Pac. 499.

From what has been said it follows that the order granting a new trial should be affirmed; and it is so ordered.

RICE, C. J., and DUNN and LEE, JJ., concur.

MCCARTHY, J., concurs in the conclusion reached.

LITTELL v. BRAYTON MOTOR & ACCESSORY CO. (No. 10065.)

(Supreme Court of Colorado. June 6, 1921.
Rehearing Denied Oct. 3, 1921.)

1. Chattel mortgages ⇨173(3)—Complaint pleading chattel mortgage executed by owner of property sufficiently alleged special ownership.

In replevin by chattel mortgagees, where the complaint pleaded a chattel mortgage for a valuable consideration executed by the owner to plaintiffs, and a copy of such instrument was made a part of the complaint, the requirement of allegation of special ownership was met.

2. Chattel mortgages ⇨173(3)—Complaint in replevin by mortgagees held sufficiently to allege defendant's possession.

In replevin by chattel mortgagees for possession of mortgaged automobile, where the complaint alleged defendant's claim of a lien for storage and repairs, plaintiffs' demand for possession and defendant's refusal, the requirement of allegation of defendant's possession was met.

3. Chattel mortgages ⇨173(3)—Plaintiff mortgagees' right of possession held well pleaded.

In replevin by chattel mortgagees, pleading provisions of the mortgage that if the property should be attached or claimed by any other person before payment the mortgagee should be entitled to take immediate possession, coupled with allegations of defendant's possession and claim of a lien for repairs, met the requirement of allegation of plaintiffs' right of possession.

4. Sales ⇨48½, New, vol. 13A Key-No. Series—Sale of used automobile, without delivery of bill of sale and assignments thereof, in violation of penal statute, not void.

Sale of a used automobile in violation of Laws Ex. Sess. 1919, p. 18, § 7, making it a penal offense to buy or sell a used car unless the original bill of sale or certificate of ownership and all assignments thereof have been recorded and delivered, is not void.

5. Chattel mortgages ⇨147—Insufficiency and alteration of description immaterial where defendant had actual notice of identity of property.

Under Laws 1917, p. 127, § 4, where defendant, before an automobile came into his possession, had actual notice that it was the identical car covered by plaintiffs' chattel mortgage, his lien for storage and repairs was subject to the mortgage; and the description of the car in the mortgage was, in this connection, immaterial, as was also an alteration in the description adding the motor number.

6. Chattel mortgages ⇨173(1)—Defendant withholding possession of mortgaged automobile from chattel mortgagees cannot urge mortgagees' failure to take possession.

The claim that plaintiff mortgagees lost all rights under their mortgage by their failure to take possession of the mortgaged property,

an automobile, within 30 days after maturity of their debt, cannot be successfully urged in mortgagees' replevin action, by defendant, who, with actual notice of the mortgage, took and held possession of the car under an inferior claim of a lien for storage and repairs, since the mortgagees could acquire possession only by such action.

Department 3.

Error to District Court, Pueblo County: Samuel D. Trimble, Judge.

Action by the Brayton Motor & Accessory Company, a corporation, against S. M. Littell. Judgment for plaintiff, and defendant brings error. Supersedeas denied, and judgment affirmed.

Harry Leddy, of Pueblo, for plaintiff in error.

Leo P. Kelly, of Pueblo, for defendant in error.

BURKE, J. This was an action in replevin brought by defendants in error against plaintiff in error for the possession of an automobile, and the parties are hereinafter designated as in the court below. Trial was had to the court without a jury and judgment was entered for plaintiffs. To review that judgment defendant brings error.

There are 47 assignments of error, most of which are unjustified and unargued. We confine ourselves to the principal contentions.

The theory of plaintiffs, and the basis of the judgment, is that one Edmondson owned the car in question; that he mortgaged it to plaintiffs; that while that mortgage was in effect the car was left with defendant for repairs; that defendant took it with actual notice of the mortgage and retained it under claim for a lien for such repairs and for storage; that such possession and claim breached the mortgage and gave to plaintiffs a right of possession under their qualified ownership.

Defendant contends: (1) That the complaint is defective, in that it fails to allege ownership or right of possession in plaintiffs, or possession in defendant. (2) That there was no proof of Edmondson's ownership. (3) That the description of the car as set forth in the mortgage was insufficient. (4) That the mortgage offered in evidence had been altered in a material particular and hence was not the mortgage given by Edmondson. (5) That plaintiffs lost all rights under said mortgage by their failure to take possession within 30 days after maturity of the debt.

[1] 1. The complaint pleaded a chattel mortgage, for a valuable consideration, executed by the owner of the property and in favor of plaintiffs. A copy of this instrument was made a part of the complaint. The necessary allegation of special ownership was thus met. *Elliot et al. v. First Nat. Bank*, 30 Colo. 279, 70 Pac. 421.

[2, 3] The complaint alleged defendant's claim of lien for storage and repairs (which could only be predicated upon possession), plaintiffs' demand for possession, and defendant's refusal, and the prayer was for possession. The necessary allegation of possession in defendant was thus met. The mortgage provided that if the property in question should "be attached or claimed by any other person or persons at any time before payment" the mortgagee should be entitled "to take immediate and full possession." This, coupled with the allegation of defendant's possession and claim, met the necessary allegation of plaintiffs' right of possession.

[4] 2. Section 7, c. 7, L. 1919 (Extraordinary Session), makes it a penal offense to buy or sell a used automobile unless the original bill of sale or certificate of ownership and all assignments thereof shall have been recorded, and the same, or copies thereof, delivered with the car. If there was here an apparent violation of this statute, the transaction was not for that reason void. *Dunlop v. Mercer*, 156 Fed. 545, 86 C. C. A. 435.

[5] 3. The mortgage originally described this car as, "One 6-40 Hudson automobile." The sufficiency of this description is immaterial because the evidence clearly discloses, and the trial court so found, that defendant, before this car came into his possession, had actual notice that it was the identical car covered by the mortgage. His lien was therefore subject to the mortgage. *Laws* 1917, c. 43, § 4.

4. The alleged alteration in the mortgage consisted in adding to the above description, after the words "motor No.," therein appearing, the figures "831." This alteration was thereafter, and prior to the commencement of this action, erased. In view of what has been said in paragraph 3, supra, such alteration was wholly immaterial. It was at most an unwarranted addition to the description of property concerning the mortgage and identity of which defendant had actual knowledge.

[6] 5. Defendant, with actual notice of the mortgage in question, and before the expiration of the lien thereof, took and held possession of the property under an inferior claim. Plaintiffs could acquire possession only by virtue of this action and their judgment herein. Hence defendant is in no position to urge his own wrong as a defense to their claim. *Ellison v. Tuckerman*, 24 Colo. App. 322, 335, 134 Pac. 163.

Finding no reversible error in this record, the supersedeas is denied, and the judgment affirmed.

TELLER, J. (sitting for SCOTT, C. J.), and BAILEY, J., concur.

McCARTY-JOHNSON HEATING & ENGINEERING CO. v. FRANKEL.
(No. 10165.)

(Supreme Court of Colorado. Oct. 3, 1921.)

New trial — **9**—No error in submission of sole question of amount of damages where liability established by verdict at former trial, though nominal damages awarded as compromise.

Where the liability of defendant, as found by the county court, was established by a verdict for nominal damages in the district court, and an affidavit of the foreman of the jury, in support of defendant's motion for new trial, that the verdict did not represent the true beliefs of the jury as to the merits of the case, nor the amount of damages, but was an arbitrary award for the purpose of a compromise verdict, was specific only as to a compromise on the amount of damages, the trial court, in the exercise of its discretion, under Supreme Court rule 6 (161 Pac. vii), authorizing it, on motion for new trial, to order a retrial of questions of fact as to which error was committed, without resubmitting those as to which there has been no error, did not err, though such power should be exercised with great caution, in submitting to a second jury, on retrial, the sole question of the amount of damages.

Department 3.

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Action by Henry Frankel, doing business as the H. Frankel Stationery Company, and the Frankel Carbon & Ribbon Manufacturing Company against the McCarty-Johnson Heating & Engineering Company, a corporation. Judgment for plaintiff, and defendant brings error. Supersedeas denied, and judgment affirmed.

Defendant in error brought this action in the county court of the city and county of Denver against plaintiff in error, for damages in the sum of \$453. It is not disputed that it was there tried without a jury, that the findings were in favor of defendant in error on the question of negligence, and that the full amount prayed for was awarded. On appeal to the district court the cause was tried to a jury, which, after lengthy deliberation, sent the following communication to the court:

"Hon. Chas. Butler: There is no possibility of the jury agreeing in this case. F. N. Briggs, Foreman."

Whereupon an additional instruction was given, calling the attention of the jurors to the importance of an agreement, if one could conscientiously be reached, and their duty in the premises. Thereupon the jury retired, and after further deliberation brought in a verdict in favor of the defendant in error, assessing its damages in the sum of \$1. Mo-

tion for a new trial was made, supported by the affidavit of the foreman that—

"The verdict reached in the above case did not represent the true beliefs of the members of said jury as to the merits of the case, but was a compromise arrived at in accordance with the wishes of the court that the jury agree; that the amount of damages found did not in the opinion of the jury represent the true damages, but was an arbitrary award made for the purpose of a compromise verdict."

The motion for a new trial was granted and the cause retried upon the sole question of the amount of damages, which the second jury fixed in the sum of \$300. From the judgment thereupon entered by the court, the Heating & Engineering Company brings error, asserting that the court was without power to divide the issues, directing a retrial only of the amount of damages, and asks the issuance of a supersedeas. The parties are hereinafter designated as in the court below.

John A. Rush and Foster Cline, both of Denver, for plaintiff in error.

Joseph P. O'Connell and Frank J. Mannix, both of Denver, for defendant in error.

BURKE, J. (after stating the facts as above). Rule 6 of the rules of the Supreme Court, 161 Pac. vii, reads as follows:

"Upon a motion for a new trial, the trial court may, in its discretion, order a retrial of questions of fact with respect to which error was committed, without resubmission of those concerning which there has been no error."

It is admitted that under the evidence in the first trial in the district court "reasonable men might well disagree as to whether there was any negligence proven." The same may be assumed as to the evidence in the county court. There is no dispute as to the validity of rule 6 above quoted. Without it the power of the trial court to divide issues has been affirmed in a well-considered case in which it is said that such power "ought to be exercised with great caution," and a doubt is there expressed as to whether a proper case for its exercise could arise in which liability and adequacy of damages could be so separated. *Simmons v. Fish*, 210 Mass. 563, 97 N. E. 102, Ann. Cas. 1912D, 588.

Where the reasonable inference is that a jury compromised differences as to liability by returning an inadequate sum for damages, it is held that the entire verdict should be set aside. *Doody v. Boston & M. R. R. Co.*, 77 N. H. 161, 89 Atl. 487, Ann. Cas. 1914C, 846. Adopting the rule as announced in *Simmons v. Fish*, supra, modified by said rule No. 6 of the rules of our own court, and applying the test sanctioned in *Doody v. Boston & M. R. R. Co.*, supra, we have here but

to inquire if there was a reasonable inference that the jury so compromised their differences as to liability.

In view of the fact that the county court found liability; that but for the compromise (if such existed) defendant's liability is established by the first verdict in the district court; that the affidavit of the foreman is specific only as to a compromise on the amount of damages—we are forced to the conclusion that the trial court properly exercised its discretion in determining from all these, and from the evidence in the first trial in the district court, that the question of liability had been fairly and without compromise adjudged against defendant, and that the submission to the second jury of the sole question of the amount of damages was without error.

The supersedeas is accordingly denied, and the judgment affirmed.

TELLER, J. (sitting for SCOTT, C. J.), and BAILEY, J., concur.

KELLIHAN v. McHUTT. (No. 9824.)

(Supreme Court of Colorado. Oct. 3, 1921.)

1. Damages \S 42—Living expenses, not increased by injury, no part of damages.

One's living expenses during disability from injury, where not increased by the injury, are no part of the damages therefor.

2. Appeal and error \S 1052(5)—Verdict being general, reversal necessary for evidence of improper elements of damage.

The verdict being general, admission of evidence of improper elements of damages requires reversal.

Error to District Court, City and County of Denver; J. W. Sheafor, Judge.

Action by Thomas D. McHutt against Elmer J. Kellihan and another. Judgment for plaintiff, and defendant Kellihan brings error. Reversed.

Edmund J. Churchill and Frank T. Johnson, both of Denver, for plaintiff in error.

TELLER, J. Defendant in error was plaintiff in an action against plaintiff in error and one Ransom to recover damages alleged to have been suffered by the plaintiff as the result of the misconduct of the defendants named. Verdict and judgment were for plaintiff and defendant Kellihan brings the cause here for review.

Plaintiff claimed damages for injury suffered from unskillful, unsafe, and harmful treatment, and from drugs improperly administered to him by defendants. He sought also to recover various sums alleged to have

been expended for living expenses, while under said treatment; also, exemplary damages.

The verdict was for \$1,000 actual damages, \$5,000 exemplary damages. The verdict for exemplary damages was set aside by the court.

[1] It is unnecessary to determine a number of questions raised by plaintiff in error, as the judgment must be reversed on the ground of the admission of improper evidence. Over the objection of defendants, plaintiff was permitted to testify to the various items of special damages set out in the complaint, including the amount that he paid for board and room for 16 weeks, for medical tests, and laundry bills. These payments were in no sense the result of the action of the defendants. The plaintiff's living expenses do not appear from the evidence to have been increased by the alleged improper treatment by the defendants, and the amount of such expense was entirely immaterial in the case. *Graeber v. Derwin*, 43 Cal. 495.

[2] On a general verdict it is impossible to say of what items the same is made up, and the admission of this evidence must therefore be held to be prejudicial error.

The judgment is reversed.

BAILEY and ALLEN, JJ., concur.

HASTINGS & HEYDEN REALTY CO. v. GEST et al. (No. 9839.)

(Supreme Court of Colorado. June 6, 1921. Rehearing Denied Oct. 8, 1921.)

1. Waters and water courses \S 151—Occasional use of water to irrigate certain land not abandonment of right to use it on other land to which it is appurtenant.

Occasional use of water by owner of two tracts of land to irrigate one tract did not constitute an abandonment of the right to use it upon other tract to which the right to the water was appurtenant.

2. Waters and water courses \S 154(1)—Water may or may not be appurtenant to land, depending on provisions of deed, or intention of parties.

Water may or may not be appurtenant to land, depending upon the provisions of the deed, or, if deed is silent, upon the intention of the parties, to be determined from all the circumstances of the case, including the use of the water and its necessity to the beneficial use and enjoyment of the land.

3. Waters and water courses \S 154(1) — Right to water held appurtenant to land.

Where land was not susceptible to cultivation without water, and water had been used thereon for many years under a contract with an irrigation company providing where

it was to be used and prohibiting its use elsewhere, the right to the water was appurtenant to the land.

4. Waters and water courses \Rightarrow 156½ — Trustee's release of portion of land from deed of trust held to carry with it water rights appurtenant to it.

Where land and water rights appurtenant thereto were conveyed by deed of trust, trustee's release as to a part of the land did not sever the water rights from the land, though the partial release clause of deed of trust providing for the release of portions of land from deed of trust on payment of specified amounts did not mention the water rights.

Error to District Court, City and County of Denver; Julian H. Moore, Judge.

Action by the Hastings & Heyden Realty Company against William P. Gest and others. Decree for defendants, and plaintiff brings error. Reversed and remanded, with directions.

Rogers, Ellis & Johnson, of Denver, for plaintiff in error.

L. Ward Bannister, Leroy McWhinney, and Samuel M. January, all of Denver, for defendants in error.

BAILEY, J. Plaintiff brought action to quiet title to a certain water right as appurtenant to the northwest quarter of the southwest quarter of section 35, township 3 south, range 67 west, owned by it, to restrain the defendant Gest and the Irrigation Company from diverting this water to other land, and for general relief. Findings and decree were for defendants, which plaintiff brings here for review.

It appears that Gest and others associated with him were owners of the southwest quarter of section 35, township 3 south, range 67 west, and that in January, 1911, they conveyed the land to one Gallup by warranty deed for a consideration of \$48,000.00. The deed also conveyed all water appurtenant thereto in the following terms:

"The southwest quarter (S. W. ¼) of section thirty-five, (35) township three (3) south, range sixty-seven (67) west of the 6th P. M., together with all water rights belonging or appurtenant to said lands and premises, including with and among any other of said water rights any and all water rights, and any and all interests in and to any and all water rights owned or held by said parties of the first part under and by virtue of any contracts made by them or by one William Howell in his lifetime or by his executors, with the Northern Colorado Irrigation Company, or the Platte Land Company, Limited, and any and all other water rights used upon or in connection with said above described real property."

On the same day Gallup conveyed to the Public Trustee of Adams County this land

and water to secure the payment to Gest and his associates of the balance of the purchase price, \$40,000.00, which was evidenced by four notes of \$10,000.00 each. In the deed of trust, following the legal description of the land, is the following:

"* * * Together with all water rights belonging or appurtenant to said lands and premises, including all and among any other of said water rights, any and all water rights and any and all interests in and to said water rights owned or held by said party of the first part, under and by virtue of that certain deed of conveyance of date January 2, 1911, made, executed and delivered by the parties of the second part to the party of the first part, and any and all other water rights used upon or in connection with said above described real property."

The trust deed also contained the following provision in regard to partial releases upon part payment of the debt:

"The party of the first part may have released at any time as follows: The southeast quarter (S. E. ¼) of said premises upon the payment of eight thousand dollars (\$8,000.00); any five-acre tract in the north one-half (½) of said premises on the payment of twelve hundred and fifty dollars (\$1,250.00); and any five-acre tract in the southwest quarter (S. W. ¼) of said premises on the payment of twenty-five hundred dollars (\$2,500.00); said payment to be credited on the note or notes maturing first. On payment of any of said notes the release price shall be proportionately reduced."

Some six months later Gallup conveyed the land to the plaintiff company, with all water rights and appurtenances. Plaintiff entered into possession through tenants, who have ever since continuously used water thereon regularly for irrigation during each irrigating season.

In January, 1912, plaintiff paid the \$10,000.00 note then due, and secured a release under the provisions of the trust deed of a certain tract included therein. This particular parcel was not then, and never had been, under irrigation, and was entitled to no water as appurtenant.

In December of the same year plaintiff gave notice that it would pay the \$10,000.00 note due in January, 1913, and elected to have the northwest quarter of the southwest quarter of the land released. A release deed was accordingly prepared by Gest and his associates, which release contained the following provision and exception:

"All water rights conveyed by or mentioned in said deed of trust are hereby expressly reserved and excepted from this release."

Accompanying the release, which was submitted to the company before delivery, was the following letter:

"I wish to call your attention to the fact that no water rights are released. Neither were any water rights released a year ago when a different tract was released. The reason is that we do not know to what particular tract of the entire property any particular water rights attach, so we have been following the policy of (not) allowing any water rights to be released until the final release."

The deed was returned with the exception approved, as follows:

"Acknowledging receipt of yours of December 19, in re Hastings & Heyden Realty Company property, Boston Heights, we beg to say that we enclose form of release deed which meets with our approval."

The deed was duly delivered and recorded. Payment of the remainder of the notes was defaulted and the property was later sold by the Public Trustee under the provisions of the trust deed. There was no redemption from the sale, and a deed from the Trustee was in due course delivered to Gest, who was the purchaser. The deed purported to convey the land not theretofore released, and all water rights appurtenant to the entire quarter section.

Gest then secured a deed from the Irrigation Company purporting to convey the water right in dispute to another tract of land belonging to him previously without water, and detach it from the land, to wit, the northwest quarter of the southwest quarter of section 35, to which it had theretofore been appurtenant, and to which it had been continuously applied for irrigation purposes for more than twenty years.

In March, 1919, the plaintiff company demanded of the Irrigation Company that it supply water for this forty-acre tract, as it had previously done. This demand, and the tender of the water rental accompanying it, were refused, because of an alleged transfer of such water right. About a month later this suit was brought and resulted as above indicated.

The main question is whether the water originally appurtenant to the northwest quarter of the southwest quarter of section thirty-five remained so appurtenant, and if so, whether plaintiff was legally entitled to have it released from the lien of the trust deed when the land itself was released.

[1] It is plain that the water right in question was conveyed by Gest and his associates to Gallup, and by him to the plaintiff company. It is equally clear that such water right was included in the trust deed by Gallup, and was described as "belonging or appurtenant to said lands and premises." It is true that the deed also purported to convey to the trustee "all other water rights used upon or in connection with said above described real property," but this phrase

gives the trustee no added power, or other water rights, because Gallup had no other water rights there, than those appurtenant to and regularly used upon the land, all of which water rights were conveyed to him by Gest. The trust deed contained no power of sale of water rights alone. It is manifest that the water rights he had were those and those only appurtenant to the land. Indeed, there is no claim to the contrary. There is some contention that the water in question was occasionally used to irrigate other land, but it does not amount to an abandonment of the right to use it on the land in question; neither does it in the slightest degree show that the water right had ceased to be appurtenant to that land, or had ever been severed from it.

In *Bessemer Irr. Co., v. Woolley*, 32 Colo. 437, 76 Pac. 1053, 105 Am. St. Rep. 91, it is said in the syllabus:

"Whether or not a water right used to irrigate land passes as an appurtenance to the land by a conveyance of the land which is silent as to the water right depends upon the intention of the grantor which must be determined by the circumstances of the case, and whether or not the water right is or is not incident and necessary to the beneficial enjoyment of the land, and in the absence of a showing of such intention such water right will be held not to pass as an appurtenance."

[2] It is recognized in this state that water may or may not be appurtenant to land. The provisions of the deed control, and if the deed be silent on the subject, then the intention of the parties is to be determined from all the circumstances of the case, including the fact as to the use of the water, and whether it is necessary and essential to the beneficial use and enjoyment of the land. *Bessemer Irr. Ditch Co. v. Woolley*, supra; *Arnett v. Linhart*, 21 Colo. 188, 40 Pac. 355; *Insurance Co. v. Childs*, 25 Colo. 360, 54 Pac. 1020; *King v. Ackroyd*, 28 Colo. 488, 66 Pac. 906.

In *Bessemer v. Woolley*, supra, the question was whether certain water rights were conveyed as appurtenant to the land, the deed being silent on the subject. The court held that the intention of the grantor must be gathered from all of the facts and circumstances of the case, and whether the water was in fact incidental and necessary to the beneficial use and enjoyment of the land conveyed.

[3] In the case at bar it is undisputed that the water right involved was necessary to the beneficial use and enjoyment of the land. The land was not susceptible to cultivation without water. It had been used thereon for many years, under contract with the Irrigation Company, which provided where it was to be used, and prohibited its use elsewhere. The records of the Irrigation Company es-

tablished beyond dispute that the water was and is appurtenant to the land.

[4] It is also well established that without water the land would be practically worthless for agricultural purposes, and would have a value of only one-tenth the amount paid to obtain its release. This fact is important as indicating the intention to convey the water with the land, and in thus assisting to the conclusion as to the effect of the partial release clause, contained in the deed of trust, which partial release clause is silent as to water rights. The fact that the partial release clause failed to specify the water right by no means detached it from the land. The release of the land carried with it all appurtenances, and it seems to have been well understood, by those in interest, that this water right was still appurtenant to the land, even after the default and sale by the trustee. This is evidenced by the recitals of the deed from the Irrigation Company to Gest, executed at his request, wherein it is stated:

"Whereas, the Northern Colorado Irrigation Company, at the request of the said William P. Gest, and relying on the statements and representations made by him as aforesaid, has agreed that the said water right may be severed and detached from the first above described tract of land, and attached to and connected with the second mentioned tract of land, as hereinabove described."

The deed then purports to convey from Gest to the Irrigation Company the water right attached to and used upon the land here involved, and the Irrigation Company reconveyed it to Gest to be attached to another parcel of the land owned by him.

The only circumstance even tending to show that the water right in question was not appurtenant to the land is the correspondence between the attorneys of the parties in reference to the release of portions of the land upon partial payments. The essential parts of the letters are quoted above. There is nothing in the letter of Gest's attorney to lead the recipient to believe that Gest intended to hold the water right as separate and distinct security for the balance of the money due. Indeed the only logical inference to be drawn therefrom is that he intended to hold all water from release until it was ascertained to what particular land rights belonged as appurtenant thereto, as shown by use.

It is plain from a careful consideration of the provisions of the deeds involved that the water rights were conveyed as appurtenant to the land; that the trust deed covered all water rights, and that the release deed in question in fact released not only the land

described, but also the water right in question, which by abundant proofs is shown beyond all doubt to have been appurtenant thereto. Upon these proofs, including the recitals in the deeds, it is free from doubt that the water right conveyed belonged as an appurtenance to the several tracts of land in ratable proportions, each tract being entitled to its proportionate share of the water allotted to the whole tract, according to the previous use of water for irrigation on the particular tract.

It is contended that the action was barred by the five year statute of limitations, section 4073, R. S. 1908. This point is not well taken, as the cause of action cannot be held to have accrued until after the sale by the Trustee, in 1918, and final refusal of the Irrigation Company to continue to deliver water, which refusal occurred in March, 1919.

Other points are raised by defendants in error, but they do not warrant discussion, since the case is determined upon the legal effect of the various deeds between the parties, and the correspondence. We conclude that the warranty and trust deeds conveyed the water, the use of which plaintiff now claims, as an appurtenant to the land, and that the release of the land in question, executed by the Public Trustee, ipso facto released the water right with the land to which it was appurtenant. *Huff v. Farwell*, 67 Iowa, 298, 25 N. W. 252; *Cowen v. Loomis*, 91 Ill. 132. In 27 Cyc. 1918, the rule is thus stated:

"Upon performance of the stipulated condition, or the happening of the specified event, the mortgagor is entitled to have a formal release or discharge of the mortgage; and if the mortgagee refuses to perform his part, equity, treating that as done which ought to have been done, will hold the mortgage as released."

The judgment of the trial court is reversed and the cause remanded with directions to enter a decree that plaintiff is the owner of the water right described in the complaint as appurtenant to the forty acres in question, free from any cloud either by reason of the deed of the trustee, or the deeds attempting to transfer such right, by Gest or the Irrigation Company, and that all parties be and they hereby are perpetually restrained and enjoined from in any way interfering with plaintiff in the free use and enjoyment of the same.

Judgment reversed and cause remanded, with directions.

TELLER, J., sitting for SCOTT, C. J., and BURKE, J., concur.

MILLER v. PEOPLE. (No. 10087.)

(Supreme Court of Colorado. July 5, 1921.
Rehearing Denied Oct. 3, 1921.)

1. Criminal law §386, 566—Testimony of stenographers as to remarks heard through dictagraph held of doubtful competency and insufficient to establish guilt.

Where defendant and one accused of complicity with him were placed in adjacent cells between which a dictagraph had been installed, but one or the other of them was several times taken from his cell while the instrument was in use, and it did not appear that stenographers listening through it were familiar with the prisoners' voices or that they knew that remarks reported were made by either of them, the competency of such evidence was doubtful, and it was insufficient to establish defendant's guilt.

2. Criminal law §414—Conversation with accused of little probative value where accused unable to respond intelligently to questions propounded.

Where it was shown that a shot had penetrated defendant's brain so that he was unable, at least at times, to respond intelligently to questions propounded to him, a conversation with him was of little probative value.

3. Criminal law §304(2), 730(14)—Statement of prosecutor as to German descent of defendant and witness held prejudicial error; prejudice against Germans a matter of common knowledge.

Statements of the prosecutor to the jury that defendant and a witness who testified in support of his claim of an alibi were of German descent, and that defendant was a friend of the witness' family, including his grown daughters, with whom he visited for months and played cards, was prejudicial error, though the court instructed counsel to go no farther on that line; the statement not being supported by the evidence, and it being common knowledge that many persons entertain a strong prejudice against Germans.

4. Criminal law §700—Duty to see that facts are fully and fairly placed before jury.

While a prosecuting attorney is justified in bringing out all the facts tending to establish accused's guilt, it is his duty, as the representative of the people, to see, not that accused is convicted, whether or no, but that the facts are fully and fairly placed before the jury.

5. Criminal law §1171(1)—Prejudicial conduct of district attorney ground for reversal where case is close.

Where the guilt of an accused is evident, improper action of the prosecuting officer may be overlooked; but, where the case is close, conduct on his part which might reasonably be expected to prejudice the jury is ground for reversal.

Department 1.

Error to District Court, City and County of Denver; Francis E. Bouck, Judge.

Ernest Miller, alias Ernest Forster, alias Frank Forster, was convicted of an attempt

to rob a mail car, and he brings error. Reversed.

L. J. Stark, of Denver, for plaintiff in error.

Victor E. Keyes, Atty. Gen., and Charles R. Conlee, Asst. Atty. Gen., for the People.

TELLER, J. The plaintiff in error, herein-after designated as the defendant, was convicted of an attempt to rob a mail car on the Union Pacific Railroad at Sandown, about six miles east of Denver. The attempted robbery occurred a little after 9 o'clock p. m. on November 16, 1920. The train was stopped at the station named, and when the engineer descended from his cab he was confronted by a man with a revolver who immediately ordered him to put up his hands. Another man, who kept some distance away from the engine, was implicated in the hold-up. The first man mentioned was wounded by a shot fired by one of the brakemen, and one John Lane, or Lame, was afterwards arrested, and identified by the brakeman as the man who held up the engineer.

Lame also was charged with said offense, but died before his trial.

[1] After their arrest the accused were placed in adjacent cells, between which a dictagraph had been installed. Stenographers were stationed at a convenient point to hear, through this instrument, what passed between the two prisoners. The case made against the defendant seems to rest very largely upon a conversation reported to have been heard through said instrument. It appears from the record that while the dictograph was in use, and the stenographers listening to hear and take down what passed between the prisoners, one or the other of the prisoners was several times taken from his cell. It nowhere appears in the testimony of these stenographers that they were familiar with the voices of the prisoners, or that they knew of their own knowledge, at the time the reported remarks were made, that they were made by either of the prisoners. The competency of this evidence, therefore, was, at best, very doubtful, and it is far from establishing the guilt of defendant.

[2] The testimony of an experienced physician, who examined Lame, was to the effect that the shot had penetrated his brain, so that he was unable, at least at times, to respond intelligently to questions propounded to him. Any conversation with him would therefore be of little probative value. There is no evidence directly connecting the defendant with the offense; and the matters upon which the state relies to support the conviction, when considered as a whole, do little more than raise a suspicion against him. Under such circumstances, it was vitally important that the case be presented

to the jurors fairly, and without any attempt to mislead them.

The defendant's attorney, appointed by the court to defend him, but who does not represent him here, made no argument to the jury, and left the jurors with no help in the analysis of the testimony, and without any suggestion as to what ought to be their reasonable conclusion from the facts in evidence. His short statement to the jury that the facts were before them was regarded by the court as sufficient to entitle counsel for the state to make a second argument to the jury, and he made such argument.

The evidence disclosed that the defendant was working, at the time of his arrest, and had been so working for a few days prior thereto, on the farm of one Schneider, some 16 miles north of Denver. Mr. Schneider testified that on the night of the attempted robbery the defendant came home at about 10 o'clock. Had the jury believed this evidence the defendant must have been acquitted. That being so, the persistent attempt of the state, without any apparent cause, to discredit Schneider, and to suggest reasons why he would testify falsely, did not comport with the proper discharge of the duties of the office of the district attorney.

[3] Counsel for the state in his argument to the jury made the following statement:

"Now what is Schneider's object in this case? The two men come from the same race—German or German descent. Miller was a friend of the family, came out there and visited for months. * * * Did Miller work there long? No, he came and flitted away. The evidence disclosed that Schneider had daughters, grown daughters; that they were in relationship together socially, visiting and playing cards."

Objection was made to this language, and the court instructed counsel to go no farther on that line. Even though a jury be warned to disregard remarks of that kind, when once made the remarks have done the injury. It is idle to suppose that an instruction to disregard them will wholly remove their effect. The statement was not supported by the evidence, was highly improper, and clearly prejudicial to the defendant. There was no evidence that either Schneider or Miller was a German, or of German descent; they were Swiss. The fact that a native of Switzerland speaks the German language is no evidence that he is of German origin. It is common knowledge that many persons now entertain a strong prejudice against people of the German race.

There is no evidence that Miller was a friend of the family, or that he ever visited there for months, or, at the most, for more than a day or two, and that but recently.

There was evidence that Schneider had daughters, one of whom (a girl 14 years of age) testified, but there is no evidence that Miller ever saw the elder daughter. The attempt plainly was to break down the testimony of Schneider by leading the jury to believe that Miller's relations to the family were such as might influence Schneider to color his testimony, or misstate the facts. The only evidence as to Miller's relations to the family in a social way was that a few nights before his arrest Schneider, his wife, Miller, and the other hired man, played cards in the Schneider kitchen. The testimony of the Schneiders is clear, and without anything to suggest that they were doing anything other than attempting to tell the facts as they recalled them; that being so, the course of the district attorney was without excuse, and a clear violation of his duty.

[4] There are other incidents in the trial from which it appears that counsel for the state regarded his position as that of a partisan attorney, justified in excluding evidence of matters favorable to the defendant, and in putting in everything which could, by any possibility, reflect upon him. While a prosecuting attorney is justified in bringing out all the facts which tend to establish the guilt of the accused, he has no right to misrepresent facts, or create false impressions in the minds of the jurors. This court has several times had occasion to call the attention of district attorneys to the fact that they represent the people, and should endeavor to see, not that an accused person is convicted, whether or no, but that the facts are fully and fairly placed before the jury. Cases on this question are collected in *Hillen v. People*, 59 Colo. 284, 149 Pac. 250. It seems that this warning must be constantly repeated, that such officers may not in their zeal for success go beyond their line of duty.

[5] The rule is that where the guilt of an accused is evident, improper action upon the part of the prosecuting officer may be overlooked; but where the case is close, as it is here, conduct upon the part of the district attorney which might reasonably be expected to prejudice the jury will be treated as ground for reversal.

It is highly probable that some juror, hearing this statement of the assistant district attorney as to Schneider, there being no answering argument in behalf of the defendant, was moved to conclude that the defendant was guilty of the crime charged.

For the reasons above stated, the judgment is reversed.

BAILEY, J., sitting for SCOTT, C. J., and ALLEN, J., concur.

**FARMERS' MUT. TELEPHONE CO. et al.
v. HEINEMAN. (No. 10149.)**

(Supreme Court of Colorado. Oct. 3, 1921.)

Time ⇨10(9)—Where the twentieth day from approval of appeal bond is Sunday, fees may be paid on following Monday.

Where the twentieth day from approval of appeal bond, on appeal from justice to county court, falls on a Sunday, the fees may be paid on the following Monday, under Rev. St. 1908, § 3848, requiring such fees to be paid 20 days from the approval of the appeal bond.

Department 1.

Error to Montrose County Court; S. S. Sherman, Judge.

Action between the Farmers' Mutual Telephone Company and others and G. D. Heineman. From judgment dismissing appeal by the former to county court from judgment for Heineman, rendered in justice court, the Telephone Company and others bring error. Reversed.

Moynihan, Hughes, Knous & Fauber, of Montrose, for plaintiffs in error.

Hugo Selig and L. C. Kinikin, both of Montrose, for defendant in error.

ALLEN, J. The plaintiffs in error sought to perfect an appeal to the county court from a judgment rendered against them in a justice court. They paid the docket fees on the twenty-first day after the approval of their appeal bond. The twentieth day was a Sunday. The county court dismissed the appeal on the theory that Sunday cannot be excluded, under section 3848, R. S. 1908, which provides that the party appealing from a judgment against him in a justice court—

"shall, within twenty days from the date of the approval of his appeal bond, pay to the clerk of the court to which he takes an appeal, all fees necessary to have the cause docketed and placed on the calendar of said court."

The plaintiff in error seeks to reverse the judgment of dismissal, contending that, if the twentieth day falls on a Sunday, the fees may be paid on the following Monday.

In 88 Cyc. 330, it is said that there are decisions excluding Sunday when it falls on the last day provided for taking steps necessary to perfect an appeal. This is the rule in most jurisdictions. 3 C. J. 1048. It was followed by this court in *Elliott Co. v. Court-right Pub. Co.*, 67 Colo. 449, 182 Pac. 882, where it was held that, if the tenth day on which an appeal bond may be entered into falls on a Sunday, the bond may be furnished on the following day.

The county court erred in dismissing the appeal. The judgment is reversed.

TELLER, J., sitting for **SCOTT, C. J.**, and **BAILEY, J.**, concur.

**BURBANK et al. v. BOARD OF COM'RS OF
EAGLE COUNTY. (No. 10043.)**

(Supreme Court of Colorado. July 5, 1921.
Rehearing Denied Oct. 3, 1921.)

1. Evidence ⇨83(1) — Registration officers presumed to have discharged duties.

It will be presumed, until the contrary is shown, that precinct registration officers have properly discharged their duties, and that the names upon the registry are lawfully there.

2. Counties ⇨35(1)—Omission of registration judge's name from registry opposite that of voter held not to affect validity of county seat removal election.

Omission of registration judge's signature opposite that of voter on precinct registry, certified by the board of registry as a correct and true list of the voters in such precinct, held not to affect validity of county seat removal election under Rev. St. 1908, §§ 1165-1175, in the absence of a showing that names were not placed on the lists of the voters on affidavits of the voters or the affidavits of others competent to vote, since, if the voters registered in such manner, the signature of the judge opposite the voter's name was unnecessary.

En Banc.

Error to District Court, Eagle County; James L. Cooper, Judge.

Proceedings by Frank W. Burbank and another against the Board of County Commissioners of the County of Eagle, State of Colorado. Decree for defendant, and plaintiffs bring error. Affirmed.

E. C. Stimson and **Page M. Brereton**, both of Denver, and **William H. Luby**, of Red Cliff, for plaintiffs in error.

Ewing & Arnold and **Hume S. White**, all of Denver, for defendant in error.

BAILEY, J. The cause is here on writ of error to review a judgment of the district court of Eagle County, involving an election on the removal of the county seat from Red Cliff to the town of Eagle. Plaintiffs below, as qualified electors, brought the proceeding against the County Commissioners for that, as is claimed, certain votes cast at the election were illegally cast, and that such votes affected the result to the extent that but for them the town of Eagle would not have been chosen the county seat. Findings and decree were for the Commissioners, the town of Eagle was duly declared the county seat, and the county officers were directed to remove their offices thereto, agreeable to law.

The election was held on the same day the general election of November 2nd, 1920, was held. Special judges, books and ballot boxes were provided, and special lists were made up of electors qualified to vote upon the question, and in all respects the election appears

to have been conducted according to the requirements of the statute relating to the location and removal of county seats, sections 1165-1175, R. S. 1908. It is contended, however, that the special registration judges in the precincts of Ruedl, McCoy, Burns and Sheephorn, made a fatal error in preparing their lists of qualified voters, which error it is charged disqualified the voters of those several precincts from participating in the county seat election at all.

Upon the face of the returns the vote was as follows: Red Cliff, 414; Eagle, 1,095; Minturn, 105; Gypsum, 3. At the trial the court found that certain ballots were cast for unqualified persons, and the returns were amended to show: Red Cliff, 405; Eagle, 1,088; Minturn, 105; Gypsum, 3. The total vote, as corrected, was 1,601. The number necessary for choice of county seat is two thirds of the votes cast, in this case 1,067 $\frac{1}{3}$. The town of Eagle, having 1,088, was declared chosen, and the removal to that town was ordered by the court.

In the contested precincts 121 votes were cast, of which 119 favored the town of Eagle. It is manifest, if these votes be declared illegal, that the result of the election as announced must be reversed, and the county seat allowed to remain at Red Cliff. The claim of illegality is based upon the following state of facts: In each of the four precincts the situation is the same, and the question at issue may be discussed and determined as a single proposition. It appears that in none of these precincts was the name of any registration judge signed opposite that of any voter, and because of such failure it is said that no legal registration took place in these precincts, and that therefore no return of votes therefrom can be lawfully counted. There was, however, the usual certificate required by statute attached at the end of the lists, as follows:

"We, the undersigned, composing the Board of Registry for Precinct No. —, in the County of Eagle, in the State of Colorado, do certify that the foregoing is a correct and true list of the voters in said precinct."

In determining the question involved it is to be noted that there are several ways in which an elector's name may be placed upon the registry list. It may be placed there at any session of the board of registry except the final session; it may be placed there upon the voter's own affidavit, and a properly identified legal voter may make affidavit that the voter is qualified; under these two methods there is no provision that the affidavits shall be preserved. Or if an applicant be known to one or more of the board of registry the judge having such knowledge shall place his name opposite that of the applicant, as evidence of his right to vote. Or at the last session of the board preceding an election the

applicant himself and two qualified electors may make affidavits as to his qualification, and these are the only affidavits which it is necessary to preserve, or of which any record need be made upon the registration books.

[1] There is no provision in the statute that the evidence of the manner in which the name of a voter is placed upon the list shall be noted or preserved except as above indicated. The election judges are concerned only with the fact that such name is there, and the books properly certified as containing a correct list. The presumption is that officers have properly discharged their duties, and that the names upon the registry are lawfully there. This presumption obtains until the contrary is shown. The names may have been placed upon the lists in any of the four methods outlined above. No notation appearing after the names they may have been placed there upon their own affidavits, or by affidavits of others competent to vote, and if the names in question have been registered by either of these methods all statutory requirements have been literally fulfilled. Under such circumstances the persons on the registry are plainly entitled to vote, unless there be a showing that affirmatively disqualifies them.

It is to be noted that there is no claim even that any unqualified person voted in the precincts contested, or that through failure of one or more of the judges to sign the registry any qualified person was deprived of his vote. Neither is there a claim or any evidence that any name was placed upon the lists in any one of the ways in which the signature of some other person is required to appear thereon. In order to determine that such persons were irregularly registered it is necessary to assume that each was registered by a judge of election and that for some unknown reason in each case the judge failed to subscribe his name. This is so because the books of registry are fair on their face, and carry a certificate signed by all the members of the board of registration; and also, as above noted, because there is no claim or proof that there was the slightest irregularity connected with the placing of the names or any thereof upon the registry list.

In *People v. Earl*, 42 Colo. 238, 94 Pac. 294, in discussing the effect to be given statutes relating to the registry of voters, this court quotes with approval from *Stinson v. Sweetney*, 17 Nev. 309, 30 Pac. 997, as follows:

"In other respects where a noncompliance with the provisions of the registry or election laws, upon the part of the registry agent or officers of the election, are not essential 'to preserve the purity of elections,' the courts recognizing the fact that the will of the people, when fairly expressed, should be the law of the land, have universally declared that the

qualified electors should not, on that account, be deprived of their votes.'

"In other words, we believe that the provisions of the registry law should be strictly construed only when necessary to accomplish the purpose for which they were enacted, to wit, 'To secure the purity of elections.'"

Quoting further from Contested Election of E. R. Wheelock, 82 Pa. 297, this court continued:

"An election is the embodiment of the popular will, the expression of the sovereign power of the people. When the application of technical rules and a strict construction of the acts of the officers, in preparing the election papers and conducting an election, would tend to defeat the will of the people and change the result of an election for an important office, they should not be applied, and all reasonable inferences should be made in favor of the legality of their proceedings."

The court then quotes from Cooley on Constitutional Limitations, as follows:

"The statutes of the different states point out specifically the mode in which elections shall be conducted; but, although there are great diversities of detail, the same general principles govern them all. As the execution of these statutes must very often fall to the hands of men unacquainted with the law, and unschooled in business, it is inevitable that mistakes shall sometimes occur, and that very often the law will fall of strict compliance. Where an election is thus rendered irregular, whether the irregularity shall avoid it or not must depend generally upon the effect of the failure to comply strictly with the law may have had in obstructing the complete expression of the popular will, or the production of satisfactory evidence thereof. Election statutes are to be tested like other statutes, but with a leaning to liberality in view of the great public purposes which they accomplish; and except where they specifically provide that a thing shall be done in the manner indicated, and not otherwise, their provisions designed merely for the information and guidance of the officers must be regarded as directory only, and the election will not be defeated by a failure to comply with them; providing the irregularity has not hindered any who were entitled from exercising the right of suffrage, or rendered doubtful the evidence from which the result was to be declared."

[2] The record fails to show the violation of any provision of the law governing registration, in fact there is nothing to indicate that the registrations under consideration were not effected in minute compliance therewith. The result of the election is manifestly an expression of the popular will of those qualified to vote on the question of the change of county seat, and should not be lightly set aside. For this court to assume that each judge in the several precincts failed to sign opposite the name of such voter, thus making, as is claimed, the vote illegal, would be in conflict with both the letter and spirit of

the law. To so hold would have the effect to disfranchise more than one hundred confessedly qualified electors, without fault on their part, and without affording them an opportunity to protect and enforce their constitutional right to vote. The judgment of the district court being clearly right is affirmed.

Judgment affirmed.

MINKS v. CLARK. (No. 10126.)

(Supreme Court of Colorado. Oct. 8, 1921.)

1. Brokers \Leftrightarrow 53—Where purchaser procured purchased a portion of the property but induced another to purchase remainder, broker entitled to full commission as procuring cause.

A broker who procured a purchaser for a portion of property, who in turn procured a purchaser for the remaining portion, held entitled to commission for sale of the entire property; the broker being the procuring cause of the two transactions, and therefore of the sale of the entire property.

2. Brokers \Leftrightarrow 57(1)—Entitled to commission where owner of own accord sells only portion of property listed for sale as a whole.

The owner, having sold of his own accord to a purchaser procured only a portion of property listed with the broker for sale as a whole, was liable to broker for his commission.

Error to District Court, Larimer County; George H. Bradfield, Judge.

Action by Carlton E. Clark against W. O. Minks. Judgment for plaintiff, and defendant brings error, and applies for a superseas. Application for superseas denied, and judgment affirmed.

Claude C. Coffin, of Ft. Collins, for plaintiff in error.

Ab H. Romans, of Loveland, and Paul W. Lee and George H. Shaw, both of Ft. Collins, for defendant in error.

ALLEN, J. This is an action to recover a real estate broker's commission. The complaint, in substance, alleges that the plaintiff, Carlton E. Clark, was employed by the defendant, W. O. Minks, to find a purchaser for the latter's property, and that he did thereafter find such purchaser in the person of one H. A. Myers. It is alleged that the whole of the property was sold for \$35,000, and that the sum of \$900 is due plaintiff as commissions. The cause was tried to a jury, resulting in a verdict for plaintiff in the sum of \$700. Judgment was entered accordingly. The defendant has sued out this writ of error, and the cause is before us upon his application for a superseas.

[1] The first contention of the plaintiff in error, defendant below, is to the effect that

there is insufficient evidence to support the verdict. The evidence shows that the defendant listed for sale with the plaintiff certain real estate and personal property, including three separate tracts of land. Myers became a purchaser of the greater portion of the property, and procured one Mehaffey as a purchaser for the remaining property. Myers was a purchaser procured by the plaintiff. The whole of the defendant's property was sold for \$35,000; the part taken by Myers was sold for \$27,000, Mehaffey purchasing the remainder for \$8,000. Assuming without conceding or deciding, that plaintiff was employed only to find a purchaser for all of the property, this does not preclude plaintiff's right to compensation. He procured Myers as a purchaser for the greater part of the property, and Myers in turn procured Mehaffey as a purchaser for the remaining portion of the property. The plaintiff was, therefore, the procuring cause of the two transactions, or of the sale of the entire property. This is equivalent to the plaintiff's procuring a purchaser of the whole of the property. It is immaterial that the plaintiff never saw, nor had any conversations with, Mehaffey. Under the evidence, the jury would have been justified in awarding plaintiff a commission as for the sale of the entire property. *Satisfaction Co. v. York*, 54 Colo. 566, 131 Pac. 444. In 9 C. J. 612, citing the above case, it is said:

"If, however, the transaction which the broker was authorized to negotiate is consummated as the direct and proximate result of his efforts, he is entitled to a commission, and this is true even though he may have had no personal intercourse with the person with whom the principal enters into the contract."

The evidence shows that the plaintiff was employed to sell all of the property together. Whether he was also authorized to sell only the part that was purchased by Myers is not material, under the view we take of instruction No. 7, hereinafter mentioned. There is sufficient evidence to support the verdict, and also a verdict for \$900, which latter sum is conceded to be the proper amount of commissions on the sale of the entire property for \$35,000. The jury, however, found for the plaintiff in the sum of \$700, evidently proceeding under instruction No. 7, of which instruction the plaintiff in error complains.

By instruction No. 7 the court instructed the jury that they may find for the plaintiff in the sum of \$900 if he "was the procuring cause of the sale of all the property," and in the sum of \$700 if he "was the procuring cause in the sale of only" that part of the entire property which was purchased by Myers.

[2] It is not disputed that the instruction is correct if the complaint alleged and the evidence showed that the plaintiff was authorized not only to sell the entire proper-

ty but also that part thereof which was sold to Myers. The plaintiff in error, however, insists that the plaintiff was authorized to sell only the whole of the defendant's real estate and personal property. Assuming that the fact is as claimed by plaintiff in error, the instruction, under the evidence, is not erroneous. It is clear, from the record, that the plaintiff brought the defendant and Myers together, and as a direct and proximate result of the plaintiff's efforts, the defendant sold to Myers two of the tracts of land involved in defendant's original listing with plaintiff, and secured as a purchase price the sum of \$27,000, which was all that was ever named by defendant to plaintiff as the purchase price so far as those two tracts of land were concerned. The reduction of the amount of the property was made of the defendant's own accord. The plaintiff should not be deprived of his compensation on that account. The principle controlling the case is the same as that which would obtain if the plaintiff or defendant had sold Myers all of the property but at a different price from that at which the plaintiff was authorized to offer the property. It was said in *Plant v. Thompson*, 42 Kan. 664, 22 Pac. 726, 16 Am. St. Rep. 512:

"The defendants will not be allowed to take advantage of their introduction to the purchaser by plaintiffs, and reap the benefits of the sale made to him in consequence, and then escape all liability of paying them their commission because they sold the land for a sum less than the price given their agents, where the reduction was made of their own accord."

This rule has been applied by this court. See *Millage v. Irwin*, 68 Colo. 188, 187 Pac. 525; *Morgan v. Howard Realty Co.*, 68 Colo. 414, 191 Pac. 114; *Geiger v. Kiser*, 47 Colo. 297, 107 Pac. 267; *Carson v. Baker*, 2 Colo. App. 248, 29 Pac. 1134. In 9 C. J. 600, it is said:

"If a broker has brought the parties together and as a result they conclude a contract, he is not deprived of his right to a commission by the fact that the contract so concluded differs in terms from the one which he was authorized to negotiate."

Upon principle, it is immaterial to the result whether the principal finally sells the property at a lesser price or sells a lesser amount of the property, other circumstances being such as to entitle the agent to his commission. As said in *Carson v. Baker*, supra:

"Since the broker earned his wages, the owner ought not to complain if he is called upon to pay."

There is no error in the record. The application for a supersedeas is denied, and the judgement is affirmed.

TELLER, J., sitting for SCOTT, C. J., and BAILEY, J., concur.

LEE et al. v. CERISE. (No. 10140.)

(Supreme Court of Colorado. Oct. 3, 1921.)

1. Work and labor \S 30(2) — Whether labor was performed and material used in repair of plaintiff's automobile held for jury.

In action on an account for labor and material used in the repair of plaintiff's automobile, evidence as to the work being done and as to plaintiff's knowledge thereof held sufficient for submission of case to jury.

2. Account stated \S 6(2)—Evidence \S 220 (7)—Retention of bills without objection admissions against interest.

Debtor's retention of two statements of the full account without objection, though not sufficient to show an account stated, may be considered as admissions against interest.

Error to Montrose County Court; S. S. Sherman, Judge.

Suit by E. A. Lee and W. A. Miner, partners as Lee & Miner, against J. Cerise. Judgment of nonsuit and plaintiffs bring error. Reversed.

Hugo Selig and L. C. Kinikin, both of Montrose, for plaintiffs in error.

Moynihan, Hughes, Knaus & Fauber, of Montrose, for defendant in error.

TELLER, J. Plaintiffs in error brought suit against the defendant in error to recover on an account for labor and material used in the repair of an automobile belonging to him.

At the close of the evidence the court sustained a motion for a nonsuit, and judgment was entered accordingly. The cause is now here for review; and the principal error alleged is in the sustaining of the motion for a nonsuit. Both parties request that the court determine the case upon the application for supersedeas.

[1, 2] While the evidence on behalf of the plaintiffs was, as the trial court stated, in many respects unsatisfactory, yet we think that there was enough competent testimony by the plaintiff Lee, as to his personal knowledge of the work done and material furnished, as well as by the bookkeeper as to admissions of liability made to him by defendant, to entitle the plaintiffs to have the same passed upon by the jury. It is true that the evidence does not show an account stated; but it does appear that at least two statements of the full account were rendered to the defendant and retained by him without objections. The retention of these bills may be considered as admissions against interest. *Chinn Land & Live Stock Co. v. Stewart*, 196 Pac. 189.

The judgment is accordingly reversed.

BAILEY and ALLEN, JJ., concur.

J. R. WATKINS MEDICAL CO. v. JOHNSON et al. (No. 9882.)

(Supreme Court of Colorado. Oct. 3, 1921.)

1. Guaranty \S 5—Guarantors held not liable on contract not signed by principal.

Plaintiff could not recover on a contract purporting to be an acknowledgment of indebtedness by named person against defendants, who signed the contract as guarantors of such indebtedness, where the named person did not himself sign the contract or acknowledge the indebtedness, and was not a party to the action.

2. Principal and surety \S 20—Rule as to presumptions arising on sureties' signing instrument stated.

The rule that sureties signing an instrument are presumed to have known and guaranteed the genuineness of former signatures applies only where a bond has been delivered by, or in behalf of, the principal, though unsigned by him, and the sureties consent to its delivery in that condition.

3. Principal and surety \S 20—Obligee has burden of showing that surety consented to delivery of bond without principal's signature.

Where bond purports to be signed by principal, but was delivered without his signature, the obligee has the burden of showing that the surety consented to the delivery of the bond without the signature.

4. Estoppel \S 114 — Of guarantors to deny principal's indebtedness must be pleaded.

In action on contract, which was signed by defendants, as guarantors, of the indebtedness of a named person, and which purported to be an acknowledgment by such named person of such indebtedness, but which was not signed by such person, the plaintiff could not recover, on the ground that defendants by signing the contract estopped themselves from denying named person's indebtedness without pleading such estoppel.

Error to District Court, Larimer County; George H. Bradfield, Judge.

Action by the J. R. Watkins Medical Company, a corporation, against J. B. Johnson and another. Judgment of dismissal, and plaintiff brings error. Affirmed.

Lawrence R. Temple, of Ft. Collins, and Tawney, Smith & Tawney, of Winona, Minn., for plaintiff in error.

H. E. Churchill, of Greeley, and R. W. Fleming, of Ft. Collins, for defendants in error.

TELLER, J. This cause is before us on error to a judgment in favor of the defendants in error in an action in which the plaintiff in error sought to recover on a contract to which the defendants in error were parties.

The complaint alleges that the defendants

hereinbefore named, and one R. A. Brand, had entered into a written contract with the plaintiff wherein the said Brand promised to pay to plaintiff a named indebtedness, the time of payment of which was by said contract extended; that in consideration of said extension of the time of payment the defendants agreed and guaranteed to pay the said indebtedness of Brand. The complaint further alleged the failure to pay, and prayed judgment.

The answer contained a general denial of indebtedness, and of the making of said agreement; also a specific defense that the said Brand did not execute and sign said contract; that he did not admit the said indebtedness, and did not receive an extension of the time for payment thereof. Further, that the defendants when they signed the contract, a copy of which was attached to the agreement, did not know that it was not in fact the contract of the said R. A. Brand. Other defenses need not be considered.

Upon trial to the court, the principal issue to be determined was as to the execution of the contract. On a conflict of evidence the court found for the defendants, and the case was dismissed.

[1] Plaintiff in error contends that, conceding that the contract was not executed by R. A. Brand, the sureties were nevertheless bound under the rule that, where there is an existing debt, a contract for its payment, signed by sureties, is valid, though the principal debtor fails to sign. No doubt the rule asserted is well founded, as when, for example, there has been a bond given by the supposed principal, and his debt is not disputed; but that is not this case. Here there was no bond given by the supposed principal at all. So far as appears, he had no knowledge of the transaction. As to him there was no contract with the plaintiff, and though there was evidence of an indebtedness, he, not being a party to the action, and having no opportunity to contest the claim, cannot be said in fact to be indebted.

[2] Nor is the plaintiff in error's cause better founded upon the proposition that sureties signing an instrument are presumed to have known and guaranteed the genuineness of former signatures. That rule, according to the weight of authority, applies only where a bond has been delivered by or in behalf of the principal, though unsigned by him, and the sureties consent to its delivery in that condition. *Gay v. Murphy*, 134 Mo. 98, 34 S. W. 1091, 56 Am. St. Rep. 496.

[3] The burden of proof is upon the obligee to show that the surety consented to the delivery of the bond without the signature of the principal, though it purported to be signed by him. *Goodyear Dental Vulcanite Co. v. Bacon*, 151 Mass. 460, 24 N. E. 404, 8 L. R. A. 486, *State v. Austin*, 35 Minn. 51, 26

N. W. 906 and *Board of Education v. Sweehey*, 1 S. D. 642, 48 N. W. 302, 36 Am. St. Rep. 767, are to the same effect.

In 21 R. C. L. at page 964, it is said:

"The general rule is that where the instrument is drawn to bind one person as principal and another as surety, and in the instrument the surety undertakes that his principal shall perform the conditions of the obligation, the surety is not bound when the instrument is not signed by the principal and the surety does not consent to the delivery of the obligation in its unsigned condition. In such cases, moreover, the burden of proving that a surety consented to the delivery of the bond, purporting to be signed by the principal without the latter's signature, is on the obligee."

[4] It should be observed that we are now considering only the rule which applies to bonds in civil cases, and to nonofficial bonds. We are of opinion also that the judgment was right, because, even if the contention of plaintiff in error were correct as to the law, a case has not been made according to the pleadings. The plaintiff sued upon a contract alleged to have been made by R. A. Brand. The contract in evidence was found not to be Brand's contract. If the plaintiff would recover upon grounds of estoppel, the pleading should notify the defendants of that purpose. Upon the whole case we are therefore well satisfied that the judgment of the trial court was right, and it is affirmed.

ALLEN and BURKE, JJ., concur.

WAHL v. LARSEN et al. (No. 9834.)

(Supreme Court of Colorado. June 6, 1921.
Rehearing Denied Oct. 3, 1921.)

1. Tenancy in common \S 29(2)—No contribution for unauthorized improvement, not necessary or enhancing value.

Tenants in common, operating a mine without consent of a cotenant, being sued by him for his share of ore extracted and sold by them, cannot have contribution from him for improvements made by them, not shown to be necessary and enhancing the value of the property, as development work, with a view of making a sale, and the rebuilding of a wagon road.

2. Evidence \S 471(34)—Conclusion as to account for work done not competent.

Where accounts for work on two mines, done by the owners of one and part owners of the other, are kept together, without attempt at separation, statement of such accounts, and statement of witness that he came to the conclusion that there was as much work done on one mine as on the other, constitute no competent evidence as to what part, if any, of the credits claimed against the other owner of the other mine was for work done on it.

Error to District Court, City and County of Denver; Francie E. Bouck, Judge.

Action by Charles M. Wahl against John M. Larsen and others, doing business as Larsen, McCarthy & Watts. Plaintiff had judgment for less than claimed, and brings error. Reversed, and remanded for new trial.

Hartenstein & McGinnis, of Buena Vista, for plaintiff in error.

George C. Manly, of Denver, for defendants in error.

BAILEY, J. Plaintiff brought this action to recover his share of the value of ore taken and sold from the Star mine, in Gunnison county, of which he owns an undivided one-fourth. It is admitted that he is the owner of such interest; that the ore was taken therefrom and sold by defendants, as claimed. The defendants are co-owners. The only question in issue is the amount to be credited to them in connection with the expense of mining and disposing of the ore. The trial court made findings and entered judgment for plaintiff in the sum of \$335.46, which he brings here for review. The parties are designated as below.

The Star mine is connected with an adjacent property, the Independent mine, of which defendants are the owners, but in which plaintiff has no interest. During the time when the ore involved was mined and sold, the two properties were worked by defendants, through the Independent shaft, being connected by underground workings. The pay roll, for both mines was kept as one, and it appears that the men employed worked indiscriminately in one or the other of the two properties. The board bill for the employees was also kept in the same way, as was also the account for supplies.

Another item was charged as one-half of the expense of constructing or rebuilding a wagon road for transporting ore to the railroad. This road admittedly was used for both properties. The total amount for the three items, viz. wages, supplies, and building the road, was found to be \$8,959.74. The total value of the ore taken from the Star mine was fixed at \$10,000.61; the profit thereon was found to have been \$1,341.80, of which plaintiff was awarded one-fourth.

[1] The rule under which the propriety of the credits claimed is to be tested is laid down in *Stickley v. Mulrooney*, 36 Colo. 242, at page 244, 87 Pac. 547, at page 548 (118 Am. St. Rep. 107). It is stated:

"The judgment must be reversed. It appears to be well settled that one co-owner, without the consent of the other co-owners, cannot demand from the co-owners who have not joined with him or in some way given their consent to the development or prospecting in mining property remuneration for expenses incurred in so prospecting or developing the common property. * * * A cotenant in possession, whether his interest be large or small, cannot bind

those who do not voluntarily participate in the venture. He cannot force contribution for improvements made, nor for the cost and expenses of developing or working"—citing cases.

It appears that in the case at bar plaintiff did not give his consent to the operating of the Star mine by his cotenants. In *Wolfe v. Childs*, 42 Colo. 121, 94 Pac. 292, 126 Am. St. Rep. 152, the above case is quoted from with approval, and the court said, at page 129 of 42 Colo., at page 294 of 94 Pac. (126 Am. St. Rep. 152):

"While the operating tenant may, in case he is called upon to account for profits, set off as against a nonoperating tenant the cost of the necessary improvements, he must show that such improvements were necessary and added to and enhanced the value of the common property. A portion of the expenditure for which credit was allowed Zobel was, we have seen, not of this character. What portion it is impossible to determine from the findings of the court; it appearing therefrom that part of the expenditure was for work which resulted in the development of the ore body which was opened at the time interveners acquired title, and in extracting such ore, which would be a legitimate offset, and a part was for prospecting and developing other parts of the mine, for which he was entitled to no contribution from the interveners.

"It is * * * well settled that tenants in common are not entitled to compensation from each other for services rendered in the care and management of the common property in the absence of a special agreement or mutual understanding to that effect"—citing cases.

[2] The record is barren of testimony to indicate that the work done was for necessary improvements, or that such work enhanced the value of the property. The item of the pay roll, which was arrived at by dividing the total amount by two and charging one-half to each property, is unsupported by any proper testimony, either as to the correctness of the aggregate amount, or as to what portion thereof was expended upon the Star property. The defendant who testified on these points said he kept the accounts of both properties together in an account book, which was not introduced at the trial. The item of expenses also included board for the workmen who were employed upon both mines. No attempt was made to segregate the various items as to the two properties. In fact, there is absolutely no competent testimony as to what part, if any, of the credits claimed was for work upon or supplies for the Star mine, except that this witness says in substance that he came to the conclusion that there was as much work done upon one mine as on the other. This plainly is a mere guess or approximation.

In any event, the pay roll and supply bills are not items which, under the evidence adduced, may be charged against the Star mine, because the testimony of defendants establishes that the work done upon the Star

property was for the purpose of development, with a view of effecting a sale. Neither is there any testimony that the money was expended for necessary improvements, or that the work enhanced the value of the property. Under the authorities cited, these items are not proper charges upon which to base a demand for contribution.

The credit claimed for money expended in rebuilding the wagon road is manifestly an improper charge. The evidence does not show that the road had any effect which would be directly beneficial to the Star property, or necessarily enhanced its value.

Our decisions show that the judgment of the trial court is wrong, and should be reversed. The errors of the court consist mainly in allowing improper charges against plaintiff as to expenses on the mine, in that it deducted as credits one-fourth of the general pay roll, a like portion of the expense for supplies, and also of the cost of the wagon road. The judgment is reversed, and the cause remanded for a new trial in harmony with the views herein expressed.

Judgment reversed.

TELLER, J., sitting for SCOTT, C. J., and BURKE, J., concur.

-NORWICH UNION FIRE INS. SOC. v. RAYOR. (No. 9784.)

(Supreme Court of Colorado. July 3, 1921.
Rehearing Denied Oct. 3, 1921.)

1. Insurance — §612(3)—Fire policy held not to require appraisal as condition precedent to suit; "required."

A fire insurance policy providing that loss should not become payable until 60 days after the notice, ascertainment, estimate, and satisfactory proof of the loss should have been received by insurer, including an award by appraisers "when appraisal has been required," and that no suit on the policy should be sustainable "until after full compliance by the insured with all the foregoing requirements," did not make appraisal a condition precedent to insured's right of action in any case where appraisal was not demanded by insurer; the ordinary meaning of "required" being "demanded" or "requested," rather than "made necessary."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Require.]

2. Insurance — §146(3)—Ambiguities resolved in favor of assured.

Ambiguities in fire insurance policy should be resolved in favor of the assured.

Denison, J., dissenting.

En Banc.

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Action by David E. Rayer against the Norwich Union Fire Insurance Society. Judgment for plaintiff, and defendant brings error. Affirmed.

Sylvester G. Williams, of Denver, for plaintiff in error.

Charles Clyde Barker and Leslie E. Hubbard, both of Denver, for defendant in error.

TELLER, J. The defendant in error brought suit against the plaintiff in error to recover upon an insurance policy on a stock of goods which was destroyed or injured by fire. He had judgment, and the cause is now here on error. The parties will be designated as in the trial court.

The policy in question was of the New York standard form. The following paragraphs of it are involved in this review:

"Par. 1. In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this society each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them, and shall bear equally the expenses of the appraisal and umpire.

"Par. 2. This society shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this society, including an award by appraisers when appraisal has been required.

"Par. 3. No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements nor unless commenced within twelve months next after the fire."

[1] Defendant contends that an appraisal was a condition precedent to a right of action. This contention was based upon an interpretation of paragraph 2 to the effect that an appraisal was necessary to the right of action, and, if not demanded by the insured, any action upon the policy was premature.

Paragraph 1 appears in substance in the policies discussed in many reported cases, and in none of them has it been held to be a condition precedent to a right of action. To be so the language must be clear and specific to that effect.

"In order to make such award a condition precedent to the right of maintaining suit, it must be so expressed in the policy, or necessarily implied from its terms." *Mutual Fire Ins. Co. v. Alvord*, 61 Fed. 752, 9 C. C. A. 625.

Even where such requirement is expressly made a condition precedent, it is held that it is not to be so considered unless compliance with it has been demanded. *Kahnweiler v. Phoenix Ins. Co.*, 67 Fed. 483, 14 C. C. A. 485; *Birmingham Fire Ins. Co. v. Pulver*, 126 Ill. 329, 18 N. E. 804, 9 Am. St. Rep. 598.

According to the great weight of authority, a provision that no action shall be maintained unless there has been an award, where one is required in case of dispute as to the loss, is inoperative unless an award has been demanded. *Phoenix Ins. Co. v. Badger*, 53 Wis. 283, 10 N. W. 504; *Randall v. Am. Fire Ins. Co.*, 10 Mont. 240, 25 Pac. 953, 24 Am. St. Rep. 50; *German Am. Ins. Co. v. Steiger*, 109 Ill. 254; *Liverpool Ins. Co. v. Creighton*, 51 Ga. 95; *Reed v. Ins. Co.*, 138 Mass. 572; *Wright v. Ins. Co.*, 110 Pa. 29, 20 Atl. 716; *Walker v. Ins. Co.*, 51 Kan. 725, 33 Pac. 597; *Kahn v. Traders' Ins. Co.*, 4 Wyo. 419, 34 Pac. 1059, 62 Am. St. Rep. 47. When the two paragraphs are considered together, it is clear that an appraisal is not a condition precedent. Paragraph 2 provides that the loss shall not be payable until "sixty days after notice, ascertainment, etc., including an award by appraisers, when appraisal has been required." Neither party demanded an appraisal. The trial court held that this provision meant "when the insurer has required an appraisal."

Plaintiff in error contends that a demand by the insured is a condition to his right of action, and cites *Graham v. Ins. Co.*, 75 Ohio St. 374, 79 N. E. 930, 15 L. R. A. (N. S.) 1055, 9 Ann. Cas. 79, where it was held, in a case involving this question, that the word "required" meant "made necessary." We cannot accept that court's construction of the contract. If "required" means "made necessary," the policy as written would mean "when an appraisal has been made necessary." Made necessary by whom, or what? If by the contract itself, then we should have, "is necessary," not, "has been made necessary." But if it is necessary by the contract, then the condition is without force.

The opinion in question recognizes that difficulty, and quotes the phrase as "when appraisal is required," a change which begs the question. The Ohio court accordingly held that an appraisal was made necessary by the terms of the policy, and that until there had been an award, or a demand made by the insured for one, there was no right of action.

Plaintiff in error relies also upon *Mosness v. Insurance Co.*, 50 Minn. 341, 52 N. W. 932; *Phoenix Ins. Co. v. Lorton*, 109 Ill. App. 63; *Murphy v. Ins. Co.*, 61 Mo. App. 327; *Vernon Ins. Co. v. Maitlen*, 158 Ind. 393,

63 N. E. 755; and several other cases in which the phrase here under consideration was not involved. In the Minnesota case and the Indiana case, the decisions turned upon a question of pleading, and they only indirectly support the contention of plaintiff in error. The Missouri Appeal case cites the Minnesota case, *Kahnweiler v. Insurance Co.*, supra, in which it is held that the obligation to make the demand rests as much upon one party as upon the other, hence does not support the holding, and a Michigan case in which this phrase was not involved. As we shall see, Michigan is committed to the contrary view. It cites, also, *Phoenix Insurance Co. v. Stocks*, 149 Ill. 319, 36 N. E. 408, in which the provision for arbitration was absolute. The Ohio case cited overruled by four of the six judges a case (*Grand Rapids Ins. Co. v. Finn*, 60 Ohio St. 513, 54 N. E. 545, 50 L. R. A. 555, 71 Am. St. Rep. 736) holding to the contrary. The case from the Illinois Appellate Court involved a policy making an arbitration an absolute condition. It follows *Phoenix Ins. Co. v. Stocks*, supra, though in that case it was held that even this absolute requirement was waived by failure of the company to demand arbitration.

Before taking up the cases on this paragraph of the policy it may be well to consider it independently, and try to ascertain what it means. It reads:

"The loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

This provision is wholly in the interest, and for the benefit of the insurance company. *Phoenix Ins. Co. v. Stocks*, supra. It is a wall of defense, consisting of the things named as prerequisites to liability on the part of the company. As a final condition there are added the words, "including an award by appraisers, when appraisal has been required." This is clearly intended to prevent the loss becoming payable in case the insurer has demanded an appraisal without its demand having been complied with. The assured can have no interest in delaying suit until an award has been made. In the case last cited, the court points out that "no valuation of the property can increase the amount to be recovered by the assured, while the appraisal may diminish the amount to be paid by the company." It is, then, for the insurer to demand an appraisal, if it wants one. If such is not the case, why are the words, "if an appraisal has been required," used? If an award is a prerequisite to suit, these words are useless.

The words cannot refer to something required by the contract; they can only apply to a case in which an appraisal has, as an act of some one, been required, i. e., requested. The ordinary meaning of required is de-

manded, or requested. Since there is no reason for the assured requiring an appraisal, or for a failure on the part of the assured to get an appraisal, if requested, being made a condition of suit, it is clear that it is for the insurer to demand an appraisal, if desired. And so the great weight of authority holds. The cases supporting the trial court's decision, and in which this phrase is construed, are: *Chainless Cycle Mfg. Co. v. Ins. Co.*, 169 N. Y. 804, 62 N. E. 392; *Leasure Lbr. Co. v. Insurance Co.*, 101 Iowa, 514, 70 N. W. 761; *Zimeriski v. Insurance Co.*, 91 Mich. 600, 52 N. W. 55; *N. H. Bd. Ass'n v. Insurance Co.*, 106 Mich. 236, 64 N. W. 21; *Winchester v. Insurance Co.*, 160 Cal. 1, 116 Pac. 63, 35 L. R. A. (N. S.) 404; *Lion Fire Ins. Co. v. Heath*, 29 Tex. Civ. App. 203, 68 S. W. 305; *Fireman's Fund Ins. Co. v. Caye*, 14 Ky. Law Rep. 810; *Davis v. Insurance Co.*, 16 Wash. 232, 47 Pac. 436; *Bailhe Co. v. Insurance Co.*, 49 La. Ann. 658, 21 South. 736; *Springfield F. & M. Ins. Co. v. Hays*, 57 Okl. 266, 156 Pac. 673, L. R. A. 1917A, 1078.

In the New York case above cited the court said:

"It is not the duty of a person whose property is insured by a standard policy, such as the one before us, to initiate an appraisal, for the contract makes an appraisal a condition precedent to recovery, only when one 'has been required' by the insurer. Either party, however, has the right to require an appraisal when there is a disagreement as to the amount of loss."

In *Cooley's Briefs on Insurance*, p. 3616, it is said:

"It is also a general rule that a policy in the New York standard form providing that the loss shall not become payable until a certain time after proofs, 'including an award by appraisers when appraisal has been required,' and that 'no suit shall be sustainable until after full compliance by the insured with all the foregoing requirements,' does not require an appraisal as a condition precedent to the right of maintaining an action, unless there has been a demand therefor."

[2] The most that can be claimed in support of the contention of plaintiff in error is that the language of the policy is ambiguous, and, that being so, the ambiguity should be resolved in favor of the assured. *German Ins. Co. v. Hayden*, 21 Colo. 127, 40 Pac. 453, 52 Am. St. Rep. 206; *Nat. M. & F. Ins. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. (N. S.) 340; *Conn. Co. v. Colo. Co.*, 50 Colo. 424, 116 Pac. 154, Ann. Cas. 1912C, 597; *National Bank v. Ins. Co.*, 95 U. S. 673, 24 L. Ed. 563.

It being clear, both upon principle and authority, that the judgment is right, it should be affirmed, and it is so ordered.

DENISON, J., dissents.

SCOTT, C. J., not participating.

McKEE LIVE STOCK CO. v. MENZEL et al.
(No. 10049.)

(Supreme Court of Colorado. July 5, 1921.
Rehearing Denied Oct. 3, 1921.)

1. Animals \S 26(1)—Agister's lien statute strictly construed.

The agister's lien statute (*Mills' Ann. St. 1912*, \S 4568), being in derogation of common law, must be strictly construed.

2. Animals \S 26(1)—Agister's lien dependent on exclusive possession.

To support an agister's lien under *Mills' Ann. St. 1912*, \S 4568, possession, and that exclusive, of the animals is essential.

3. Animals \S 26(2)—Agister's lien not given to owner's servant.

The agister's lien given by *Mills' Ann. St. 1912*, \S 4568, does not exist in favor of a mere hired servant of the owner of the animals.

4. Appeal and error \S 1011(1)—Judgment on conflicting evidence not disturbed.

A judgment on conflicting evidence will not be disturbed on the ground of insufficient evidence.

5. Evidence \S 568(1)—Mere conclusions given over objections no evidence.

Mere conclusions as to what "the agreement was," what cattle were "referred to," whom witness "represented" in the negotiations, what "the understanding" and "the purpose" was, given over objection, and demand for what was said, is no evidence of the contract, especially where the only other person who could testify in respect to it is beyond the reach of process.

6. Frauds, statute of \S 44(4)—Oral extension of sublease of so much of lessee's two or three years' term as sublessee desired void.

An oral extension of sublease by a lessee having a two or three years' term, of so much of the term as the sublessee desired, is void, under *Rev. St. 1908*, \S 2662.

7. Witnesses \S 240(1)—Testimony on leading questions, objected to, contrary to witness' other testimony, no evidence.

Testimony drawn out by leading questions, objected to, and contrary to witness' previous testimony covering the whole subject, is no evidence.

Department 3.

Error to District Court, Ouster County;
James L. Cooper, Judge.

Action by the McKee Live Stock Company against Charles A. Menzel and others. There was judgment giving certain defendants a lien superior to that of plaintiff, and plaintiff brings error, and applies for supersedeas. Reversed and remanded, with directions.

John A. Rush and Foster Oline, both of Denver, for plaintiff in error.

Blunt & Hessick, of Florence, and James T. Locke, of Canon City, for defendants in error.

BURKE, J. This cause was tried to the court without a jury, and judgment entered below, giving defendants in error an agister's lien to the amount of \$6,079.08 upon 304 head of cattle, and establishing the priority of that lien as against two recorded chattel mortgages on said property held by plaintiff in error. From that judgment the latter prosecutes this writ, and asks the issuance of a supersedeas. The parties occupy the same relative position here as in the court below.

The clerk of the trial court was appointed as receiver, the cattle were sold, and the sum in controversy is now in the hands of the clerk. The cause is fully briefed, and both plaintiff and defendants request that it be finally disposed of on this application. The cattle in question belonged to the copartnership of B. Pepper & Co., of which Sam Pepper was the managing partner. Having apparently gone beyond his financial depth he disappeared, leaving his creditors to satisfy their claims as best they could out of the tangible property of his firm. The copartnership was made a defendant herein, and defaulted. Plaintiff was given a judgment against B. Pepper & Co. for the total unpaid amount of its claim, i. e., \$18,170.49, and defendants a judgment against B. Pepper & Co. for \$6,079.08. The receiver had in his hands \$3,497.89 over and above the costs and expenses of the receivership and the claim of defendants, and that sum was ordered paid to plaintiff. To such portion of the judgment no objection is urged which requires our consideration. The sole question to be determined here is the priority of the claims of the respective parties to said \$6,079.08 remaining in the hands of the receiver.

B. Pepper & Co. were engaged in buying, feeding, and selling cattle. A portion of those in dispute herein were bought in November, 1919, with money advanced by plaintiff and secured by a chattel mortgage recorded November 19, 1919. The remainder were purchased in December, 1919, with money advanced by plaintiff and secured by a chattel mortgage recorded December 26, 1919. Both mortgages describe these cattle as located on "the Kennicott place."

Defendants contend that they were so located in pursuance of an oral contract made by Charles A. Menzel (representing all the lien claimants) with Sam Pepper (representing B. Pepper & Co.) in the latter part of October, 1919; that the Kennicott place was in the possession of Charles A. Menzel; and that, while there kept and fed, these cattle were in the possession of defendant Dorsey Garnier, as the agent of all the lien claimants.

Plaintiff contends that there is no evidence of such a contract; that the Kennicott place, during the time in question, was in the possession of B. Pepper & Co.; and that Garnier was merely the hired servant of B. Pepper & Co., and that his possession was theirs.

There is much evidence and argument concerning the transfer of these cattle to other places at later dates, their care and feed by other persons, their return to the Kennicott place, their removal by plaintiff, the shipment of a portion of them, the seizure and return of the remainder by defendants. All this, in view of what is hereinafter said, becomes immaterial. Our statute (section 4568, M. A. S. Rev. Ed.) provides:

"Any ranchman, farmer, agister, herder of cattle * * * or any other person to whom any * * * cattle * * * shall be intrusted for the purpose of feeding, herding, pasturing, keeping or ranching, shall have a lien upon such * * * cattle * * * for the amount that shall be due for such feeding, herding, pasturing, keeping, or ranching, and for all costs incurred in enforcing such lien."

[1-3] This statute is in derogation of the common law, and must be strictly construed. *Bailey v. O'Fallon*, 80 Colo. 419, 420, 70 Pac. 755; *Auld v. Travis*, 5 Colo. App. 535, 539, 39 Pac. 357; *Ellison, Adm'r, v. Tuckerman, Rec.*, 24 Colo. App. 322, 326, 134 Pac. 163. Possession is essential to support the lien, and that possession must be exclusive. *Auld v. Travis*, supra. No such lien exists in favor of one who is a mere hired servant of the owner. *Sorrells v. Sigel-Campion Co.*, 27 Colo. App. 154, 171, 148 Pac. 279.

[4, 5] Where the testimony is conflicting, the judgment will not be reversed for insufficient evidence. *Hallack et al. v. Stockdale et al.*, 14 Colo. 198, 23 Pac. 840; *Lanham v. Copeland*, 66 Colo. 27, 178 Pac. 562. There is no evidence as to the alleged contract between Menzel and Pepper, under which the lien is claimed, save that of Charles A. Menzel. This consists solely of the statements by the witness as to what "the agreement was," what cattle were "referred to," whom Menzel "represented," what "the understanding" was, and what "the purpose was." These were mere conclusions, repeatedly given over repeated objections, and repeated demands for "what was said." The witness detailed no fact and recited the substance of no conversation from which either the trial court or this court could determine the correctness of his conclusions. The observance of the rule that facts, not conclusions, are to be given, is particularly important where, as here, the only other witness (Sam Pepper) is beyond the reach of the process of the court. Under such circumstances the testimony was no evidence. Furthermore, Menzel introduced in evidence a written acknowledgment (dated March 16, 1920) of his indebtedness and lien. It fixes no date for the alleged lien and mentions no other claim than the individual claim of Charles A. Menzel. It could in no way bind plaintiff, and its tendency is to deny the alleged contract and the priority of the lien claim.

[6] Pepper had the Kennicott place leased from the owner, and sublet it to Charles A.

Menzel. Menzel's lease expired in February, 1918, while Pepper's lease had still two or three years to run. Menzel had an oral cropping agreement for the season of 1919 under which one-half the hay went to him and the other half to Pepper. He had removed from the place in March, 1918. He claimed an oral extension of his sublease for so much of Pepper's unexpired term as he desired. If any such existed it was in violation of section 2662, R. S. 1908, and Menzel was not in possession under it.

[7] On cross-examination the defendant Garnier, alleged agent for the lien claimants, and the only person who could speak with authority as to his possession, testified absolutely and unequivocally that he was employed by Sam Pepper; that he was to get \$60 per month for feeding and caring for the cattle; that he was doing other work for Pepper at the same time, and being paid for it; that he acted by authority of Pepper; that he was under Pepper's orders and directions; that Pepper was running the business, and was his boss. Under the most palpable leading he gave some testimony to the contrary. Every particle of this was put into his mouth over repeated and vigorous protests from counsel for plaintiff. The following are examples:

After the witness had covered the whole matter on direct and cross-examination, an attempt was made to go over the ground again on redirect. Objection being made, counsel for defendants said:

"If the court please, I would like to draw that out a little more fully, with reference to the fact that he himself employed these men (other feeders whom witness had said were employed and paid by Pepper), and saw them, and arranged with them, and had supervision of the whole matter. Sam Pepper wasn't there and had nothing to do with it, and I would like to go into that matter a little more fully."

"The Court: Well, be as brief as you can."

Whereupon counsel proceeded to "draw it out a little more fully," thus:

"Q. You arranged with them (the other feeders) to come and do this work, didn't you? A. Yes."

"Q. But it was the agreement that Sam Pepper would pay the necessary help? A. Yes, sir; he was supposed to pay the help."

"Q. And you were to get the help? A. Yes, sir."

"Q. And you did that? A. Yes, sir."

"Q. And that is the way these boys happened to be there, by your arrangement, was it? A. Yes, sir."

Upon such testimony the trial court found that defendant Garnier was in possession of the cattle for the lien claimants. It is no evidence, is entitled to no weight as against witness' contrary statements, and will not support the "finding." Garnier was the mere hired servant of Pepper.

There being no evidence of the contract for lien, no evidence of defendants' possession of the ranch where the cattle were kept and fed prior and subsequent to the recording of plaintiff's mortgages, and defendants not having been in possession of the cattle during that time, their claims are junior and inferior to the lien of plaintiff's mortgages. It becomes unnecessary to examine the remaining evidence, or consider other questions raised by the record and argued in the briefs.

The judgment is reversed, and the cause remanded, with directions to enter judgment for plaintiff.

TELLER, J., sitting for SCOTT, C. J., and BAILEY, J., concur.

PEOPLE, by KEYES, Atty. Gen., v. UNITED MINE WORKERS OF AMERICA, DIST. 15, et al. (No. 9772.)

(Supreme Court of Colorado. April 4, 1921. Rehearing Denied Oct. 3, 1921.)

1. Master and servant \S 16—Private business may become one of public interest.

A business by circumstance and in its nature may rise from a private to a public concern under Acts 1915, p. 578, \S 30, prohibiting strikes and lockouts pending investigation in industries affected with a "public interest."

2. Evidence \S 20(1) — Judicial notice taken that coal industry is vitally related to other industries.

Court must take judicial notice of what is taking place in the different states, and that coal industry is vitally related not only to all other industries, but to the health, and even the life, of the people.

3. Master and servant \S 16—Mines and minerals \S 86—Coal mining industry affected with "public interest."

Coal mining is an industry affected with a "public interest" within Acts 1915, p. 578, \S 30, prohibiting strikes and lockouts during an investigation, hearing, or arbitration of disputes by the Industrial Commission.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Interest.]

4. Constitutional law \S 83(2)—Master and servant \S 16—Statute prohibiting strikes constitutional.

Acts 1915, pp. 578, 580, $\S\S$ 30, 33, prohibiting strikes and lockouts in industries affected with a public interest during an investigation, hearing, or arbitration of a dispute by the Industrial Commission, is not unconstitutional as compelling involuntary servitude.

5. Statutes \S 16(1) — Original purpose of anti-strike act held not changed by amendment during passage.

The original purpose of House Bill 177 (now Acts 1915, p. 562), relating to strikes and

lockouts, was not changed by amendment during its course through the two houses in violation of Const. art. 5, § 17.

6. Constitutional law §90—Anti-strike act held not to forbid freedom of speech.

Acts 1915, p. 580, § 33, forbidding incitement to lockout or strike during an investigation by Industrial Commission, does not violate Const. art. 2, § 10, concerning freedom of speech, in view of Rev. St. 1908, § 1620, relating to accessories.

En Banc.

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Bill by the People of the State of Colorado, by Victor E. Keyes, Attorney General, against the United Mine Workers of America, District 15, and others. Judgment for defendants, and plaintiff brings error. Reversed.

Victor E. Keyes, Atty. Gen., and Chas. Roach, Deputy Atty. Gen., for plaintiff in error.

Henry Cohen, of Denver, for defendants in error.

H. E. Curran, of Denver, amicus curiæ.

DENISON, J. Bill by the people to enjoin coal miners from striking before or during the consideration of their grievances by the Industrial Commission. The bill was dismissed, and the people obtained a writ of error from this court, and filed their brief July 9, 1920. The defendants in error have favored us with no brief.

The bill was based more particularly upon section 30, c. 180, of the Acts of 1915:

"Sec. 30. It shall be unlawful for any employer to declare or cause a lockout, or for any employé to go on strike, on account of any dispute prior to or during an investigation, hearing, or arbitration of such dispute by the commission, or the board, under the provisions of this act. Provided, that nothing in this act shall prohibit the suspension or discontinuance * * * of any industry or of the working of any persons therein which industry is not affected with a public interest."

The questions argued below were: First, whether the act was passed in a constitutional manner, and, second, if it was, whether it violated any of the provisions of the Constitutions of the state of Colorado or of the United States; but the court decided that the occupation of coal mining was not an industry "affected with a public interest," and therefore not within the terms of the act, and accordingly dismissed the bill.

The learned judge who tried the case based his decision upon *In re Morgan*, 26 Colo. 415, 429, 58 Pac. 1071, 1076 (47 L. R. A. 52, 77 Am. St. Rep. 269), where the court, speaking through Chief Justice Campbell, said:

"The business of operating smelters and working underground mines is purely a private business. It is not affected with a public interest, or devoted to a public use. * * * Hence, smelting does not come within the operation of the principle of those decisions in which have been upheld reasonable regulations of a business affected by a public interest."

The real question before the court in that case was whether the industry of smelting ore was affected with a public interest. The question whether underground mining was so affected arose only incidentally because underground mining, in the act there in question, the so-called 8-hour labor act, was classed with work in smelters. The remarks of the Chief Justice were doubtless directed to the mining of ores, in respect to which they were appropriate; but although his statement was broad enough, as the court below justly remarked, to cover the industry of coal mining, yet we cannot think that he had that industry in mind, the question before him being in regard to smelters, which naturally connoted mining of ores. The case does not hold, and we hardly believe he would have said that the mining of coal was not affected with a public interest.

[1] Then, too, a business by circumstance and in its nature may rise from a private to a public concern. *German, etc., Co. v. Kansas*, 233 U. S. 411, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189, and since the decision of the *Morgan Case* (1899) the rapid development of the relations of the coal miners, the coal operators, and the public have produced a situation very different from that which then existed. Because of these considerations we do not think that the *Morgan Case* controls this one. However, if the statute in question is not constitutional, the dismissal of the bill was right, and must be affirmed.

[2] Unless coal mining may be said to be affected with a public interest, its regulation by statute to the extent attempted by said chapter is unconstitutional. See the cases cited below. The words "affected with a public interest" were no doubt used by the General Assembly to keep the statute within constitutional limits. It becomes necessary, then, not only in order to construe the statute, but to decide whether it is constitutional, to determine whether coal mining is so affected, and it seems self-evident that it is. We must take judicial notice of what has taken place in this and other states, and that the coal industry is vitally related not only to all other industries, but to the health and even the life of the people. Food, shelter, and heat, before all others, are the great necessities of life, and, in modern life, heat means coal.

In 1902 the great anthracite coal strike threatened the social stability of several of

the great states, and recently, in the neighboring state of Kansas, under the maxim "Salus populi lex suprema est," the Governor seized the coal mines, when a strike had stopped the production of coal, and operated them with volunteers until the emergency had passed. Other instances might be cited. Can it be said that a business with such possible consequences is not affected with a public interest? The answer must be: No.

The authorities are decidedly in favor of this conclusion. The leading case is *Munn v. Illinois*, 94 U. S. 132, 24 L. Ed. 77, which involved contracts by grain elevators. In *State v. Barrett*, 172 Ind. 169, 179, 87 N. E. 7, coal mining was held to be affected with a public interest. The regulation of interest on loans of money is so familiar we do not even notice it. The following are some of the cases on the subject: *Budd v. New York*, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247; *The Sinking Fund Cases*, 99 U. S. 700, 747, 25 L. Ed. 504; *German, etc., Co. v. Kansas*, 233 U. S. 389, 411, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189; *Brechtbill v. Randall*, 102 Ind. 528, 1 N. E. 362, 52 Am. Rep. 695; *Hockett v. State*, 105 Ind. 250, 258, 5 N. E. 178, 55 Am. Rep. 201; *Webster Telephone Case*, 17 Neb. 126, 22 N. W. 237, 52 Am. Rep. 404; *Mobile v. Yuille*, 3 Ala. 137, 140, 36 Am. Dec. 441; *Stock Exchange v. Board of Trade*, 127 Ill. 153, 19 N. E. 855, 2 L. R. A. 411, 11 Am. St. Rep. 107; *Cutsinger v. Atlanta*, 142 Ga. 555, 564, 83 S. E. 263, L. R. A. 1915B, 1097, Ann. Cas. 1916C, 280; *Davis v. State*, 68 Ala. 58, 44 Am. Rep. 128; *Baker v. State*, 54 Wis. 368, 12 N. W. 12; *Girard Co. v. Southwark Co.*, 105 Pa. 248, 252; *Inter-Ocean Co. v. Asso. Press*, 184 Ill. 438, 56 N. E. 822, 48 L. R. A. 568, 75 Am. St. Rep. 184.

One reason for holding a business to be affected with a public interest is that it is a practical monopoly. *German, etc., Co. v. Kansas*, 233 U. S. 389, 416, 34 Sup. Ct. 612, 58 L. Ed. 1011, L. R. A. 1915C, 1189; *Budd v. New York*, 143 U. S. 517, 537, 12 Sup. Ct. 468, 36 L. Ed. 247; *Nash v. Page*, 80 Ky. 539, 545, 44 Am. Rep. 490.

[3] There can be no question that the production of coal is, at the present time, affected with a public interest to a certainty, and an extent not less than any other industry; consequently coal mining is within the terms of chapter 180, S. L. 1915, and it follows that that statute does not violate any constitutional provision as to due process or liberty of contract, as appears from the cases cited above.

[4] There is no involuntary servitude under this act. Any individual workman may quit at will for any reason or no reason. There is not even prohibition of strike. The only thing forbidden is a strike before or during the commission's action.

[5] As to whether House Bill 177 (now chapter 180, S. L. 1915) was regularly passed: The objection seems to be that the original purpose of the bill was changed by amendment during its course through the two houses, in violation of article 5, § 17, of the Colorado Constitution; we cannot find, however, that such was the case.

It would seem that House Bill 177 and Senate Bill 99 were identical—that each was cut in two, that which was cut from one remaining in the other. The latter emerged as chapter 179, providing workmen's compensation, and the former as chapter 180 of the Acts of 1915, establishing an Industrial Commission to administer and enforce the other, each with amendments of more or less importance, but none which altered the original purpose. That was, and continued to be, to provide for workmen's compensation and an industrial commission.

That the purpose of the General Assembly in passing the two bills was the purpose of the original bill there can be no doubt. What would have been the effect if one had passed and the other had failed we are not now called upon to say. It is enough to say that, after all the amendments, the final passage of the two amended bills effected the purpose of the original.

[6] It is objected that section 33 of the act in question, forbidding incitement to lockout or strike, violates article 2, § 10, of the state Constitution, concerning freedom of speech; but, if the Legislature has power to forbid anything, it has power to forbid incitement thereto. See R. S. 1908, § 1620, on accessories.

The judgment should be reversed.

DAVIES v. CRAIG et al. (No. 9801.)

(Supreme Court of Colorado. July 8, 1921.
Rehearing Denied Oct. 8, 1921.)

1. Boundaries \S 3(3)—Monuments are superior to courses, distances, quantities, and field notes.

Courses, distances, and quantities yield to monuments set in the original survey, which, when they are found, establish the boundaries of survey, being better evidence of what the surveyor did than plats or field notes.

2. Boundaries \S 37(3)—Evidence founded on field notes held not sufficient to sustain finding of trial court as to location of corner of survey.

Evidence founded on plats and field notes, which contained errors, and which were contradicted by monuments and eyewitnesses of the survey, held not sufficient to sustain the findings of the trial court as to location of a corner of a survey.

3. Appeal and error § 1176(3) — Judgment may be directed in accordance with undisputed evidence.

When findings of trial court are not supported by evidence, appellate court may disregard them and direct a judgment in accordance with the undisputed evidence in the case.

En Banc.

Error to District Court, Grand County; Harry S. Class, Judge.

Action by William Bayard Craig and another against J. W. Davies and others. Judgment for plaintiffs, and defendant named brings error. Reversed and remanded with directions.

See, also, *Wescott v. Craig*, 60 Colo. 42, 151 Pac. 934.

Howard & McCrillis, of Denver, for plaintiff in error.

H. A. Hicks, E. W. Hurlbut, and A. T. Monson, all of Denver, for defendants in error.

TELLER, J. This case, which is here for the second time, involves the location of the corner common to sections 5, 6, 7, and 8, township 3 north, range 75 west, Grand county. The parties will be designated as in the trial court.

The plaintiffs below, who are defendants in error here, brought an action against the plaintiff in error and others, to remove a cloud on the plaintiff's title. Later it appears that, by consent of the parties, the case was treated as arising under the statute concerning lost or disputed boundaries. The trial court appointed two surveyors as commissioners to locate the south line of section 6 and establish the southeast corner thereof. The commissioners took testimony and reported that the south line terminated on the edge of the lake at a point where there was a stone marked "OC" on the north side, with five grooves on the east and five on the south. They reported that this stone was practically in line between the southwest corner of section 6, the monument of which was not disputed, and the recognized corner common to sections 3, 4, 9, and 10 to the east, and that said OC stone was 2,470 feet easterly, on said line, from the south quarter corner of section 6. They also reported that, starting from the east quarter corner of 7, and running a true line between said quarter corner and the northeast corner of section 6, also undisputed, at a distance of 2,548.62 feet from said east quarter corner of 7, their line intersected the south shore of Grand Lake at a point 42 feet east of another stone set on the shore of the lake, marked "CC" on the west face, with five grooves on the south face and five on the east face. This they determined to be the intersection of the

line between sections 7 and 8 with the meander line of the lake. This placed the corner in question in the lake at the intersection of these two lines projected from the respective CO stones.

The court sustained objections to the report, and appointed another commissioner, who reported that, according to the field notes as recorded in the Surveyor General's office, said corner was 6.54 chains west of meander corner 8, set on the south shore of the lake. He accordingly set a stone 6.54 chains west of said meander corner as the southeast corner of section 6. The court approved the report and entered judgment accordingly. That judgment was reversed in this court in an opinion found in *Wescott v. Craig*, 60 Colo. 42, 151 Pac. 934.

Another commissioner was thereupon appointed, and reported the corner substantially as placed by the judgment which was reversed. Thereafter further evidence was taken before the court, largely by deposition, and the court made new findings, establishing the corner within a few feet of where it was located by the last-named commissioner. The cause is now here on error to that judgment.

[1] It is evident that this litigation was begun, has been carried on by the plaintiffs, and decided by the court, upon a wrong conception of the relative value, as evidence, of the records of the Surveyor General's office and the evidence of the survey which may be found on the ground.

"It is elementary that courses, distances, and quantities yield to monuments set in the original survey, and that, when such monuments are found, they establish the boundaries of the survey; this for the reason that they are better evidence of what the surveyor did than are plats or field notes." *Morse v. Breen*, 66 Colo. 398, 182 Pac. 887.

[2] The report of the last commissioner, which was substantially followed by the court, accepts and is clearly based upon the records of the Surveyor General's office. Despite the fact that it is admitted that those records, and the plat made in connection with them, place Grand Lake about 400 feet nearer to the north boundary of the township, which is evidenced by undisputed monuments, than it actually is when located by those monuments, the commissioner locates the corner on the land, and explains that he did so because that was the location least inconsistent with the field notes. It is not located according to the field notes generally, but apparently with relation to the supposed meander corner 8.

On the second trial it was found that what was supposed to be meander corner 8 was meander corner 53; meander corner 8 being upon the north shore of the lake.

There is, therefore, nothing in the record which justified the action of Commissioner Brown in proportioning the corner in between the south quarter corner of 6 and a supposed meander corner 8. It being admitted that the lake is 460 feet farther north, according to the plat, than it actually is, it would appear that, that mistake having been made, the notes were written up to conform to the supposed location of the lake.

Huntington, a witness for plaintiff, while assistant county surveyor, established a corner on the land in accordance with the plaintiff's contention. He testified that from the south quarter corner of 6, east to the CC stone, the line is nearly on the course as given in the notes.

The supervisor of Arapahoe Forest testified that in 1917, at the southwest corner of section 6, he found bearing trees with blazes, and that upon cutting into the trees he found 36 rings of annual growth since the blazes were made, from which he determined that the cuttings had been made 36 years prior to his investigation; that is, in 1881, the date of the original survey. He found trees likewise blazed at the south quarter corner, and some near the CC stone on the west side of the lake, all showing 36 years of growth since the blazing. He testified further that there was a plainly marked line from the south quarter corner eastward to said CC stone; that he found near that stone a dead tree blazed, showing 32 rings, and in a live tree blazes showing 36 rings. He further testified that he had had experience in relocating survey lines in the forest.

Treas, who made the meander survey immediately following the original survey by Ouelette, and under the same contract, testified that the instructions from the Surveyor General's office were to set closing corner stones where subdivisional lines intersected the high-water line of the lake.

Alden testified that he was shown the CO stone on the west side of the lake, and saw the blazed line to the westward of it, forming the south line of section 6, within a few days of the survey.

Wescott, who was a squatter on section 7, and who entered land in that section and in the southeast of 6, testified by deposition that he saw the CC stone set at the east end of the south line of 6, and that Ouelette, the surveyor, told him that he had placed a stone, also on the south shore of the lake, marking the end of the line between section 7 and section 8, and that the corner was in the lake where the lines, if projected, would intersect.

Ashley, who financed Ouelette on this survey, testified that he saw the south line of 6 run from a short distance west of the south quarter corner to the lake; that trees were blazed along the line, and the brush cut out to the lake, where the CC stone was set.

He further testified that Wescott was there at the time, thus corroborating the latter's testimony. He says, further, that he was directed by the Surveyor General to have closing corner stones set where the survey lines intersected the line of the lake. He called attention to the fact that the field notes show that the line between sections 5 and 6 was run from the north; whereas, if the corner had been on the land as located by the judgment of the court, this line should have been run north from that corner, instead of south to it.

Byers testified that in the fall of 1881 he assisted his father, a deputy United States surveyor, in laying out the town site of Grand Lake; that when the line was run to the lake a CC stone was found at the southwest corner of the lake; that the section corner was supposed to be in the lake; that the town site was tied to this CC corner.

It is worthy of note that all the other monuments set in the survey of said section 6, except the east quarter corner, are in place and undisputed. This quarter corner is admittedly in the lake. This is at least suggestive that the southeast corner of 6 was never set on the land.

The trial court did not adopt the findings of Commissioner Brown in toto, but made new findings, from which he located the corner in question within a few feet of its location by the commissioner. The court said:

"While in the former trial of this cause it seems to have been taken for granted that meander corner 8 was a corner set in the meander survey of the lake, it now appears, and the court so finds, that M. C. 8 was a corner set in the subdivisional survey, and not in the subsequent meander survey of the lake. It therefore became a monument of importance, being an incidental call to the corner in the subdivisional survey."

We find nothing in the record to support this finding of the court, except the field notes, which are contradicted by the accepted monuments on the ground. There is no evidence that the corner marked M. C. 53 was set in the subdivisional survey, and treated as M. C. 8. The court further finds:

"That the so-called CC stones around Grand Lake are not a part of the original government survey, nor was the well marked and blazed line near the south line of section 6, which defendants contend was the south line of section 6."

The only ground for this finding is that the CO stones are not mentioned in the surveyor's notes as recorded. On the other hand, there is the testimony of two witnesses who saw the CC stones set as closing corners upon the lake, and two others who saw them within a few days, and when the line eastward from the south quarter of 6

was freshly cut and blazed. The testimony of these witnesses is uncontradicted. The testimony of the Forest Supervisor as to the age of the blazing strongly corroborates the witnesses who testified that the line was so blazed.

The further finding of the court that the lines as originally run can be fully retraced, and that they show that the missing corner should be where located by the commissioner, has no evidence whatever to sustain it. The line from the south quarter corner of 6 to the corner established by the commissioner is far away from the course reported in the notes, and runs through timber in which there is no evidence of a line ever having been run at the time of the original survey.

[3] Upon the undisputed evidence the CO stones mark the intersection of subdivisional lines with the high-water line of the lake. The evidence clearly establishes that a line was blazed, and the brush cut out, nearly due east from the south quarter corner of 6 to the CC stone on the west shore of the lake. The findings of the trial court being without support in the evidence, this court is at liberty to disregard them, and direct a judgment in accordance with the undisputed evidence in the case.

The judgment is therefore reversed, and the trial court is directed to enter a decree fixing the southeast corner of section 6 at a point in Grand Lake where a line from the south quarter corner of 6, passing through the CC stone on the west side of the lake, projected on that course, intersects a line between the east quarter corner of section 7 and the accepted monument at the northeast corner of said section 6. The other lines in difference will then be easily located from the lines thus determined.

SCOTT, C. J., and BAILEY, J., not participating.

JOHNSON v. COOLBAUGH. (No. 23222.)

(Supreme Court of Kansas. Oct. 8, 1921.)

(Syllabus by the Court.)

Wills §682(2)—Trust held active, and testator's son's interest construed to be a life use of income only.

A trust created by a will imposed upon the trustee the power and responsibility of paying to the widow of the testator so much of the income from real estate as might be necessary for her support during her life, and at her death the income was to be paid to a son during his life, and, if he left children surviving him, then at his death the income was to be paid to them for a period of 20 years, at which time the fee title was to vest in them. *Held*, that the trust is an active and not a dry or

passive one, and that it cannot be executed until the time arrives for the final distribution (*Grossenbacher v. Spring*, 108 Kan. 397, 195 Pac. 884), and further *held*, that the only interest acquired in the real estate by the testator's son is a life use of the income from the time of his mother's death.

Appeal from District Court, Rooks County.

Action by Howard Johnson against M. J. Coolbaugh, as trustee under the will of John J. Johnson, deceased, involving the construction of a will. Judgment in favor of the defendant, and plaintiff appeals. Affirmed.

David Ritchie, of Salina, and F. E. Young, of Stockton, for appellant.

O. O. Osborn, of Stockton, and S. N. Hawkes, of Bartlesville, Okl., for appellee.

PORTER, J. The case involves the construction of the last will of John J. Johnson, deceased, who died in April, 1911, leaving surviving him his widow, Arabella Johnson, and their only child, Howard Johnson, who is the appellant. The material provisions of the will read:

"I devise and bequeath all my real estate, whatever it may be, unto M. J. Coolbaugh, Jr., of Stockton, Kansas, or to his successors, for the following trusts and purposes:

"I direct that my said wife, Arabella, under the advice of my above mentioned trustee, or his successor, shall have the income from my real estate, or so much as may be necessary for her support and maintenance during her life, and at her death, I direct that the income from my said real estate shall go to my said son, Howard, during his life, and at his death, said real estate to descend to my legal heirs under the laws of Kansas. In case I shall outlive my said wife, then I direct that the income from said real estate shall go to my said son, Howard, during his lifetime, and at his death said real estate to descend as last above mentioned. * * *

"It is hereby expressly directed that in the provisions above made, where my said real estate after the death of my said son, Howard, shall go to my legal heirs under the laws of Kansas, in case my said son, Howard, shall have children, said real estate shall remain in said trust and not go to them in fee until twenty years after the death of my said son, Howard."

The will was duly probated and the widow elected to take under its provisions and M. J. Coolbaugh, Jr., qualified as trustee. The widow died in 1916. The appellant, who is now 38 years of age and has one child, brought this action in ejectment and claims that the title to the real estate vested in him on the death of his father, subject to a life use in Arabella Johnson, and that upon her death the fee title vested in him. Appellant concedes that during the life of Arabella Johnson, the trustee had active duties to perform in the collection of the income and

in determining what was necessary for the support and maintenance of the widow, but contends that upon her death the trust became a mere dry or passive one, which became executed by the statute of uses. Section 11686, Gen. Stat. 1915. The statute provides that—

"A conveyance or devise of lands to a trustee whose title is nominal only, and who has no power of disposition or management of such lands, is void as to the trustee, and shall be deemed a direct conveyance or devise to the beneficiary."

The will devises all the real estate to the trustee or his successors, "for the following trusts and purposes," and then directs that the widow, under the advice of the trustee or his successor, shall have the income from the real estate or so much as may be necessary for her support and maintenance during her life; at her death he directs that the income shall go to his son, Howard. The appellant is given no right to the possession or the control of the real estate, nor any interest in it except to receive the net annual income thereof upon the death of his mother and during his lifetime. The will directs that the real estate shall, upon the death of the appellant, descend to the legal heirs of the testator, with a further proviso that in case appellant should have children born to him the estate shall at his death descend to them but the real estate shall remain in the trust for 20 years after the death of appellant and then go to his children.

There can be no doubt by the terms of this will an active trust is created which upon certain contingencies cannot be fully executed until the time fixed for distribution which may be 20 years after the death of appellant. Every contention raised by him is fully met by the opinion in the recent case of Grossenbacher v. Spring, 108 Kan. 397, 195 Pac. 884. There the testator directed that his real and personal property should be held in trust for his four grandchildren or the survivors of them during their natural lifetime, they to receive only the net income of the property held in trust until each became of age when its respective share was to be paid to it. Upon the death of the last survivor of the grandchildren, all the estate held in trust was to be divided between the heirs of the grandchildren being the issue of their bodies. The will was held to create an active trust, which was not fully executed until the grandchildren attained their majority. In the opinion it was said:

"The testator did not devise his property directly to his grandchildren. He devised it to a trustee, not alone for their benefit, but also for the purpose of holding the title, collecting the income, paying the taxes, conserving the property, and paying to the grandchildren the net income as annuities during the lifetime, and at their death—not before—dividing the prop-

erty among the heirs of their bodies. Of course, whether they shall have such heirs or not, the time set for the performance of the active duties of the trustee shall then expire; and, even if there should be failure of such heirs, the properties will then be freed of the trust and pass unrestrained to the next taker according to the statute of descents and distributions. The will does not create an estate tail which may be broken by a conveyance. To do so it would have been necessary that the will should devise directly and without restricting qualifications a life estate in each of the grandchildren with remainder over to the heirs of their bodies in allodial fee. *Ewing v. Nesbitt*, 88 Kan. 708, 129 Pac. 1131; *Bryant v. Flanner*, 99 Kan. 472, 162 Pac. 280. But here the estate was devised in trust, with active duties imposed on a trustee which cannot be fully executed until the death of the last surviving grandchild of the testator." 108 Kan. 400, 195 Pac. 885.

In that case it was held to be the design of the testator that the principal of his estate should be kept intact by the trustee until the time specified for its distribution. It was said in the opinion:

"Since such design is clear and it violates no rule of Kansas law, that design, that intention, governs the rights and duties of the trustee, the rights of the plaintiffs, the rights of the next takers, and it governs the courts as well. *Ernst v. Foster*, 58 Kan. 438, 49 Pac. 527; *Markham v. Waterman*, 105 Kan. 93, 181 Pac. 621." 108 Kan. 402, 195 Pac. 886.

In the present case the appellant is not concerned with the question of where the title vested, or when it vested, since by the express terms of the will it was never, upon any condition, to vest in him.

The judgment is affirmed.

All the Justices concurring.

EVANS v. EVANS et al. (No. 23349.)

(Supreme Court of Kansas. Oct. 8, 1921.)

(Syllabus by the Court.)

1. Wills §311—Execution, testamentary capacity, and testator's freedom from restraint, may be conclusively determined in district court action to contest refusal of probate.

Sections 1 and 2 of chapter 336 of the Laws of 1917 interpreted, and held, the issues of due execution of a will, testamentary capacity of the testator, and his freedom from restraint, may be conclusively determined in an action commenced in the district court to contest an order of the probate court refusing probate of the will.

2. Wills §329(4), 400—In contest of order refusing probate, instruction held not subject to criticism; findings on conflicting evidence are conclusive.

Assignments of error relating to an instruction given the jury, and the sufficiency of the

evidence to sustain the findings of fact, considered, and held to be without substantial merit.

Appeal from District Court, Reno County.

Action by Martha Evans against Loretta Evans and another to contest an order refusing to probate a will. Judgment for plaintiff, and defendants appeal. Affirmed.

E. T. Foote and C. M. Williams, both of Hutchinson, for appellants.

F. L. Martin, John M. Martin, and James N. Farley, all of Hutchinson, for appellee.

BURCH, J. The action was one to contest an order of the probate court refusing to probate a will. The plaintiff prevailed, and the defendants appeal.

The petition alleged that the will was duly executed, and that the testator was of full age, of sound mind, and not under any restraint. The answer pleaded that the testator lacked testamentary capacity, and that he was unduly influenced to make the will; the facts being stated in detail. The issues thus raised were fully canvassed. The court took the advice of a jury, which returned the following findings of fact:

"Q. No. 1. Did the deceased have sufficient mental capacity to make a will, at the time the instrument purporting to be his will was executed? A. Yes.

"Q. No. 2. Was the instrument purporting to be the will of the deceased signed by reason of undue influence as defined by the instructions herein given? A. No.

"Q. No. 3. Did W. E. Evans, at the time he signed the last will and testament, have the intelligence to know and understand that he desired one-half of his property to go to his wife and one-half thereof to his mother? A. Yes.

"Q. No. 4. Did W. E. Evans sign the will, after it was read to him in the presence of the two attesting witnesses, without duress or coercion? A. Yes.

"Q. No. 5. Do you find that there was undue influence exercised upon the deceased? A. No."

The findings were approved, and the court rendered the following judgment:

"It is therefore ordered, considered, and adjudged by the court that the plaintiff have judgment herein: That the instrument set out in plaintiff's petition as the last will and testament of W. E. Evans, deceased, be and hereby is adjudged and found to be the last will and testament of said W. E. Evans, deceased, and said instrument is entitled to probate as said last will and testament. * * *"

The defendants say the district court erroneously regarded the proceeding as one to establish the will itself, and not merely as one to reverse the order of the probate court.

[1] Formerly the proponent of a will had but one remedy, in case the probate court refused to probate the will, and that was by appeal to the district court. In 1907, the

proponent was given a remedy by way of civil action commenced in the district court (Laws 1907, c. 429, §§ 1, 2.) In the case of *Durant v. Durant*, 89 Kan. 347, 131 Pac. 613, it was held the statute did not, by implication, abolish appeal, and the remedy of independent civil action was cumulative. In 1917, the act of 1907 was amended in some minor particulars, and the statute under which the plaintiff proceeded now reads as follows:

"If no person interested, or claiming to be interested, shall appear within two years from the time of the making of any order by a probate court, probating or refusing to probate the will and contest the same, such order shall be forever binding, saving, however, to persons under legal disability, the period of two years after such disability is removed. The provisions of this act shall apply to any order of the court probating or refusing to probate the will, made at any time within two years prior to the taking effect of this act: provided, however, that no proceeding to contest or set aside such order of the probate court shall affect the rights of innocent parties who have acquired title to property under the laws as they existed prior to the passage of this act. * * *

"The mode of contesting a will after probate, or an order of the court refusing to probate the will, shall be by civil action in the district court of the county in which the will was admitted to probate or the order of the court refusing to probate was made, which action may be brought at any time within two years after the probate, or the order of the court refusing to probate the will, and not afterwards; provided that this act shall not apply to any action or proceeding now pending."

Laws 1917, c. 336, §§ 1, 2.

In the case of *Hospital Co. v. Hale*, 69 Kan. 616, 619, 77 Pac. 537, 538, the nature of the proceeding to procure probate of a will, whether in the probate court or on appeal to the district court by the defeated proponent, was discussed. In the opinion it was said:

"In both courts the procedure is of the most informal and perfunctory character, and when a prima facie case is made upon the several points as to validity of execution, testamentary capacity, and freedom from illegal restraint, the order of admission should be made, leaving for the more formal and regular proceedings provided by section 20 of the wills act (Gen. Stat. 1901, § 7957) the contest of the nicer and more difficult questions, a contest in which issues are duly formed, evidence properly produced, the machinery found for obtaining a jury should one be ordered. Upon the application to admit to probate, a party interested in having the application denied may not, as a matter of right, demand the examination of his witnesses in opposition. Just to what extent this preliminary examination ought to go it is difficult in any one case to say; it can be said, however, that it is not a contest; that is left for another proceeding in another forum. In the rough, it is probably sufficient to say that it should go only to the extent that a

prima facie case is made in favor of the validity of the will. * * *

Soon after the publication of this decision, the Legislature made somewhat more definite the extent of the inquiry (Laws 1905, c. 526, § 1), but did not enlarge the issues, or provide for a probate court contest, or abrogate the rule that probate should be allowed on a prima facie showing, whether made in the probate court or in the district court. *Wright v. Young*, 75 Kan. 287, 89 Pac. 694. The situation was thus left in much the same unsatisfactory condition as before. The probate court could not determine a will contest, and the district court on appeal had only the jurisdiction of the probate court. The proponent had no means of establishing the will against a contestant, while a contestant, although twice defeated, still had the remedy of an action in the district court, commenced at any time within two years after probate. Such being the state of the law, what did the Legislature undertake to do by the second section of the statute of 1917?

The defendants argue that the sole effect of the statute was to give the proponent, if defeated in the probate court, another way to reach the district court. Formerly he could appeal. Now he can appeal, or commence an independent action; but in either case the object is the same as before, that is, to obtain probate of the will, and the authority of the district court is limited to the same extent as before. The court is unable to accept this interpretation.

The statute provides for two kinds of contest, one by the contestant after probate of the will, and one by the proponent after probate has been refused. The contestant contests the will. The proponent contests the order of the probate court. The contestant contests the will because the probate court has found it was duly executed and the testator was of sound mind and under no restraint. The proponent contests because the probate court has found the will was not duly executed, or the testator was not of sound mind, or the testator was under undue restraint. The district court is not restricted to the exercise of virtually probate jurisdiction invoked by appeal from the probate court. The action is a civil action, and the court possesses all the power of a district court in a civil action. Issues may be duly framed, evidence may be properly produced, the machinery for obtaining a jury, if desired, is available, and all the "nicer and more difficult questions" may be determined in a formal and regular way. There is no reason for two trials, should the proponent bring the action, but one trial if the contestant should bring the action, and this court concludes the district court correctly interpreted the statute.

[2] The court instructed the jury as follows:

"The jury are instructed that a person is presumed to be of sound mind until the contrary is proven by the evidence, and in this case the burden is on the defendant to prove, by a preponderance or greater weight of the evidence, that the deceased, Will Evans, did not, at the time he executed the will in question, understand the nature of what he was doing; and the burden is on the defendant to prove by a preponderance of the evidence, that said deceased was induced to sign said will by reason of undue influence of others."

It is said the instruction was erroneous, in that the proponent of the will was not required to make out a prima facie case, and the jury may have been influenced by the instruction. Although a jury was called, its office was merely advisory. The ultimate determination of the issues of fact rested with the court. Until a prima facie case was presented, there was no occasion to interrogate the jury, and whether or not a prima facie case had been presented was subject for decision by the court. The plaintiff introduced his evidence first. At the close of the evidence, the court evidently was satisfied the plaintiff had sustained the burden resting on him, and submitted the issue of the validity of the will to the jury under the instruction quoted, which was appropriate to that issue.

It is said the findings of fact were not sustained by sufficient evidence. The evidence was conflicting, the credibility of testimony was involved, and this court is precluded by well-understood rules, from disturbing the findings.

The judgment of the district court is conclusive with respect to the validity of the will and its admissibility to probate, and it is affirmed.

All the Justices concurring.

PENDLETON v. PENDLETON. (No. 23297.)

(Supreme Court of Kansas. Oct. 8, 1921.)

(Syllabus by the Court.)

Divorce \S 62(6)—Residence of wife of military officer held not domiciliary or sufficient; "domicile."

Findings of fact in an action for divorce considered, and held, residence of the wife of a captain of the United States army at Ft. Riley, to which military post he was assigned for duty, was not domiciliary, within the meaning of the divorce statute (Gen. St. 1915, § 7572 [Code Civ. Proc. § 664], and section 10973, subd. 23), which requires "domicile" of the plaintiff in the state and in the county in which the petition is filed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Domicile.]

Appeal from District Court, Geary County.

Suit by Annabelle Pendleton against Henry McEldery Pendleton for divorce. Judgment for defendant, and plaintiff appeals. Affirmed.

L. B. Morris and U. S. Weary, both of Junction City, for appellant.

J. V. Humphrey and A. S. Humphrey, both of Junction City, for appellee.

BURCH, J. The action was one by the wife of a captain of the United States army stationed at Ft. Riley, to procure a divorce. The court held the plaintiff was not an actual resident of the state, or a resident of the county in which the action was brought (Gen. Stat. 1915, § 7572; Code Civ. Proc. 664), and refused a decree, although statutory grounds for divorce were proved. The plaintiff appeals.

The material findings of fact follow:

"(4) Plaintiff actually dwelt for more than one year prior to the filing of her petition and at the time thereof, at Ft. Riley, on the Ft. Riley, Kan., military reservation.

"(5) Prior to her marriage, plaintiff was a resident of and domiciled in the state of Texas, and was married to defendant in the state of New York, in 1918. Her husband served in France from that time until March, 1919, during which time plaintiff resided at her former home. On his return, defendant visited plaintiff's family in Texas until July, when he and plaintiff moved to Ft. Riley, on military orders. He never resided in the state of Kansas except the time he was located on said military reservation at Ft. Riley; that is, he never resided at any other place in the state of Kansas.

"(6) Defendant was born upon a military reservation at Ft. Sam Houston, Tex., at a time when his father was an officer in the United States army, and claimed no other residence. Defendant's entire life has been spent upon military reservations, except for short visits to relatives not living on such, and he now holds the rank of a captain in the United States army, and claims no other residence or domicile than at Ft. Riley, at which place he has, for more than a year prior to the filing of the petition herein, maintained a home for himself and plaintiff in quarters furnished by the government. It was the intention of the parties to make Ft. Riley their home so long as defendant's duties gave him employment at Ft. Riley.

"(7) Ft. Riley is on that part of the reservation which, prior to the cession by the Legislature of the state of Kansas of the jurisdiction of said reservation to the federal government, was situated in Geary county, Kan."

For many legal purposes there is a clear distinction between "residence" and "domicile."

A person may hold an office, or may have business or employment or other affair which requires him to reside at a particular place. His intention is to remain there while the office or business or employment or other concern continues; but he has no purpose to remain beyond the time the interest exists which determines his place of abode. "Domicile" is characterized by the animus manendi. The Legislature has defined "residence" as the place adopted as one's habitation, and to which, whenever absent, he intends to return. Gen. Stat. 1915, § 10973, subdiv. 23. Because the marital relation is one of profound interest to the state, and because the marital status virtually constitutes a res for purposes of jurisdiction over divorce, the Legislature intensified the character of residence necessary to maintain an action for divorce by use of the term "actual." The purpose evidently was to indicate that permanency which the word "domicile" denotes, and the court has already held that the divorce statute contemplates domicile of the plaintiff in the state for a year preceding the filing of the petition, and domicile in the county in which the petition is filed. *Carpenter v. Carpenter*, 30 Kan. 712, 717, 2 Pac. 122, 46 Am. Rep. 108.

The findings of fact were stated with care and discrimination, and the element essential to domicile was not included. The plaintiff's husband went to Ft. Riley, not of his own choice, but in obedience to military orders. The plaintiff accompanied her husband, and makes no claim of domicile apart from that of her husband. So far as the findings disclose, neither one has any intention of abiding at Ft. Riley beyond the assignment of the defendant to that post. There is nothing whatever to indicate permanence of the assignment. Whenever military need for the defendant to be at Ft. Riley terminates, he will obey the order assigning him to another station, and it is not possible to affirm that Ft. Riley is the true, fixed, permanent home of the plaintiff.

In view of the foregoing, it is not necessary to discuss the subject of the jurisdiction of the state of Kansas over the Ft. Riley military reservation, and the question whether or not an officer of the army of the United States may establish a domicile on such a reservation is not decided. It is sufficient that in this case the residence of the plaintiff on the Ft. Riley military reservation is temporary, and not domiciliary.

The judgment of the district court is affirmed.

All the Justices concurring.

STATE v. DOEBELE. (No. 23545.)

(Supreme Court of Kansas. Oct. 8, 1921.)

*(Syllabus by the Court.)***1. Intoxicating liquors §236(6½)—Evidence held to show unlawful possession.**

Evidence considered, and held sufficient to establish the unlawful possession of intoxicating liquor.

*(Additional Syllabus by Editorial Staff.)***2. Intoxicating liquors §236(6½)—Unlawful possession may be established by circumstantial evidence.**

In a prosecution for the unlawful possession of intoxicating liquors, the fact of possession may be established by circumstantial evidence.

Appeal from District Court, Washington County.

William Doebele was convicted of unlawfully having in his possession intoxicating liquor, and he appeals. Affirmed.

Bennett & McFarland, of Washington, Kan., for appellant.

Richard J. Hopkins, Atty. Gen., and F. C. Baldwin and A. J. Freeborn, both of Washington, Kan., for the State.

PORTER, J. The appellant, who holds the office of mayor of the town of Hanover, was convicted of the offense of unlawfully having in his possession intoxicating liquor. His sole contention is that the evidence is insufficient to establish the fact of possession.

[1] The state's evidence was to this effect:

On August 9, 1919, William Doebele and his brother Edward were together in Kansas City, Mo., leaving there in the evening on a train for St. Joseph, Mo., where they waited together an hour and a half for a train to Hanover. Edward had eleven quarts of whisky in two suit cases. On the train to Hanover, the brothers occupied the same seat a part of the time, and under the seat were the two suit cases containing the liquor. They arrived at 2:30 in the morning of the 10th, and went to William's house. Edward then went across the street to where his brother Henry lived, who was in bed asleep, wakened him, and had him go to William's house, where the three drank part of the whisky. Henry drank too much and after going home abused his wife. She called the city marshal to come to her protection and informed him that there was whisky in William's house and asked him to get the sheriff and have all three of the brothers arrested. The sheriff had just arrived at appellant's residence when a car drove up in which were William, Edward, and George Doebele and

Frank Seeberger. The sheriff showed them the warrant, and William said: "There's nothing to that at all. Just forget it. It was just a little family affair." He inquired who started the prosecution. The sheriff said: "You had some liquor last night, did you not?" Edward said, "Yes, we brought in some whisky last night, and we stopped at Henry Doebele's as we came from the train and drank it all up." William, the appellant, said: "That is true. We have no whisky. We drank it all up." He said that if the sheriff thought there was any whisky in the house to go in and search. He afterwards withdrew this offer and refused to permit a search without a warrant. A warrant was procured and the whisky was found in a closet of the bedroom in William's house.

It is argued that the fact is undisputed that the liquor was placed in William Doebele's home without his knowledge or consent, and that he could not have counseled, aided, or abetted his brother in the commission of the offense. We think there were several circumstances which justified the jury in arriving at the verdict.

Moreover, the city marshal testified that he had a conversation with appellant about his arrest and the search of his house in which the appellant complained that the marshal should have exercised a little consideration, and could have put off calling the sheriff a couple of hours and then have told the parties that he was unable to get him; that, among other things, the appellant said: "You could have let us know when they were coming."

[2] The fact of possession, like any other element in the offense charged, may be established by circumstantial evidence.

The judgment is affirmed.

All the Justices concurring.

HUBBARD v. GARIES. (No. 23157.) *

(Supreme Court of Kansas. Oct. 8, 1921.)

*(Syllabus by the Court.)***Landlord and tenant §324 — Defendant's right to hay mowed from pasture held dependent on fact question of good husbandry.**

The provisions of a lease of farm land considered, and held, the question whether the tenant is entitled to hay mowed from pasture land, depends on whether or not his manner of using the pasture constituted good husbandry.

Appeal from District Court, Wabaunsee County.

Action by Robert Hubbard against George Garies. Judgment for defendant, and plain-

tiff appeals. Reversed and remanded, with directions.

Wheeler, Brewster & Hunt, of Topeka, for appellant.

A. E. Crane, of Topeka, for appellee.

BURCH, J. The action was one by a landlord to recover from his tenant the value of prairie hay grown on the leased premises and appropriated by the tenant. The judgment was for the defendant, and the plaintiff appeals.

The lease was of a described half section of land. The rent reserved consisted of shares of crops, with the exception of rent for the pasture; one-third of the wheat, two-fifths of the corn, two-fifths of the Kaffir corn, one-half of the alfalfa, one-third of the prairie hay, if baled, and two-fifths if stacked. Specific portions of the land from which these crops were to be produced were not described. It seems, from an agreed statement of facts on which judgment was rendered, that there was a meadow on the farm, from which 22 tons of hay were cut. The pasture land was not described, but appears to have been fenced. The tenant agreed to procure stock for the pasture, not exceeding 4 head for the acre, and the landlord was to receive \$6 per head for the season; stock not to be removed until pasture bill was paid. The acreage of the pasture was such that the tenant was not allowed to pasture more than 81 grown animals. He placed 30 head in the pasture, and kept them there until some time in August, when he sold 19 of them. The remaining 11 head were in the pasture for the full season. After the removal of cattle in August, the grass was not eaten down, and in late September the tenant cut from the pasture 46 tons of hay, worth \$15 per ton. He paid \$180 for the pasture, or at the rate of \$6 per head for 30 head. The parties stipulate that, if the plaintiff is entitled to recover, he should recover the value of one-third of the hay.

The tenant admits he cut 46 tons of prairie hay from the pasture, but he says the prairie hay referred to in the lease was hay on the meadow land; he has paid in full for the pasture, and, other shares of crops having been delivered or accounted for, all rent for the half section has been paid. The landlord says the word "meadow" does not appear in the lease, and the term "prairie hay" was not restricted to hay from the meadow.

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The tenant was obliged to procure stock for the pasture. That was one of the conditions of the lease, and the landlord's share of wheat, corn, Kaffir corn, alfalfa, and prairie hay, wherever cut, together with the sum received for pasture of stock, formed the entire consideration for the lease.

When the lease was executed, the parties doubtless understood the rent provisions to refer to known subdivisions of the land and established uses of those subdivisions. Doubtless, mowing the pasture was not thought of, and "prairie hay" was understood to mean hay from the meadow of native grass, as distinguished from alfalfa. Both parties understood that the tenant was to furnish as many cattle for the pasture as it would sustain without overstocking. There is nothing in the lease, however, which permits the tenant to convert the pasture into meadow. To do so would ordinarily constitute waste. A portion of the herbage of pastured land is returned to the soil in manure, uneaten grass returns to the soil and protects and enriches it, and mowing pasture land soon renders it unfit for pasture. This being true, the tenant should not be allowed to profit through a violation of his contract resulting in waste, and, but for the stipulation relating to amount of recovery, he might be required to account for all the hay taken from the pasture. If the tenant had plowed up the pasture land and planted it to corn, he could take none of the corn, and would be accountable for pastureage as such, and damages for waste. When the tenant delivered proper shares of the wheat, corn, Kaffir corn, alfalfa, and meadow hay, and paid for the number of cattle the pasture would sustain, he discharged his obligation in full, provided his handling of the pasture constituted good husbandry. While the facts adverted to are generally true, they may not be pertinent in this instance, considering the character of this particular pasture, the season, and other circumstances. Therefore the district court should determine the question of good husbandry as a question of fact, and, in the event the tenant's use of the pasture was not an approved use, he should account for the pasture hay according to the stipulation; otherwise the same judgment should be rendered as before.

The judgment of the district court is reversed, and the cause is remanded, with directions to proceed as indicated.

All the Justices concurring.

FARMER v. PURCELL. (No. 23350.)*

(Supreme Court of Kansas. Oct. 8, 1921.)

*(Syllabus by the Court.)***Master and servant** §367 — **Compensation claimant held employee of independent contractor and not of millowner.**

The owner of a sawmill had occasion to remove a quantity of sawdust that had accumulated. He arranged for his employees to feed it into a chute through which by an endless chain it was conveyed to an elevated bin from which it could be loaded into wagons by gravity. He contracted with a person to take it from the bin as fast as should be necessary to prevent such accumulation there as to delay the work, and remove it to a designated place, in consideration of the payment of a fixed price per hour. A driver employed by such person was injured while attempting to load a wagon from the bin and sued the mill owner under the compensation act. It is held that such person was an independent contractor and the plaintiff was not an employee of the defendant.

Appeal from District Court, Wyandotte County.

Action by Robert Farmer against Frank Purcell under the Workmen's Compensation Act for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions to enter judgment for defendant.

L. O. Carter, of Kansas City, for Farmer.
W. L. Wood, of Kansas City, for Purcell.

MASON, J. Robert Farmer sued Frank Purcell under the Workmen's Compensation Act (Laws 1911, c. 218, as amended by Laws 1913, c. 216) on account of an injury received at a time the plaintiff claims to have been employed by the defendant. The principal ground of defense was based upon the claim that at the time of the injury the plaintiff was not working for the defendant, but for an independent contractor, George E. Holter, who was doing a particular piece of work for the defendant under a special agreement. The plaintiff recovered judgment and the defendant appeals, his chief contention being that the evidence did not support a finding that the plaintiff was in his employ. The case was submitted to the jury under an instruction that if Holter was an independent contractor the plaintiff could not recover.

There is no substantial conflict in the evidence bearing upon the question at issue. The material facts as established by the evidence introduced by the plaintiff may be thus summarized:

The defendant had for some years been operating a sawmill and factory. A large quantity of sawdust had accumulated on the premises and which he desired to have removed. He caused to be constructed an ele-

vated bin holding about four wagonloads into which the sawdust was conveyed through a chute by an endless chain. Employees of the defendant fed the sawdust into the conveyor by means of horse-drawn scrapers.

The bin referred to was so arranged that a wagon could be driven under it and filled with sawdust by drawing out a slide by means of a handle made of a piece of belting or rubber hose. The defendant by his superintendent entered into an agreement with Holter to pay him \$2 an hour to haul the sawdust away from the bin, to take it away as fast as it was fed into the bin irrespective of how many teams this would require, to keep the bin clear so long as the work of removing the heap of sawdust lasted. Holter arranged with O. H. Groomer to share the work with him on a fifty-fifty basis. The work was done in accordance with this agreement. Holter and Groomer each furnished one wagon and team. Holter hired the plaintiff to drive his wagon a part of the time, paying him 35 cents an hour, or \$3.50 a day. The defendant paid Holter and Groomer by checks running to them jointly, and Holter paid the plaintiff. The plaintiff was injured in this manner: He drove the wagon under the outlet of the bin and undertook to draw the slide. As he did so the handle broke and he fell from the wagon to the ground. In the original agreement between the defendant's superintendent and Holter, it was specified that the sawdust was to be dumped one wagonload deep clear across the tract on which it was to be deposited. Afterwards the superintendent, seeing that if this were done there would not be enough sawdust to fill up some low places, asked Holter to fill up one of them first and this was done. He also asked to have a few of the loads dumped in the lumber yard to make a road, and this also was done—according to his testimony as an accommodation to him. Except as has been stated, the defendant or his superintendent exercised no control over the manner in which the work of hauling away the sawdust was carried on. The superintendent testified that he could have discharged Holter if he had failed to comply with his contract to keep the bin empty.

We do not regard these facts as establishing the relation of employer and employee between the defendant and the plaintiff. There is nothing to suggest any want of good faith in the arrangement entered into between the defendant and Holter, such as characterized the contract passed upon in *Nelson v. Cement Co.*, 84 Kan. 797, 115 Pac. 578; nor was the work in which the plaintiff was engaged intrinsically dangerous, as in the case of the mining operations involved in *Laffery v. Gypsum Co.*, 83 Kan. 349, 111 Pac. 498, 45 L. R. A. (N. S.) 930, Ann. Cas.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied December 16, 1921.

1912A, 590. The carrying away of the sawdust was not a continuous feature of the ordinary operation of the defendant's business. Such an amount of sawdust had accumulated that it became necessary, or at all events desirable, that it should be removed. The defendant arranged for his employees to do the work necessary to convey it to the elevated bin, and contracted with Holter at a fixed rate per hour to see that it was removed from the bin to the dumping ground fast enough to prevent a delay in the work. The means of removal—the number of wagons used and the selection of drivers—were left with Holter. The agreement covered the getting the sawdust away from the bin during the whole period occupied by the operation of removing it from its original position. The testimony was that Holter could have been discharged at any time, if he had failed to carry out his contract; the necessary implication being that he had a right to continue the work so long as it lasted provided he lived up to his agreement. Groomer testified that he and Holter continued to work till they got through the job; Holter, that—

"They [referring to the defendant] took all the sawdust out they was going to take out; they changed their minds and didn't take it all out, and laid the teams off."

To the question thus asked by the plaintiff (on direct examination), "Well, were you discharged or did you quit?" Holter answered: "We were not discharged; we were laid off, finished up." There was no other evidence on that feature of the case. The defendant had no control over or interest in the methods employed by Holter; he was concerned only with the results reached—the keeping of the bin empty (or in condition to receive the sawdust as it was fed in by the conveyor) and the dumping of the sawdust in the place that had been designated. The later indication of a somewhat different place for the disposal of a few loads, acquiesced in by Holter, whether as an accommodation or in recognition of a right on the part of the defendant to make such change, did not in our judgment amount to such a control of the method of reaching the result sought as to be inconsistent with the theory of an independent contract. Holter was at liberty to use his own teams or those of some one else; to drive them himself or hire any one he might choose for the purpose; and to do as he saw fit with his time, his implements, and his employees, so long as he prevented the undue accumulation of the sawdust in the bin, and procured its deposit in the proper place on its removal therefrom.

We do not deem it advisable to review the many cases presenting facts more or less similar to those here involved, some falling

on one side of the line and some on the other. A recent summary of the effect of the decisions is to be found in the article on Independent Contractors in Ruling Case Law (14 R. C. L. 85-108), and many cases involving the principle as applied to the Workmen's Compensation Act are collected in 1 Honnold on Workmen's Compensation, § 66. The determining consideration is whether or not there was a control of methods as distinguished from results, and we conclude that Holter was an independent contractor and that the plaintiff was not an employee of the defendant. It follows that there can be no recovery in this proceeding.

We are not called upon to determine whether the defendant might be liable notwithstanding the plaintiff was the employee of an independent contractor, under the portion of the Compensation Act which reads:

"Where any person (in this section referred to as principal) undertakes to execute any work which is a part of his trade or business or which he has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this act which he would have been liable to pay if that workman had been immediately employed by him. * * * (d) This section shall not apply to any case where the accident occurred elsewhere than on or in, or about the premises on which the principal has undertaken to execute work or which are otherwise under his control or management, or on, in, or about the execution of such work under his control or management." Gen. Stat. 1915, § 5398.

The instruction of the trial court that no recovery could be had if Holter was an independent contractor has not been challenged, but has been accepted as the law of the case. The matter is mentioned only in order that the decision may not be regarded as placing an interpretation upon the statutory provisions just quoted.

If the action were one for an injury to the plaintiff through the negligence of the defendant, an entirely different question would be presented. *Railroad Co. v. Madden*, 77 Kan. 80, 93 Pac. 586, 17 L. R. A. (N. S.) 788; 14 R. C. L. 81.

The plaintiff contends that error affecting the amount of the judgment was committed against him, but as we hold that no cause of action was established, it is not necessary to determine what would have been the proper basis of recovery if our conclusion in that regard had been different.

The judgment is reversed and the cause is remanded, with directions to render judgment for the defendant.

All the Justices concurring.

STATE v. KIPERS. (No. 23120.)*

(Supreme Court of Kansas. Oct. 8, 1921.)

(Syllabus by the Court.)

1. Criminal law §603(7, 12)—Where application did not show testimony expected from absent witness, supplemental, unverified application did, continuance properly denied.

In a criminal action, a verified application for a continuance on account of the absence of a witness failed to show to what the witness would testify; in a supplemental oral application afterward made, the evidence of the absent witness was set out, but the supplemental application was not sworn to nor verified. *Held*, that it was not error to deny a continuance.

2. Criminal law §404(1)—In prosecution for statutory rape, it is not error to permit child to be exhibited to the jury.

In a prosecution for rape by carnally and unlawfully knowing a female under the age of 18 years, it is not error to permit the child begotten by the unlawful intercourse to be exhibited to the jury where the child, at the time it is so exhibited, is more than one year old.

3. Criminal law §430—Certificate of birth of child of unlawful intercourse held admissible.

It is not reversible error to admit in evidence a certified copy of a certificate of birth made by an attending physician, where he on the stand testifies that he obtained from the defendant in a conversation with him all the information from which the facts stated in the certificate were derived, and details the conversation, which, if the testimony is true, establishes the facts stated in the certificate.

4. Criminal law §564(1)—Evidence held to show crime committed within county.

There was evidence sufficient to justify the jury in finding that the offense had been committed in Butler county.

Appeal from District Court, Butler County.

Anthony E. Kipers was convicted of statutory rape, and he appeals. Affirmed.

Chas. W. Steiger and Leydig, Geddes & Grant, all of El Dorado, for appellant.

Richard J. Hopkins, Atty. Gen., Arch F. Williams, of El Dorado, and Stanley C. Taylor, of Augusta, for the State.

MARSHALL, J. The defendant appeals from a conviction for rape by carnally and unlawfully knowing a female under the age of 18 years.

[1] 1. It is urged that the court committed error in refusing to grant a continuance on the application of the defendant. The action had been twice tried; each trial had resulted in a failure of the jury to agree upon a verdict. The trial which resulted in a conviction commenced on March 4, 1920. On that day the defendant presented an application

for a continuance on the ground of the absence of Mrs. John Kipers, who had been subpoenaed, but who at the time was sick, and unable to attend. That application was verified, but it was denied. Mrs. John Kipers and Lola Kipers had been witnesses on one or the other or both of the former trials. The evidence of Mrs. John Kipers given at a former trial was read to the jury. The plaintiff, by leave of court, over the objection of the defendant, indorsed the names of certain witnesses on the information. The defendant then orally renewed his application for a continuance, and stated as an additional ground therefor that Lola Kipers, who had been subpoenaed, could not attend on account of the sickness of her 8 months old child, and that the testimony of this witness was desired to refute the testimony of witnesses whose names had been on that day indorsed on the information. The statements in the renewed application were not sworn to nor verified, and the application was again denied. The plaintiff then made its trial statement at the conclusion of which the following transpired:

"By Attorney Geddes, for Defendant: In view of the statement of the attorney for the state, the defendant now asks leave to add a statement of what the witness Lola Kipers would testify to if present, such statement to be added to the application of the defendant for a continuance. This statement goes in as additional grounds for a continuance; that the witness Lola Kipers would testify, if present, that the information given to the attending physician with reference to the paternity of the child was given by her, and not by the defendant, Anthony Kipers.

"By the Court: That goes in as a part of the other application, and there is no need of any further ruling on it.

"By Attorney Geddes: No need of any further ruling."

On the trial the attending physician testified that he obtained information as to the paternity of the child from Anthony Kipers, the defendant. The testimony of Lola Kipers given at a former trial was read to the jury. Neither of the first two applications presented the evidence of the absent witness in such a form that it could be read as the deposition, and the last one was not sworn to nor verified. Continuances in criminal actions are granted "for like causes and under the like circumstances as in civil cases." Crim. Code, § 210 (Gen. St. 1915, § 8124). In civil actions an application for a continuance on the ground of the absence of evidence must be made by affidavit, must show the materiality of the evidence expected to be obtained, and must show what the applicant believes "the witness will prove."

"If thereupon the adverse party will consent that on the trial the facts alleged in the affidavit shall be read and treated as the deposition of the absent witness, or that the facts in

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied November 18, 1921.

relation to other evidence shall be taken as proved to the extent alleged in the affidavit, no continuance shall be granted on the ground of the absence of such evidence." Civ. Code, § 315 (Gen. St. 1915, § 7217).

None of the applications complied with the statute, and for that reason it was not error for the court to refuse to grant a continuance.

[2] 2. The person against whom the crime is alleged to have been committed was Hazel Belle Kipers. She gave birth to a child on December 30, 1918, and died a few days thereafter. The trial occurred more than a year after the birth of the child. It was exhibited to the jury over the objection of the defendant, who urges that as error. Although there is a sharp division of the authorities on the subject, this court has declared that a child may be exhibited to a jury for the purpose of establishing paternity in bastardy cases. *State ex rel. v. Browning*, 96 Kan. 540, 152 Pac. 672. Why the same thing cannot be done in a rape case is not readily perceived. Many authorities state that it can be properly done, although again there is a conflict in the decisions. 22 R. C. L. 1202; 33 Cyc. 1477.

[3] 3. A certified copy of the birth certificate, as it was on file with the board of health of the state of Kansas, was introduced in evidence, and was presented by L. P. Kissler, an officer from the board of health, who testified that it was an exact copy of the original certificate on file. The introduction of that certificate is urged as error. The attending physician testified that he made out the certificate, that he obtained from the defendant the information from which he made out the certificate, and detailed the conversation in which the information was given. The abstract discloses the following:

"By the Court: Tell the jury what information he gave you. A. Well, I asked him what township, and he said 'Murdock.' And I asked him his full name, and he said 'Anthony E. Kipers; residence, Benton; color, white; age at last birthday, 31; birthplace, Potomac, Ill.; occupation, farming.' I filled this in. It says: 'Number in order of births,' and I put in 'Number 1.' I do not know whether this was correct or not, but it was the first child by this mother, and the full maiden name of the mother was 'Hazel Halsey; residence, Benton; age at last birthday, 19; birthplace, Douglas, Kan.' * * *

"By the Court: Did the defendant say anything to you about who was the father of this child? A. We did not discuss that at all.

"Q. Nothing said about that at all? A. Only the first question that I asked him before I filled this out.

"Q. What was that first question? A. I asked him if he was married. And he said, 'Yes,' and then he gave me his name as father of the child."

If the certificate was improperly admitted in evidence, the testimony of the attend-

ing physician rendered immaterial any error that had been committed in its admission.

[4] 4. It is urged that the court committed error in overruling the defendant's demurrer to the plaintiff's evidence. It has often been said that a demurrer to the evidence is not proper in criminal cases. The question that the defendant urges under this head is that there was no evidence to prove that the offense had been committed in Butler county. There was no direct evidence as to the commission of the offense; the evidence was either circumstantial or was contained in admissions of the defendant. The defendant and his children and Hazel Belle Kipers lived in the same house at the defendant's home in Butler county. The mother of the defendant had adopted Hazel Belle Kipers when the latter was a small child, and she had been raised in the family with the defendant and three other boys. The husband of the adopting mother had died, and the mother had remarried. The defendant and his family, consisting of a wife and some children, had moved from Chicago to the home of his mother in Butler county, where his wife died. After the death of his wife his family consisted of his children and his adopted sister. The wife of one of the brothers of the defendant lived with him a part of the time.

At the time of the birth of the child the members of the family of the defendant were sick with the "flu," and he had difficulty in getting any of the neighbors to render any assistance. The testimony of one witness, a neighbor, as set out in the abstract, was in part as follows:

"I saw him again that night at my house; he came over after some milk. I asked him how they were, and he said they were pretty sick, and he said if some one would go in there and cook for them, that the kids were starving, and nobody said nothing. When he went away, or just before he went away, he said that he guessed they could lay there and kick the bucket. I told him, I says, 'Now, Tony, if this is a confinement we will go in and help you and do all we can but if it is the flu we do not want to run into it.' He said nothing. Mrs. Wilson and I went over about 8 o'clock; we did not go in the house at first. I talked with Tony; I said, 'Now, Tony, you have got to come across,' and I said, if it is a confinement case, we will go in and help, but if it is the flu we do not want to run into it; and he says it is not time for anything like that yet. He wanted me to get some one to go in there, and I went to George Pitcher's, and my wife and I and Bertha Pitcher went back to the Kipers home, and went into the house; this was about half past 9; I went into the kitchen and the women went into the room where Hazel was. Anthony said he wanted me to get a doctor. We were in the kitchen at the Kiper home when that conversation took place. I went to Mr. Phares and got Dr. Hurd, at Benton, but he did not come out. I went back to the house, and the baby had been born. At that time I had a conversation with Kipers, and I says, 'Tony, you know that

you ought not to have done this,' and he says, 'Why?' and he says, 'We are married,' and I thought then it was none of my business."

Another witness testified to hearing a statement made by the defendant at a place where threshing was being done, in which the defendant in substance stated that he was having illicit intercourse with some one, not named, at his home. The defendant denied making these statements, but the evidence of the witnesses who testified concerning them, and the undisputed evidence concerning the place of residence of the defendant's family, and his relationship to them, justified the jury in finding that the offense was committed in Butler county.

The judgment is affirmed.
All the Justices concurring.

FIELDS v. ALLEN COUNTY INV. CO. (No. 23128.)

(Supreme Court of Kansas. Oct. 8, 1921.)

(Syllabus by the Court.)

Mortgages \S 280(4)—Phrase to "accruing interest" thereof related to interest after contract date, and not that previously earned; "accrued interest."

Plaintiff bought a farm from defendant and assumed a mortgage thereon. The deed which plaintiff accepted contained a recital:

"All of said mortgages bearing date of September 2, 1918, due September 1, 1923, at 6 per cent. semiannual interest, payable to J. L. Pettyjohn & Company, of Olathe, Kansas, to accruing interest thereof, all of said mortgages grantee assumes and agrees to pay as part of the purchase price of said premises."

The contract was made February 11, 1919, and on March 1, 1919, the semiannual interest, \$240, became due, and plaintiff paid it to prevent foreclosure, and sued to recover the sum paid. *Held*, as against a demurrer to plaintiff's evidence, that the phrase, "to accruing interest thereof," related to the interest which would accrue after February 11, 1919, and that this phrase was not susceptible of an interpretation that the plaintiff bound himself to pay that portion of the semiannual interest which had already accrued—had already been earned—when the contract was made.

[Ed. Note.—For other definitions, see Words and Phrases, Accruing Interest.]

Appeal from District Court, Allen County.

Action by J. E. Fields against the Allen County Investment Company. Judgment for defendant on demurrer to evidence, and plaintiff appeals. Reversed, and remanded for new trial.

G. R. Gard and S. A. Gard, both of Iola, for appellant.

Apt & Apt. of Iola, for appellee.

DAWSON, J. The plaintiff bought a mortgaged farm from the defendant at an agreed price, and shortly thereafter the semiannual interest, \$240, fell due, which plaintiff had to pay, and in this action he seeks reimbursement.

The defendant advertised the farm for sale by circular letter in January, 1919. Plaintiff answered this letter by correspondence, and by telephone and other conversations. On February 11, 1919, a deal was closed whereby the plaintiff was to assume an \$8,000 mortgage on the farm, give a second mortgage on it, and pay \$1,200 in cash. Plaintiff planned to let a third party, D. C. Hall, have the farm, and Hall was to execute the second mortgage. This was explained to the defendant and apparently it acquiesced therein. Plaintiff paid the agreed sum of \$1,200 by a check on a distant bank, and until it was duly honored the defendant's agent and depository would not surrender the deed from the defendant. This and similar details, such as the necessary time to record Hall's second mortgage, delayed the completion of the transaction until about the last of February, 1919. The deed from the defendant recited that it was given subject to mortgages aggregating \$8,000—

"all of said mortgages bearing date of September 2, 1918, due September 1, 1923, at 6 per cent. semiannual interest, payable to J. L. Pettyjohn & Co., of Olathe, Kansas, to accruing interest thereof all of said mortgages grantee assumes and agrees to pay as part of the purchase price of said premises."

On March 1, 1919, the semiannual interest on the first mortgages fell due; plaintiff paid this amount, \$240, to prevent foreclosure, and now sues for its recovery.

Defendant's answer set up the documents and correspondence, and the deed containing a recital of the grantee's assumption of the mortgages which recital also included the words, "to accruing interest thereof," and the plaintiff's acceptance of the deed.

The oral evidence for plaintiff added nothing material to the matters pleaded, or to the documentary evidence, including the recital in the deed, which he had accepted. He testified that he noticed the words, "to accruing interest thereof," but did not know what they meant:

"A. I did not understand it. Mr. Gray (banker) and I looked over it and we tried to see if it meant the past or future, and we could figure nothing out but the future, 'to accruing interest.'

"Counsel for defendant: We object as wholly incompetent.

"By the Court: Sustained."

Defendant's demurrer to plaintiff's evidence was sustained, and plaintiff appeals.

There is something wrong here. Plaintiff bound himself to assume the mortgages and

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"to accruing interest thereof"; and while this phrase is obscure and ungrammatical, it certainly is not so indefinite and clumsy as to be susceptible of an interpretation that plaintiff bound himself to pay the interest which had already accrued. Almost the entire sum of \$240 had accrued when the deal was made on February 11. Only a few dollars of the \$240 which would be due on March 1 were yet to accrue. Nothing is more common in the commercial world than the offer of interest-bearing securities "at par and accrued interest." In such purchases and sales a computation is made as to what part of the interest is already earned or has "accrued," and what part of it has still to accrue—"the accruing interest thereof"—before the next interest paying period. In common parlance, accrued interest does not mean past-due interest; it simply means earned interest; and accruing interest is that which is being earned in the present time, and which is still to be earned during the period yet to run until the date fixed for payment.

We note the defendant's citations, and have carefully read *Gross v. Partenheimer*, 159 Pa. 556, 28 Atl. 370, but, as we construe this particular contract, with all the light available up to the point of the interposition of defendant's demurrer, the plaintiff, by the acceptance of the deed with its recitals of his assumption of the mortgages and "to accruing interest thereon," bound himself only to pay the interest accruing after the contract was made, and did not obligate himself to pay the interest which had already accrued.

This necessitates a reversal of the judgment on the demurrer, and that the cause be remanded for a new trial.

Reversed.

All the Justices concurring.

CLARK v. EATON et al. (No. 22981.)*

In re SPRUENS' ESTATE.

(Supreme Court of Kansas. Oct. 8, 1921.)

(Syllabus by the Court.)

1. Limitation of actions §197(4) — Evidence held to show credit keeping statute from running.

The evidence tended to show a credit on the claimant's account which kept the 3-year statute of limitation from running.

2. Executors and administrators §225(1) — Claimant waiting over two years and 50 days after debtor's death before procuring appointment of administrator held precluded from recovering.

The claimant waited more than 2 years and 50 days from the death of the decedent to procure the appointment of an administrator to whom his claim could be presented, and there-

fore, following *Hoover v. Hoover's Estate*, 104 Kan. 635, 180 Pac. 275, and cases cited, it is held he is thereby precluded from recovering under section 4565 of the General Statutes of 1915.

Appeal from District Court, Seward County.

In the matter of the claim of Francis M. Clark against T. J. Eaton, as administrator, and W. C. Spruens, sole heir of the estate of Sarah E. Spruens, deceased. Judgment for plaintiff, and defendants appeal. Reversed and remanded, with directions to enter judgment for defendant.

A. L. Noble, of Wichita, and Hackney & Moore and Grant Stafford, all of Winfield, for appellants.

Emory W. Earhart, of Winfield, for appellee.

WEST, J. Sarah E. Spruens died November 12, 1914, leaving her husband as her only heir. May 5, 1917, on the petition of Francis M. Clark, an administrator was appointed. His claim—the only one—was filed against the estate May 10, 1917: For the money lent June 12, 1909, \$1,500; about November 12, 1914, \$5; interest, \$720; total, \$2,225—with credit for the use of a room, \$522, leaving a balance of \$1,703. The claim was allowed by the probate court, and an appeal was taken to the district court where the jury returned a verdict in favor of the claimant. The administrator demurred to the evidence, which demurrer was overruled, and from this judgment he appeals, and contends that the claimant was barred by the three-year statute of limitation, and that the statute of non-claim (section 4565 of the General Statutes of 1915) also precludes his recovery.

There was evidence indicating that in 1908 the claimant lent his stepmother \$1,800. The testimony of the banker and the production of a certain check tended to show such fact. It was suggested on the argument that the claimant had forgotten the exact amount of the loan, and, as he was sure of only \$1,500 and interest, less credits, he could not recover more. It appears that the jury found the exact amount claimed \$1,703, which the court reduced to \$1,500 and from which there is no cross-appeal.

The claim would appear to be barred save for testimony to the effect that for more than five years Mr. Clark had the use of a room at the house of the deceased, for which he gave her credit at the rate of \$90 a year, amounting to \$522. It appeared that Mrs. Spruens had said in substance that this room rent was to offset the interest on the note, and, while the evidence of the witness so testifying was severely criticized by counsel, we find nothing in the record which precludes

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied November 18, 1921.

giving it credence as the trial court seems to have done.

[1] It is contended that there was no evidence introduced to avoid the operation of the statute of nonclaim, and that, as the creditor permitted more than 2 years and 50 days to elapse before applying for an administrator, he lost his right to proceed against the estate. In *Bauserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051, it was held that a creditor having a claim to establish against an estate may, if the widow or next of kin refuse to take out letters for 50 days after the death of the deceased, obtain the appointment of an administrator, and he cannot without good reason defer making such application until the statute of limitation has run, and then contend that all of the time from the death of the debtor to the appointment of the administrator the statute of limitations is suspended on account of the nonappointment of such administrator.

"If a creditor would save his claim against the estate of a decedent from the bar of the statute, he must exercise reasonable diligence, if the widow or next of kin refuse to take out letters of administration, to obtain administration for himself or some other person." Syl. par. 4.

In *Kulp v. Kulp*, 51 Kan. 341, 32 Pac. 1118, 21 L. R. A. 550, it was held that a creditor must take affirmative action within a reasonable time or the statute will run. *Bauserman v. Charlott* was approved and followed. It was held in *Brown v. Baxter*, 77 Kan. 97, 94 Pac. 155, 574, that where no administrator has been appointed the claim of a creditor will become void at the end of 3 years from the last date on which an administrator might have been appointed.

"Where the parties immediately interested in an estate fail to have an administrator appointed within the time fixed by the statute, then any creditor may cause one to be appointed, and from the time when such an appointment could have been made the 3-year statute of limitation begins to run against the creditors, whether an appointment is made or not." Page 110.

[2] The 3-year statute was changed to 2 in 1911. Laws 1911, c. 188, § 4. *Hoover v. Hoover's Estate*, 104 Kan. 635, 180 Pac. 275, discusses, reviews and affirms the *Bauserman*, *Kulp*, and *Brown* cases. There the executor failed to present his own claim. It was said:

"If, however, there had been a coexecutor, it would have been Hoover's duty to exhibit his demand to that coexecutor under section 4582, or sections 4565 and 4590 would apply to him, unless those sections are modified by section 4592. * * * E. G. Hoover argues that sections 4565 and 4590 began to run from the publication of the notice of appointment as executor, but that argument is faulty for the rea-

son announced in *Bauserman v. Charlott*, 46 Kan. 480, 26 Pac. 1051; *Kulp v. Kulp*, 51 Kan. 341, 32 Pac. 1118; and *Brown v. Baxter*, 77 Kan. 97, 94 Pac. 155, 574, where it was held that these statutes run against a creditor who permits the statutory time to elapse without procuring the appointment of a personal representative to whom the creditor's claim may be presented. * * *" 104 Kan. 641, 180 Pac. 277.

See also, *Collamore v. Wilder*, 19 Kan. 67; *Scroggs v. Tutt*, 23 Kan. 181, syl. par. 5, p. 188; *Andrews v. Morse*, 51 Kan. 30, 32 Pac. 640; *Bank v. King*, 60 Kan. 733, 57 Pac. 952; *Faler v. Culver*, 94 Kan. 123, 146 Pac. 333.

Here the death occurred November 12, 1914. The 50 days would be up January 1, 1915, and the statute of nonclaim (section 4565) would have had full operation by January 1, 1917. The language of the section amended was:

"All demands not thus exhibited within two years shall be forever barred. * * *" Gen. Stat. 1915, § 4565.

And this precise language was retained in the amendatory section, save the change of 3 to 2 years. Words could hardly be plainer, and the decisions cited simply give to them their natural and necessary effect. The application for administration was not made until May 5, 1917—more than four months too late. For this reason the plaintiff is precluded from recovery.

The judgment is therefore reversed, and the cause remanded, with directions to enter judgment for the defendant.

All the Justices concurring.

STEVENS v. HARMON. (No. 23195.)
(Supreme Court of Kansas. Oct. 8, 1921.)

(Syllabus by the Court.)

1. Carriers \S 408(3)—In suit for loss of suit case, held that there was no material variance between pleading and proof.

The proceedings considered, and held, there was no material variance between the pleading and the proof, evidence complained of was properly admitted, instructions to the jury were correct, and special findings of the jury were sustained by the evidence.

(Additional Syllabus by Editorial Staff.)

2. Carriers \S 408(4)—In suit for loss of articles without market value, proof of market value not essential.

In an action for loss of wearing apparel, and articles which because of use or for other reasons had no market value, proof of market value was not essential.

Appeal from District Court, Wyandotte County.

Action by Rosa L. Stevens against Elmer Harmon. Judgment for plaintiff, and defendant appeals. Affirmed.

David F. Carson, of Kansas City, Kan., for appellant.

Joseph P. Duffy, of Kansas City, Mo., for appellee.

BURCH, J. The action was one to recover the value of a lost or stolen suit case and its contents, which the defendant was employed to transfer from the plaintiff's address in Kansas City, Kan., to the Union Station in Kansas City, Mo. The plaintiff recovered, and the defendant appeals.

The defendant was engaged in the transfer business. Ellis, his baggageman, called for two trunks belonging to the plaintiff and for the suit case, and testified he was instructed to take them to the baggage department of the Union Station. He further testified he took the baggage to the station, unloaded it on the dock, took it to the baggageroom, and delivered it there. He placed it inside the baggageroom by the door. Depot baggagemen were there, and they weighed the suit case and put it away before he left. The trunks were not weighed before he left. He reported delivery of the baggage to the defendant. The jury did not believe the witness, and with the general verdict returned the following special findings of fact:

"(1) Did plaintiff give defendant's driver instructions where to deliver her baggage? A. Yes.

"(2) Was the suit case to be delivered at the baggageroom of the Union Station? A. Yes.

"(3) Did defendant's driver deliver the suit case and trunks obtained from 706 Garfield, Kansas City, Kan., at the baggageroom at the Union Station? A. Trunks were delivered and suit case was not."

There was ample evidence to sustain the special findings.

[1] The plaintiff pleaded an engagement to carry the baggage to the Union Station and there deliver it to the plaintiff, her agents, or assigns. It is said there was no proof that the plaintiff had any agent at the Union Station to receive the baggage. The plaintiff and the defendant's driver both testified that the driver was instructed to deliver the baggage at the baggageroom of the depot. The transaction was of the everyday kind between traveler and carrier, and the technical legal relation of the baggage department of the Union Station to the plaintiff is not of the slightest consequence, especially in view of the findings of fact.

One count of the petition charged the carrier with negligence. It is said there was no proof of negligence. There was substantial proof that the suit case was in an insecure

position on the defendant's wagon when the defendant's driver started to the station with it; but the issue of negligence was not submitted to the jury. The instructions based liability on nondelivery by the carrier, and correctly stated the law on that subject.

[2] The suit case had been used, and its contents consisted of female wearing apparel and articles which, because of use or for other reasons, had no market value in the sense in which that expression is used. Under the circumstances, proof of market value was not essential, and there is no suggestion that any article was overvalued.

None of the objections to the proceedings is of sufficient moment to require a reversal of the judgment of the district court, and it is affirmed.

All the Justices concurring.

O'ROKE v. LEDERBRAND et al.

(No. 23196.)

(Supreme Court of Kansas. Oct. 8, 1921.)

(Syllabus by the Court.)

Appeal and error §907(4)—Where evidence introduced is not presented, it will be presumed to support decision.

On appeal from the overruling of a motion to revive a judgment, it appearing that evidence was introduced which has not been presented to this court, it is held, that the presumption must be indulged that the evidence supported the decision; the existence of grounds therefor not being negatived by the record.

Appeal from District Court, Hodgeman County.

Action by John O'Roke against John Lederbrand and others on a note to foreclose a lien, making other mortgagees parties. Motion by W. D. McDaniels, a mortgagee, to revive his personal judgment against defendants. Motion denied, and he appeals. Affirmed.

B. H. Asher, of Jetmore, for appellant.

Albert H. Wilson, of Jetmore, for appellees.

MASON, J. In an action involving the foreclosure of several real estate mortgages, W. D. McDaniel obtained a personal judgment against John W. and Mary Lederbrand. The mortgaged property was sold at sheriff's sale but did not bring enough to pay all the liens. More than five years after the judgment was rendered, but less than six, McDaniel filed a motion to revive the personal judgment against the Lederbrands. The motion was overruled, and he appeals.

McDaniel claims that the record shows that his personal judgment remains unpaid to the extent of substantially \$284.75 and

that it should have been revived as an obligation for that amount. The Lederbrands contend that the hearing was had upon evidence which has not been presented to this court and that the presumption must be indulged that upon a sufficient showing the trial court found that the whole of the judgment had been paid, either from the proceeds of the sale of the land, or otherwise.

In 1909 the Lederbrands executed to John H. O'Roke a note for \$4,500 secured by a first mortgage on a section of land. In 1911 J. I. Hilton and wife executed to D. H. Spencer a note for \$1,600 secured by a mortgage on the north half of the section. In 1912 the Lederbrands executed to McDaniel a note for \$1,000, secured by a mortgage on the south half of the section. O'Roke sued to foreclose his lien, making the other mortgagees parties. On April 21, 1913, judgment was rendered giving O'Roke a first lien upon the whole section for \$5,022.66, bearing 6 per cent. interest from that date. McDaniel was given a second lien upon the south half, with a personal judgment against the Lederbrands, for \$1,108, bearing 10 per cent. interest. And Spencer was given a second lien on the north half, with a personal judgment against the Hiltons for \$1,939.50, bearing 10 per cent. interest. On June 10, 1913, the property was sold by the sheriff to McDaniel, the north half for \$3,000 and the south half for \$3,400; the money being paid into court, and the sale being confirmed on the same day. The motion for a revivor was filed August 10, 1918.

The decree of foreclosure directed the proceeds of the sale to be applied first to the costs, which appear to have amounted to \$88, then to the payment of the lien under the first mortgage, which disregarding interest amounted to \$5,022.66, and that the remainder should be brought into court to abide its further order. McDaniel assumes that one-half of the first lien, or about \$2,511, and one-half of the costs, or \$44, was paid out of the proceeds of the sale of each half section, leaving from the \$3,400 which was bid and paid for the south half, \$845 to apply on his judgment of \$1,108, reducing the portion thereof still owing him to \$263. If interest were included in the computation, the amount would doubtless be raised to that claimed by him.

The entry of the court's order contains a recital that evidence was introduced at the hearing of the motion for a revivor, and the abstract does not disclose what that evidence was. In this situation no reversal can be had unless it should be clear that no evidence could have been produced to defeat McDaniel's claim. Leaving out of account the possibility that any balance of the judgment may have been paid from some other source, it is not certain that the proceeds of the sale, properly applied, were not sufficient

to meet the entire amount. The appellant assumes that one half of the first lien upon the whole section was paid out of the \$3,000 for which the north 320-acre tract was sold and the other half out of the \$3,400 realized on the remainder of the section. This assumption is not warranted. There may have been equitable reasons for a different apportionment. The files of the district court have been examined by us for the purpose of learning whether they contained anything conclusively establishing the appellant's claim, but they show no order concerning the distribution of the proceeds of the sale in excess of the costs and the first lien, nor do they indicate what the actual distribution was. There being no record, so far at least as this court is advised, of the disposition of a fund which was large enough, if applied to that purpose, to cancel the judgment, we are unable to say that error was committed in the refusal to order its revivor.

The judgment is affirmed.

All the Justices concurring.

PRICE v. RUCKER. (No. 23348.)

(Supreme Court of Kansas. Oct. 8, 1921.)

(Syllabus by the Court.)

1. Process \S 96(3)—Affidavit for publication showing nonresidence but not parties' interests held sufficient.

An affidavit to obtain service by publication, which states that the action is one for the partition of certain real property and that the defendant is a resident of another state and therefore the plaintiff is unable to procure personal service upon him, is sufficient, although it does not show the interests of the parties in the land or that a cause of action exists against the defendant.

2. Process \S 96(4)—Statutory language relating to defendant's nonresidence and inability to secure actual service not necessary in affidavit.

It is not necessary that the language employed in the statute relating to the nonresidence of the defendant or the inability of the plaintiff to secure actual service of summons upon him be used in the affidavit. It is enough if the statements made substantially show the statutory foundations for services by publication.

Appeal from District Court, Sumner County.

Action by R. P. Price against Birdie Rucker for partition of land. Judgment for plaintiff, and defendant appeals. Affirmed.

L. H. Finney, of Wellington, for appellant.
W. W. Schwinn, of Wellington, for appellee.

JOHNSTON, C. J. This action was brought by the plaintiff for the partition of a tract of land in which it was alleged that he owned six-sevenths of the tract and that the remaining one-seventh was owned by the defendant. Service on the defendant was obtained by publication, and, no appearance having been made by the defendant, the case was tried, and on April 20, 1920, the court found and decreed that the land was owned in the proportions alleged, that it should be partitioned, and commissioners for that purpose were appointed. Action was taken by the commissioners, who reported that the land was impartible in kind without prejudice to the parties, and appraised its value at \$22,000. The report was confirmed by the court on May 4, 1920, and three days later the plaintiff elected to take the tract at the appraised value. On May 25, 1920, the court awarded the land to plaintiff on payment into court of one-seventh of the valuation, \$3,142.85, for the use of the defendant, and required plaintiff to pay six-sevenths of the costs, and the defendant the remainder. The sheriff was directed to execute a deed of the land to the plaintiff. The sum mentioned was paid into court and the deed to plaintiff was executed and delivered.

[1] On October 15, 1920, the defendant made a special appearance and moved the court to set aside the service by publication, alleging that it was unauthorized and void. The invalidity asserted was that the affidavit on which it was based fell short of the Code requirements. The affidavit stated—

"That I am one of the attorneys for the plaintiff in the above-entitled action and as such am authorized to make this affidavit. That plaintiff has commenced this action to have partition of the southwest quarter of section 12 and the east half of the northwest quarter of section 12—13—1 east of the 6th P. M. in Sumner county, Kan.

"That the defendant, Birdie Rucker, is a nonresident of the state of Kansas, and is a resident of Johnson county, Tex., and her post office address is Cleburne, Tex. The plaintiff is unable to procure personal service of summons upon the defendant and can only procure service of summons upon her by publication."

It is contended that the affidavit does not show that the action is one of those in which service by publication may be made; that it fails to state the interest of the defendant in the land or anything as to the title ownership or possession of it by either party. It does allege that the action is one touching real property and asks for the partition of the same, and under the Code this is one of the cases in which service by publication may be made where the defendant is a nonresident of the state. Civ. Code, § 78 (Gen. St. 1915, § 6969). The Code, among other things, requires that the affidavit shall state that the case is one of those in which

service by publication may be made. Civ. Code, § 79. (Gen. St. 1915, § 6970). It is not necessary to set out the interest of the several parties or to show that a cause of action exists against the defendant. It is enough to state the statutory foundations for service by publication, that is, to state in general terms that the action is one relating to real estate and that the defendant is a nonresident of the state, or that the plaintiff cannot by due diligence obtain service upon him within the state. Gillespie v. Thomas, 23 Kan. 138; Sharp v. McCollm, 79 Kan. 772, 101 Pac. 659; Harvey v. Harvey, 85 Kan. 689, 118 Pac. 1038.

[2] Defendant insists that the affidavit was defective in failing to state that the plaintiff was unable to procure personal service on the defendant "within this state." It is alleged that the defendant is a nonresident of Kansas, and is a resident of Cleburne, Tex., and that therefore personal service of a summons cannot be procured. It is not necessary that the statutory language be employed in the affidavit, but other terms conveying the same meaning may be used. The terms used in the affidavit are the equivalent of the expression that service of summons could not be had upon the defendant in this state. We conclude that the affidavit substantially contains the requirements of the statute and that the publication notice was sufficient.

Judgment affirmed.

All the Justices concurring.

SMITH v. SMITH et al. (No. 23144.)

(Supreme Court of Kansas. Oct. 8, 1921.)

(Syllabus by the Court.)

1. Wills \S 64—Homestead right of party seeking to cancel contract to make will held not greater than that of defendants occupying premises 17 years.

The claim of the plaintiff to a homestead right in the land in controversy is not greater than that of the defendants who have occupied it as their home for over 17 years.

2. Wills \S 64—Evidence held to show defendants entitled to continuation of contract to devise.

Under the evidence and the facts found by the trial court the defendants are entitled to a continuation of the arrangement touching the property covered by the contract involved herein.

3. Cause remanded for decree as indicated.

The cause is remanded, with directions to enter a decree as indicated in the opinion, and to retain jurisdiction with power to modify.

Appeal from District Court, Marion County.

Suit by Esther M. Smith against Cameron Smith and another. Decree in favor of plaintiff, and defendants appeal. Reversed and remanded, with directions.

F. L. Martin, John M. Martin, and James N. Farley, all of Hutchinson, for appellants.

John E. Wheeler and Carpenter & Carpenter, all of Marion, for appellee.

WEST, J. The plaintiff, Esther M. Smith, brought this suit against her son, Cameron Smith, and his wife, to set aside a contract by which she had agreed to will to the son 80 acres of land or, in case of his death before hers, to his children, subject to a life estate therein to his wife, he to live on the land and care for it. She claims that the defendants had made life unbearable in her home and asks that she be given possession of the land to their exclusion.

The answer among other things alleged that, 17 years before the beginning of this suit, the son made a verbal contract that he should live at home on the farm, take full charge of the work and personal property, and operate the farm for his father and mother, and at their death receive as compensation for his services the full legal title to the farm, consisting of 160 acres; or, if he should die preceding his parents, the title to go to his children subject to a life estate to his wife and that after the father's death the contract was changed so that a brother was to have one 80 and the defendant Cameron Smith the other. It was further alleged that the defendant carried out his part of the agreement faithfully, and that the mother had made the will as agreed to, but had later revoked it; that two grandchildren had made their home on the place, and that the defendant had cared for them.

The court made findings of facts and conclusions of law by which it appears that the plaintiff and her husband engaged for many years in farming, and accumulated a quarter section of land. The son Curtis did not remain at home after his majority, but married and went away. The defendant Cameron desired to enter other work, but his father was in bad health, and it was verbally agreed between the three that he should remain at home, work on the farm, pay up the personal debts, and at the death of his parents have the farm and all the personal property; and in the spring of 1892, he entered upon the performance of this contract. He was married in 1905, and brought his wife home to the farm, where she did her full share of the work. Three children were born to them. In 1906, the father died, leaving 13 head of horses and colts, and some other stock and farm implements worth about \$2,500. There was a mortgage on the farm of \$2,100, and one on the personal property of \$1,100. By oral agreement between the mother and the defendant Cameron, the former contract was modified so that the

north 80 should go to Curtis and the south 80 to Cameron. February 26, 1917, a written contract to this effect was entered into between the mother and Cameron, and the mother made a will to that effect which she deposited in the office of the probate court of Marion county. In September, 1917, the plaintiff became ill, and was taken to a hospital in Kansas City for a surgical operation. Before this, and up to the fall of 1918, the parties lived together agreeably on the farm and without any serious trouble or dispute. In 1919, the mother's attitude changed, and she charged Cameron with holding out her money; with falsehood touching her checks on the bank; with having begun to take advantage of her; with having subjected her to the operation in hopes she would not survive—all of which charges were without foundation, and after this suit was begun quarrels and bad language and slanderous remarks occurred, and bad blood arose between the parties.

"(14) About the time of the bringing of this action the plaintiff repudiated the contract and procured from the probate court the will that she had deposited there for the purpose of carrying out the same, and burned or destroyed it.

"(15) The defendant Cameron Smith from 1902 has faithfully performed the contract on his part for 17 years, and up to the time the same was abandoned and repudiated by the plaintiff, and has raised crops in a good and farmerlike manner, and paid off the mortgages on the farm and personal property out of the proceeds of said crops.

"(16) The farm machinery and personal property that was on hand at the time the performance of the contract in question was commenced in 1902 has been worn out or disposed of, and replaced out of the proceeds of crops that were raised on the farm in question since said time, and at the time of the repudiation of the contract, in question said personal property consisted of horses, cows, farm implements, tractors, automobile, household furniture, savings stamps, and bonds of the total value of about \$4,000, and said farm was at said time of the value of \$25,000, and the north 80 of same of the value of \$13,000.

"(17) That since the repudiation of said contract, the defendant Cameron Smith has planted and growing on said farm 70 acres of wheat, 20 acres of oats, and 24 acres of corn.

"(18) That at the time of the repudiation of the contract the plaintiff was about 65 years old, and her expectancy of life 11 years.

"(19) At about the time or after the bringing of this suit, the plaintiff Esther M. Smith moved into a little house on the farm in question, and situated or located near by the dwelling house thereon theretofore occupied by herself and the defendant, and that she now lives in said house on said farm."

As conclusions of law the court found:

"(1) The plaintiff is not entitled to have the contract in question canceled or rescinded.

"(2) The court should not compel the specific performance of the contract in question by the parties thereto; that the equities in the

property, real and personal, should be adjusted between said parties on the basis of the time that said contract was performed as compared with the expectancy of the life of Esther M. Smith at the time of her breach or abandonment of the contract.

"(3) That the defendant Cameron Smith be allowed $17/28$ of the value of the south 80 of the farm in question and amounting to \$7,892.85, and the same be made a lien upon the same and due and payable at the death of Esther M. Smith.

"(4) If the contract in question had been fully performed to the death of Esther M. Smith, Cameron Smith would be entitled to whatever personal property she then owned, subject to the payment of her debts as to the amount and value of the same at the time. We have no way of knowing, if the contract had not been breached, and Cameron Smith had continued in the farming and managing of the farm in question to the death of Esther M. Smith, and in view of the crops and the proceeds from the same prior to the breach of the same there is good reason to believe, that the amount and value of such personal property would not be less than the amount and value at the present time, to wit, \$4,000, and that Cameron Smith should be allowed $17/28$ of said value, or \$2,428.57, same to be due and payable out of the estate of Esther M. Smith after her death.

"(5) That the crops planted on the farm in question by Cameron Smith since the breach of the contract in question should be settled for on the basis of rents or share of said crops when gathered or harvested; that Cameron have half of said crops, and that he deliver the other half of said crops to Esther M. Smith, and that Cameron Smith be allowed to retain possession of the farm in question for the purpose of harvesting, cultivating, and gathering said crops, and to date not longer than January 1, 1921, at which time his right to the possession of said farm or any part thereof is to cease and determine, and to be surrendered to Esther M. Smith, together with the possession, all personal property of every nature and kind owned by Esther M. Smith."

The defendants appeal, and, while no criticism of the findings of fact is made, the conclusions of law are met with the claim that they are not equitable, and counsel suggest various changes which (they think) should be made therein.

[1] The plaintiff argues that the court found that on account of bad blood the parties could not live together on the farm for the purpose of carrying out the contract, and that the amount awarded the son by the court is sufficient to compensate him for the work and services performed under the terms of the written contract. It is suggested that as long as she is living the mother is entitled to her homestead, and that no court can deprive her of this constitutional right.

The findings of fact show that for 17 years Cameron Smith faithfully carried out the terms of the contract he had made with his parents, and later modified by agreement with his mother, and that not until her hospital experience did she turn against him. There is nothing to indicate that she was in any wise justified in the charges she made against him, but on the contrary it is expressly found that such charges were without foundation; hence, in all these matters he was without fault, and the mutual bad blood and recriminations which rendered it, as the court found, impossible for the parties to live together seem to have been on account of the mother's changed disposition towards the son and her unfounded charges against him. We do not perceive that the homestead question is involved for, the land in controversy is as much the homestead of the defendants as of the plaintiff, and has been for many years.

[2,3] The unfortunate change of disposition wrought upon the mother, evidently by her sickness and operation, while lamentable in the extreme does not make a just ground for depriving the son of his rights under the contract, or of the proceeds of his industry during the long term of years he has been in charge of the farm. We are unable to agree with the trial court as to the equitable requirements of the situation, but upon the findings of fact we have, after due consideration, reached the conclusion that a different decree should be rendered.

The decree is reversed and the cause remanded, with directions to enter a decree to the effect: First. That the defendant be permitted to remain in possession of the farm, to operate it in accordance with the terms of the contract heretofore entered into between the defendant Cameron M. Smith and his parents, as later modified by the contract with his mother; should the plaintiff prefer to live apart from the defendants, that she be permitted to live elsewhere on the farm, or at any other reasonable place selected by her. Second. That upon the death of the plaintiff the south 80 of the quarter section involved and the personal property shall go to Cameron Smith, or, in case he should not be living at that time, such real and personal property to go to his children, subject to a life estate to his wife, Amelia A. Smith, such life estate to cease in case she should marry again. Third. That the trial court retain jurisdiction of the cause and of the parties thereto, with power to modify the decree from time to time as circumstances may require.

All the Justices concurring.

CITY OF GREAT BEND v. SHEPLER.
(No. 22770.)

(Supreme Court of Kansas. Oct. 8, 1921.)

(Syllabus by the Court.)

1. Criminal law \S 593—Motion for continuance for prejudice requiring outside counsel held properly overruled.

No error was committed in denying the defendant's application for a continuance.

2. Criminal law \S 1170½(2) — Answering question as to reputation of defendant's hotel from witness' observation held harmless.

Certain rulings touching the reception of evidence with reference to the reputation of the defendant and of his hotel examined, and held to be free from material error.

3. Criminal law \S 829(1)—Refusing instruction on matters covered by others not error.

A certain requested instruction was rightfully refused because covered by others which were given.

4. Evidence held to justify conviction.

The evidence examined, and found fully to justify a conviction.

5. Indictment and Information \S 125(26)—Complaint held not duplicitous.

The motion to quash the complaint for duplicity was properly overruled.

6. Criminal law \S 878(3)—Conviction under one count of ordinance held to operate as acquittal under other counts.

The verdict of guilty under one count operated as an acquittal on the other counts.

7. Indictment and Information \S 125(8)—Rule that information must state but one offense, except for enumeration of stages in commission thereof, applied.

Rule followed that each count in a complaint or information must state but one offense, save that it may set forth different steps or stages in the commission of one offense.

(Additional Syllabus by Editorial Staff.)

8. Criminal law \S 261(1)—Failure to arraign not ground for reversal.

The failure to arraign, even in a misdemeanor case, where the state is plaintiff, is not ground for reversal.

Marshall and Burch, JJ., dissenting in part.

Appeal from District Court, Barton County.

C. V. Shepler was convicted of violation of an ordinance of the city of Great Bend, prohibiting the keeping of houses of prostitution, and he appeals. Affirmed.

J. P. McLaughlin, of Osage City, and Harvey & O'Neil, of Topeka, for appellant.

J. W. Clark, of Lawrence, for appellee.

WEST, J. The city of Great Bend has an ordinance, section 2 of which makes it a mis-

demeanor to keep for use any house or other building, or any room in any house or other building, for any lewd or immoral purpose; section 3 makes it a misdemeanor to keep any house or building, or any room in any house, which shall with the consent of the keeper be resorted to by others for lewd purposes; and section 4 makes it a misdemeanor for any person to keep any house or other building for the purpose of prostitution, or for any lewd purpose. The defendant was arrested under a complaint which charged that he kept for use a certain building known as the Shepler Hotel, for lewd and immoral purposes; that he kept such building and rooms therein which, with his consent, were resorted to by others for lewd purposes, and that he kept such building for the purposes of prostitution and lewdness. This complaint was filed before the police judge on July 15, 1919, and in the district court August 30, 1919. On November 26, 1919, the defendant moved to quash on account of duplicity and other grounds, which motion was overruled. The abstract states that the transcript does not show the defendant was arraigned or entered a plea, and that in fact he was not arraigned, and did not plead to the complaint. At the conclusion of the city's evidence, the defendant demurred thereto, and moved for discharge, on the ground that it did not show any public offense. Both were overruled. On November 26, the defendant filed a motion for a new trial and a motion in arrest of judgment, which motions on December 16, 1919, were overruled.

The court charged that, if the jury believed from the evidence beyond a reasonable doubt that the defendant was the owner or in charge of the building described, and the rooms therein, and—

"that he kept the same for lewd and immoral purposes, and permitted other persons to resort thereto for lewd and immoral purposes and for prostitution and lewdness, then, and in such case, it would be your duty to find the defendant guilty of the offense charged in the complaint."

The jury were also instructed that, under the ordinance, to justify conviction they must find:

"That the defendant was in charge of the Shepler Hotel as the keeper thereof, and that the same was kept for immoral purposes; that he did then and there keep the said building and rooms therein which with his consent were resorted to by others for lewd purposes, and for prostitution and lewdness; or that such conduct was permitted upon his part to be carried on at such place for such purposes in connection with the operation of said premises as a hotel; and that he knew, at the time named in the complaint, to wit, July 12, 1919, acts of immorality, prostitution, and lewdness were being therein conducted."

The jury found the defendant guilty as charged under section 2 of the ordinance only, the section which makes it a misdemeanor to keep any house or building for any lewd or immoral purpose.

The defendant assigns as error the overruling of his motion for continuance, his motion to quash, his demurrer to the evidence, the motions to discharge, and for a new trial, and to set aside the verdict. He also complains of the admission and rejection of certain testimony and the giving and refusing of certain instructions; also failure to arraign the defendant, and to require his plea to the complaint.

[1] The motion for continuance was based on the ground that, owing to local prejudice, outside counsel were required, but were not present. We have examined the record touching this matter, and do not feel convinced that any error was committed in overruling the motion.

[8] Failure to arraign, even in a misdemeanor case, where the state is plaintiff is not a ground for reversal. *State v. Forner*, 75 Kan. 423, 89 Pac. 674, 12 Ann. Cas. 703. See, also, *State v. Sexton*, 91 Kan. 171, 179, 136 Pac. 901.

[2] Complaint is made about sustaining objections to certain testimony of witnesses Kelly and Everleigh touching the reputation of the hotel, but the abstract fails to show any such ruling. Witness Luce was asked:

"Q. From your observations and what you have seen there, are you able to tell the reputation of this place as being conducted in a proper manner as to morality and chastity?"

To this an objection was raised on the grounds of incompetency, irrelevancy, immateriality, and because leading, and was sustained. We are unable to see how the reputation of the place could arise from what one observes or sees there. But as the question was only whether the witness from such means was able to tell its reputation, no harm could have come from an answer "Yes" or "No" to such question. What the answer would have been, however, we cannot tell, and hence we cannot see any harm in the ruling, as no light was given on this matter on the hearing of the motion for a new trial.

Complaint is made of an instruction to the effect that in determining the reputation of the hotel the jury might take into consideration its character and reputation, as well as the character and reputation of the defendant. Counsel points out no authority for his criticism of this instruction, and assuming, without deciding, that the character and reputation of the defendant were not proper subjects for inquiry touching the character and reputation of his hotel, it may be observed that, under the evidence and findings in the abstract, no material prejudice resulted from this instruction.

[3] Fault is found because the court refused to give a requested instruction to the effect that the defendant was not an insurer of the conduct of his guests and employees, and that he could be convicted only for knowingly permitting or allowing misconduct on their part in his building. In instruction No. 9 the court told the jury that, if the defendant operated the building as a hotel or lodging house, and—

"in connection therewith knowingly permitted acts of lewdness and prostitution upon the part of his employees and guests of the said hotel, or permitted others to resort thereto for purposes of prostitution and lewdness, such conduct upon his part would be sufficient to constitute a violation" of the ordinance.

In instruction No. 13 they were expressly told that if the defendant had no knowledge of such conduct, and was innocent of any participation therein, then, and in such case he could not lawfully be convicted of the charge contained in the complaint. Hence there was no error in refusing the instruction referred to.

[4] It is argued in the brief that the evidence was insufficient to establish the guilt of the defendant. We cannot agree with this contention. The testimony found in the abstract paints about as complete a picture of the sort of place charged in the complaint as could be furnished by photographs and moving pictures.

[5, 7] We have left until the last the ruling of the court in refusing to quash the complaint, as it is the only serious point presented. Even in misdemeanor cases the defendant has a right to know the nature and cause of the accusation against him, so that he may properly prepare his defense, and if in one count of the complaint he is charged with several distinct offenses, it is quite possible, if not probable, that some of the jurors might deem him guilty of one and not of the others, and other members of the panel might take a different view of the matter, and so he would find himself convicted by the ballot of fewer than the requisite number of jurors. Former mechanical strictness touching indictments and informations has happily been superseded by practical and sensible rules of criminal pleading, but there are still rules, and a citizen cannot be haled into court and subjected to trial without being advised of some specific offense which the prosecution claims he has committed, and on that charge he is entitled to a verdict by all the members of the jury. The state or the city cannot, when 12 jurors are impaneled, convict a defendant of an offense unless the 12 unite in finding him guilty; and if he is charged with three separate offenses in one count, and four of the jurors believe him guilty of one, four of another, and four of the third, they

cannot, by combining their ballots return a legal verdict of "guilty" against him.

It is no trivial matter for a citizen to be subjected to trial upon the accusation of having committed an offense against the laws of his state or municipality, and however guilty he may in fact be, the presumption until such guilt is found in accordance with the law is in favor of his innocence, and the same rules must apply on the trial of one in fact not guilty as in the trial of a criminal of the deepest dye. This matter was thoroughly discussed and decided in *State v. Green*, 104 Kan. 16, 177 Pac. 519, a case involving a charge of misdemeanor. In that case one count in the information charged that the defendant at divers times and places delivered large consignments of liquor. It is perfectly plain that each one of these deliveries must have been a separate and distinct offense from the others. In this case we are confronted with a very peculiar ordinance. In *State v. Goodwin*, 33 Kan. 538, 6 Pac. 899, an information charging a defendant with taking away a female under the age of 18 years for the purpose of prostitution and concubinage, was held bad for duplicity. The difference between the two purposes charged was plainly pointed out by Horton, C. J., who said:

"Now two or more offenses may, under proper circumstances, be joined in one information, but it must be in separate counts. Each count, as a general thing, should embrace one complete statement of a cause of action, and one count should not include distinct offenses—at least, distinct felonies." 33 Kan. pp. 541, 542, 6 Pac. 901.

It was said that this rule did not apply in cases merely of misdemeanor, citing *State v. Schweiter*, 27 Kan. 499. In that case it was held that, when a statute makes either of two or more distinct acts connected with the same general offense, and subject to the same measure and kind of punishment, indictable separately and as distinct crimes, when each shall have been committed by the same person and at the same time, they may be coupled in one count as constituting all together one offense only. In such cases, the offender may be informed against as for one combined act. The charge there was that the defendant did unlawfully sell and barter spirituous, malt, and other intoxicating liquors, and there was a motion to elect whether the prosecution should proceed for selling or for bartering. It was said that the sev-

eral phases were construed as so many steps and stages in the same affair. In *State v. Thom*, 92 Kan. 436, 140 Pac. 866, in considering an information under the white slave act, it was held that the act (section 1, c. 179, of the Laws of 1913) defines three felonies: First, enticing away females for the purpose of prostitution, etc.; second, detaining one for such purposes; and third, persuading, inducing, or enticing or assisting in persuading or enticing, such person for such purposes.

It might be possible to resolve this ordinance into one defining three separate offenses, but it would be difficult. It is true that the court in instruction No. 6 charged in the conjunctive, instead of the alternative, but no complaint seems to have been made of that. While the ordinance is quite remarkable for its construction, and while the complaint dangerously neared the point of duplicity, that point can hardly be said to have been reached. In *State v. Pryor*, 53 Kan. 657, 37 Pac. 169, it was held that, when a statute makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a phase in the same offense, and no motion to quash before arraignment is presented, such information is not fatally defective, because they are coupled in the same count. It was there said to be the general rule that duplicity in criminal cases does not warrant an arrest of judgment, and "it is cured generally by a verdict of guilty as to one of the offenses charged." 53 Kan. 659, 37 Pac. 170.

[6] In this case the jury found the defendant guilty under section 2 of the ordinance, which must be deemed to have the effect of clearing him of any offense covered by the other two sections.

Finding no materially prejudicial error in the record, the judgment is affirmed.

JOHNSTON, C. J., and MASON, PORTER, WEST, and DAWSON, JJ., concurring.

MARSHALL, J. I concur in the result reached, but I think the rule concerning duplicity in criminal pleading is not correctly stated in either the syllabus or the opinion.

BURCH, J. I join in the special concurrence of Justice MARSHALL.

MORLEY et al. v. WILSON. (No. 23341.)

(Supreme Court of Kansas. Oct. 8, 1921.)

(Syllabus by the Court.)

Trial ~~339~~(3)—Impossible verdict properly rejected, and cause again remanded to jury.

In an action for a real estate dealer's commission, the only issue was whether the plaintiffs were to receive the sum of \$700 for their services in finding a buyer for defendant's farm, which was admittedly the original amount agreed upon between the parties, or whether, because the defendant had to extend time to the buyer, the plaintiffs had later agreed with defendant that their commission should be \$300. The trial court instructed the jury to that effect, but the jury returned a verdict for \$500, which the court declined to receive. The court repeated its instructions that the verdict should be for the plaintiffs for \$700, or for \$300, as the jury in their discretion might determine, and that this matter was the only disputed issue of fact which the jury had to decide. The jury again retired, and then brought in a verdict for \$700. *Held*, that it was proper for the court to decline to receive their first verdict, and to require them to return and bring in a verdict responsive to the issue as defined by the court, and that the jury's discretion did not extend to the rendition of a verdict at variance therewith.

Appeal from District Court, Lyon County.

Action by G. W. Morley and another, as partners, against C. M. Wilson, for brokers' commission. Judgment for plaintiffs, and defendant appeals. Affirmed.

Owen S. Samuel, of Emporia, for appellant.
W. C. Roberts, of Emporia, for appellees.

DAWSON, J. This was an action for a real estate agent's commission. The plaintiffs, as real estate agents, brought the defendant and a buyer together, and the latter two effected a bargain for the sale of a valuable farm. The plaintiffs claimed a commission of 3 per cent. on the purchase price, \$729, and sued for that amount. Defendant's answer admitted the plaintiffs' services, admitted that the original agreement between him and plaintiffs was that their commission should be \$700, but that this agreement was based on the expectation that the farm should be sold for cash, and that when it transpired that only a part of the purchase price could be paid down by the buyer, and that time would have to be given on the balance, the plaintiffs agreed to accept \$300 in full for their services.

On this issue, the cause was tried before a jury. The trial court gave pertinent instructions including the following:

"(1) In this case the controversy between the parties, is as to whether the commission due is \$700 or \$300. That is the sole question you have to determine in this case. The

plaintiffs performed the service and brought about the sale. That is conceded. The plaintiffs claim that they were to receive 3 per cent., but agreed on \$700 for this commission, and the defendant contends that, by reason of some changes in the terms, they agreed upon a commission of \$300. * * *

"(10) You will have but one form of verdict in this case. It will be for the plaintiffs, and you will return a verdict for either \$700 or \$300, as you find the facts to be."

The jury returned a verdict for plaintiffs for \$500. This verdict the trial court refused to receive. The court then further addressed the jury:

"I want to say to you that your verdict should be for either \$300 or \$700. There is no basis for finding a verdict of \$500. It must be for either \$300 or \$700. I will cross out this \$500, and you may go back into your jury room and see if you can find a verdict in one of the amounts I have named."

The jury retired, and later returned with a verdict for plaintiffs for \$700, and judgment was rendered accordingly. Defendant appeals, basing error on the trial court's refusal to accept the jury's verdict for \$500, and in its instructions that the verdict should be for \$700 or \$300.

There was no excuse whatever for a verdict for \$500. Plaintiffs asked for \$729, but acquiesced in defendant's contention that \$700 should be the commission as first agreed upon. That sum, therefore, was the only verdict which the jury could return, unless they believed the defendant's evidence that a later agreement was made, fixing the commission at \$300, when it transpired that the farm could not be sold for cash. In the course of the evidence, defendant testified that, while he was arguing with plaintiffs to induce them to accept \$300, one of them offered to accept \$500. But he did not testify that he closed a bargain with them at that figure. He admitted that he agreed to pay \$700 originally. He pleaded and testified that later plaintiffs agreed to accept \$300. Therefore the court correctly instructed the jury—and no objection to that instruction was made—that their verdict should be for either \$700 or \$300, according as they believed or disbelieved the evidence adduced to settle the only disputed point in issue. It is beside the case to argue that the jury's discretion should not be controlled by the trial court. The only discretion the jury had was to determine whether it was the plaintiffs or defendant who were telling the truth as to the matter of the alleged second agreement. The jury had no right to split the difference, or otherwise to disregard the issue upon which they had received instructions. A jury must follow instructions, as they are sworn to do.

In *Tatlow v. Bacon*, 95 Kan. 695, 700, 149

Pac. 745, where the jury obviously erred in the amount of their verdict, the trial court called their attention to the inconsistency, and directed them to return and reconsider the matter, and to return a consistent verdict. This was held to be lawful trial practice. See, also, *Snyder v. Eriksen*, 109 Kan. 314, 198 Pac. 1080; 38 Cyc. 1893, 1894, and notes; 27 R. C. L. 890, 891.

The judgment is affirmed.

All the Justices concurring.

BAIRD et al. v. SHAFER et al. (No. 23166.)

(Supreme Court of Kansas. Oct. 8, 1921.)

(Syllabus by the Court.)

Appeal and error ¶119—Decision refusing to retax costs forming part of judgment previously affirmed held to relate exclusively to costs, and not reviewable.

A decision refusing to retax costs which had been assessed and formed a part of a judgment previously affirmed upon appeal relates exclusively to costs, and is not open to review, although the amount questioned may exceed \$100.

Appeal from District Court, Smith County.

Action by James A. Baird and others against John S. Shafer and others. From a ruling refusing to retax costs, defendants appeal. Appeal dismissed.

For former opinion, see 101 Kan. 585, 168 Pac. 836, L. R. A. 1918D, 638.

Relihan & Relihan, of Smith Center, for appellants.

L. C. Uhl & Son, of Smith Center, for appellees.

JOHNSTON, C. J. This is an appeal from a ruling refusing to retax costs and exclusively relating to costs, which arose in a case and became a part of a judgment that was entered on April 3, 1913. An appeal was taken to this court from that judgment August 13, 1915, and it was affirmed here. 101 Kan. 585, 168 Pac. 836, L. R. A. 1918D, 638. Afterwards an execution was issued upon the judgment, and on May 1, 1919, the costs were paid into court. No objection was made as to the costs assessed upon the first appeal, nor for more than 6 years after they were adjudged. In May, 1919, defendants moved for a retaxation of the costs allowed an expert witness, amounting to \$109.58, which amount it appears was still in the hands of the clerk of the court. When the motion to retax the costs was denied, the court directed the clerk to hold the money pending an appeal from the decision, which defendants announced they would take.

Aside from the fact that no objection was made to the assessment of costs which constituted a part of the judgment which was affirmed upon appeal, and apart from the fact that 6 years has elapsed and many terms of court have intervened without complaint as to these costs, and notwithstanding the voluntary payment of the same, all of which afforded grounds for holding that the defendants had waived their right to a retaxation of the costs by reason of lapse of time and their own laches, the present appeal must be disposed of upon another ground. A proceeding to retax costs, after the affirmance of the judgment, involves nothing but costs. A ruling relating exclusively to costs is not open to review here, although the amount questioned may exceed \$100. *Mo. Pac. Ry. Co. v. Yawger*, 52 Kan. 691, 35 Pac. 814; *Asbell v. Aldrich*, 95 Kan. 313, 147 Pac. 1126; *Cramer v. Bank*, 98 Kan. 641, 158 Pac. 1111.

The appeal is therefore dismissed.

All the Justices concurring.

STATE ex rel. HOPKINS, Atty. Gen., v. GROVE. (No. 23612.)

(Supreme Court of Kansas. Oct. 8, 1921.)

(Syllabus by the Court.)

1. Constitutional law ¶67—Statute authorizing merely declaratory judgments held not unconstitutional.

A statute authorizing the rendition of merely declaratory judgments is not unconstitutional on the ground of attempting to confer nonjudicial power upon courts. Such judgments may be judicial acts although rendered in actions admittedly brought before a right has been invaded, and although no consequential relief is given or sought.

2. Municipal corporations ¶138—Employee of railroad company using city's streets and alleys under a "franchise" held disqualified for city office.

Where a railroad company uses certain streets and alleys in a city under ordinances granting it the right to occupy them with its tracks upon condition that it shall conform to certain requirements including the keeping the track in good condition with respect to general travel, the paving of the track between the rails, and the maintaining of a driveway and sidewalk for the public, one who is employed by such company as a boiler maker is disqualified to hold the office of city commissioner, under the statute which provides that no employee of a railway corporation operating under a franchise granted by a city, or having any contract with it, shall hold any city office. The term "franchise" is used in such statute in a broad and general rather than a narrow and technical sense, and covers rights acquired under such ordinances, and the relations of the

city and railway company under such ordinances are contractual.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fran-chise.]

Original proceeding in quo warranto by the State of Kansas, on the relation of Richard J. Hopkins, Attorney General, against Charles E. Grove, to determine his capacity to hold office as member of the board of commissioners of the city of Wichita, to which he had been elected. Judgment rendered declaring defendant disqualified.

Richard J. Hopkins, Atty. Gen., and E. W. Clausen, of Topeka, for plaintiff.

Robert O. Foulston and Geo. L. Steffen, both of Wichita, for defendant.

MASON, J. This proceeding was brought by the state on the relation of the Attorney General for the purpose of determining the legal capacity of Charles E. Grove, the defendant, to hold the office of member of the board of commissioners of the city of Wichita, to which he had been declared elected on the canvass of the returns. The case was submitted on the pleadings, the facts not being in dispute, on June 10, 1921. It being suggested that the interest of the public required an early determination of the matter, the court, having reached the conclusion that the defendant was ineligible to the position, announced its decision to that effect June 27, with the statement that an opinion would be written later.

The defendant is in the employ of the Missouri Pacific Railroad Company, and the claim of disqualification is based upon the statute which forbids an employee of a railway company operating under any franchise granted by the city or having any contract with it to hold any city office, and imposes a penalty of both fine and imprisonment for doing so. Gen. Stat. 1915, § 1556. Inasmuch as the defendant had not attempted to enter upon the discharge of the duties of the office, the proceeding against him was brought under the provisions of the law enacted at the recent session of the Legislature authorizing the rendition of declaratory judgments (Laws 1921, c. 168), the constitutionality of which is challenged by the defendant. The questions to be determined are whether the declaratory judgment statute is valid, whether the railway company is operating under a "franchise" granted by the city within the meaning of that term as used in the statute concerning the qualifications of city officers, and whether the company has a contract with the city.

[1] 1. A statute authorizing declaratory judgments has recently been held unconstitutional. *Anway v. Grand Rapids Railway Co.*, 211 Mich. 592, 179 N. W. 350, 12 A. L. R. 26. The proceeding in which the decision

was rendered was not based upon an actual controversy. The members of the court appear to have agreed that for this reason it could not be maintained. A majority of the justices, however (two out of eight dissenting, and another limiting his concurrence to the result reached), treated the proceeding as one of the kind the Legislature intended to authorize, but held the statute invalid because the power to make a declaration of rights where no consequential relief can be had is not judicial, and cannot be conferred upon courts.

Whatever may have been the intention of the framers of the Michigan act in that respect, the Kansas statute is explicitly limited in its operation to "cases of actual controversy." Section 1. The decision of the Michigan court that the proceeding there under consideration was not maintainable and should be dismissed appears to have turned upon the fact that (as in *Muskrat v. United States*, 219 U. S. 346, 31 Sup. Ct. 250, 55 L. Ed. 246, upon which case much reliance is placed) no actual controversy existed between opposing parties. The decision so far as it is based upon that ground is not inconsistent with the validity of the act here involved. In the majority opinion in that case, however, views were expressed that, if accepted as sound, would be fatal to the Kansas statute.

There is no occasion for a general discussion here of declaratory judgments—their purpose, the needs that give rise to them, the extent to which they have been employed, and the results obtained. These matters have been fully covered by recent contributions to legal publications, most important among which may be mentioned those of Prof. Edson R. Sunderland (16 *Michigan Law Review*, 69, December, 1917) and Prof. Edwin M. Borchard (28 *Yale Law Journal*, 1, 105, November and December, 1918). The authorities bearing on the question of the constitutionality of such statutes have likewise been so fully collected and discussed in the majority and minority opinions in the Michigan Case as to dispense with the necessity of reviewing them here. See, also, note 12 A. L. R. 52, in which all aspects of the matter, including the constitutional question, are fully discussed. The first and sixth sections of the Kansas act contain its vital provisions—those against which the constitutional objections are directed. They read:

"In cases of actual controversy, courts of record within the scope of their respective jurisdictions shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time could be, claimed, and no action or proceeding shall be open to objection on the ground that a judgment or order merely declaratory of right is prayed for. Controversies involving the interpretation of deeds, wills, other instruments of

writing, statutes, municipal ordinances, and other governmental regulations, may be so determined, and this enumeration does not exclude other instances of actual antagonistic assertion and denial of right." Laws 1921, c. 168, § 1.

"This act is declared to be remedial; its purpose is to afford relief from the uncertainty and insecurity attendant upon controversies over legal rights, without requiring one of the parties interested so to invade the rights asserted by the other as to entitle him to maintain an ordinary action therefor; and it is to be liberally interpreted and administered, with a view to making the courts more serviceable to the people." Laws 1921, c. 168, § 6.

Against the validity of the statute it is urged that the occasion for judicial action cannot arise until a claim is made that an actual wrong has been done or is immediately threatened, and, moreover (what is much the same thing stated in another way), that a decision cannot properly be classed as a judgment, as strictly judicial act, unless, besides determining the merits of the controversy between the parties, deciding which is right, it affords (or denies) some additional remedy—in other words "consequential relief"—and therefore that power to decide a controversy in the absence of the conditions indicated is not judicial and cannot be conferred upon courts by the Legislature. This view appears to us to be unsound, and to be the result of confusing declaratory judgments with advisory opinions and decisions in moot cases, and perhaps also of an inclination to treat a general practice that has been long established as having acquired the force of a constitutional guaranty. A mere advisory opinion upon an abstract question is obviously not a judgment at all, since there are no parties to be bound, and the rights of no one are directly affected. The situation is substantially the same where opposing parties present a moot question—one the decision of which can have no practical effect. Where a judgment is sought of such character as to be of no benefit unless accompanied by an order the carrying out of which is impossible, the futility of the proceeding is a sufficient basis for a court's refusal to entertain it, whether or not jurisdiction to do so exists. But some judgments are wholly or in part self-operative. They perform a valuable function in and of themselves. It is often said that a cause of action arises only upon the breach of a duty—the invasion of a right. This, however, is merely the announcement of a general rule of practice subject to possible exceptions and to legislative change. Actions to quiet title and to construe wills are recognized methods of invoking judicial action which do not originate in the actual commission of a wrong nor terminate in a judgment inflicting a penalty, granting compensation or injunction, or otherwise giving

"consequential relief"; the declaration of rights being all that is necessary to fit the requirements of the case. The decree in an action to quiet title is sometimes so drawn as to order the setting aside or cancellation of a deed. A declaration that the instrument is void and without effect amounts to the same thing. The judgment does not change the condition of the title, but simply declares where it is vested. It gives the only relief that is necessary to settle the controversy—the determination of the ownership of the property. Why the Legislature cannot authorize similar procedure in like situations to meet like needs is not apparent. It is hardly conceivable that any fundamental principle of our government, beyond legislative control, prevents two disputants, each of whom sincerely believes in the rightfulness of his own claim, but each of whom wishes to abide by the law, whatever it may be determined to be, from obtaining an adjudication of their controversy in the courts without one or the other first doing something that is illegal (in the case of the present defendant criminal) if he is mistaken in his view of the law.

The mere judicial determination that one party to litigation is right in his contentions and his opponent wrong accomplishes in some instances all that he seeks and in others at least a considerable part of it; it conclusively and finally settles the question of liability between the parties. This is recognized in various expressions of the courts and text-writers, of which the following are illustrative:

"But in general the office of judgment is fully performed when it declares and adjudicates the existence or nonexistence of the liability sought to be established; it is not concerned with the means of enforcing the liability declared." 23 Cyc. 669.

"The first and most obvious consequence of a judgment is that it establishes an indisputable obligation and confers upon the successful party the right to issue execution or other process of the court for its enforcement. But this, it must be repeated, is not an integral part of the judgment. The judgment is merely the affirmation of a liability. The right to use the process of the court for its enforcement is a consequence which the law attaches to it. * * * The judgment, after performing its office of declaring the existence of a certain liability, leaves the party to pursue the remedies which the law provides." 1 Black on Judgments, § 4.

Where the plaintiff asks the recovery of money, and his claim is held to be unfounded, the defendant needs no injunction against its further prosecution. He is fully protected by a judgment explicitly or impliedly declaring it to be invalid. The maker of a note may sue before its maturity to have it canceled for fraud; a judgment declar-

ing that it was fraudulently procured might answer the same purpose. In such an action the rendition of a judgment for the holder declaring the note valid would be an unquestioned exercise of judicial power. It would seem that, if the holder, learning of a claim on the part of the maker that his signature was procured by fraud, should bring an action authorized by statute to have that matter determined, a decree in his favor declaring the note valid ought not to be a nullity on the ground of being nonjudicial.

Probably the strongest statement of the view against merely declaratory judgments is to be found in an opinion written by Chief Justice Taney where, in arguing the invalidity of an act of Congress authorizing an appeal to the Supreme Court from a decision of the federal Court of Claims, he said:

"The award of execution is a part, and an essential part, of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless Congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court, in the exercise of its appellate jurisdiction; yet it is the whole power that the court is allowed to exercise under this act of Congress." *Gordon v. United States*, appendix to 117 U. S. 697, 702.

This opinion was not that of the court, nor does it appear to express correctly the grounds of the court's decision. The case to which it applies was first submitted in December, 1863, and was reargued at the December term, 1864, when it was decided. *Gordon v. United States*, 69 U. S. (2 Wall.) 561, 17 L. Ed. 921. In the meantime Chief Justice Taney had died, and the copy of the opinion from which the publication in the appendix referred to was made was produced years afterwards by the son of his executor. The actual grounds of the decision as shown by the language of Chief Justice Waite in announcing it (quoted in *United States v. Jones*, 119 U. S. 477, 478, 7 Sup. Ct. 283, 80 L. Ed. 440) seem to have been the same as those upon which *United States v. Ferreira*, 54 U. S. 40, 14 L. Ed. 42, was based, namely, that under the statute as it then existed a decision of the Court of Claims was merely advisory, was not intended to amount to an adjudication, was not a judicial act, and therefore the provision undertaking to allow an appeal to a court therefrom was invalid. The *Jones Case*, just cited, held that (the statute having been amended) an appeal to the Supreme Court of the United States could then be given

from a decision of the Court of Claims allowing a demand against the government. That necessarily involved a ruling that such a decision may be a judicial act, notwithstanding the tribunal rendering it is without power to enforce it, because no money can be drawn from the federal treasury but in consequence of appropriations made by law, and for that reason a court cannot enforce a money judgment against the government. "Hence the party who gets a judgment must wait until Congress makes an appropriation before his money can be had." *Railroad Co. v. Alabama*, 101 U. S. 832, 835, (25 L. Ed. 973). Congress can refuse to pay a claim which has been judicially determined to be valid, but this is a very different thing from having the power to set aside an award against the government, the reservation of which in Congress or any other legislative or executive body would under the *Ferreira Case* prevent the award from being final unless appealed from, and therefore cause it to be nonjudicial.

In a case where the enforcement of an order of the Interstate Commerce Commission requiring a carrier to cease a certain practice for two years from a stated time was enjoined, an appeal from the injunction was decided after the lapse of that period, over an objection that there was no longer anything upon which the decision could operate, the court saying:

"In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar), and their consideration ought not to be, as they might be, defeated by short orders, capable of repetition, yet evading review, and at one time the government and at another time the carriers have their rights determined by the Commission without a chance of redress. * * *

"In *Boise City Irr. & Land Co. v. Clark*, supra [131 Fed. 415], the period for which a municipal ordinance fixed a water rate expired pending the litigation as to its legality, and it was contended that the case had become moot. The court replied: 'But the courts have entertained and decided such cases heretofore, partly because the rate, once fixed, continues in force until changed as provided by law, and partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter.'"

So. Pac. Terminal Co. v. Int. Comm. Com'n, 219 U. S. 498, 515, 516, 31 Sup. Ct. 279, 283, 284 (55 L. Ed. 310).

In this jurisdiction the question at issue may be regarded as having been settled in *State v. Allen*, 107 Kan. 407, 191 Pac. 476. There an appeal on the part of the state in

a criminal case was sustained which was brought to determine the correctness of an instruction where no verdict had been reached; the jury having been discharged upon failure to agree. The difficulty resulting from the fact that no specific mandate for the doing or omission of any particular act could accompany the reversal was fully appreciated and considered, but was held not to prevent the determination of the issue presented. The bearing of that case is not avoided by the fact that the state Constitution (article 3, § 3) gives the Supreme Court "such appellate jurisdiction as may be provided by law," for the quoted clause does not contemplate its exercise upon appeal of any but judicial powers. Auditor of State v. A., T. & S. F. Railroad Co., 6 Kan. 500, 7 Am. Rep. 575.

A typical situation is presented for the application of the declaratory judgment act. There is a present controversy between the parties, the defendant claiming the right to perform the duties of the office to which he has been elected, and the plaintiff denying that right. The controversy is actual, not moot; concrete, not abstract. An interpretation of the statute concerning ineligibility is not the ultimate object of the suit, but is a necessary step in determining whether the defendant is entitled to act as city commissioner. That question under the ordinary procedure could only be judicially decided after the defendant had assumed the duties of the office, thereby exposing himself to punishment by both fine and imprisonment. Even if injunction would lie to prevent his acceptance of the office, such relief would be unnecessary. In the remote contingency of his desiring to occupy the office after his ineligibility had been determined, the statutory penalty would exercise a sufficient restraining influence. The decision when announced is not merely advisory. It is a final adjudication having the binding force of any other judgment. If after its being adjudged that the defendant is disqualified he should undertake to hold the office, and the state should bring a proceeding to oust him, the only matter open to inquiry would be whether he was actually holding it; he could not be heard to raise any issue of either law or fact going to the question of his eligibility, and this results from the principle of *res judicata*, and not from that of *stare decisis*.

[2] 2. The statute which the plaintiff regards as rendering the defendant ineligible reads as follows:

"No officer, employee, agent or servant or stockholder in any corporation, firm, company or person holding or operating under any franchise granted by such city, including street and other railways, telephone companies, electric light companies or gas companies, or having any contract with such city, shall hold any city

office; and no officer or employee of such city shall accept or hold any office in or employment by such corporation, firm, company or person seeking to acquire any such contract or franchise; and any person violating any of the provisions of this section shall thereby vacate his office and be fined not less than five hundred dollars nor more than one thousand dollars, and imprisoned in the county jail not less than six months nor more than one year." Gen. Stat. 1915, § 1556.

The Missouri Pacific Railroad Company uses certain streets and alleys in Wichita under ordinances granting it the right to occupy them with its tracks on condition of its conforming to certain requirements. The defendant is employed by the company as a boiler maker. He contends that the rights acquired by the company under the ordinances referred to are not "franchises" within the meaning of the term as used in the statute, and that the relations between the city and the company with respect thereto are not contractual.

It is said that legislative disqualifications to hold office are strictly construed against the claim of ineligibility. 29 Cyc. 1380, 1381. Whether that be true otherwise than where the statute is penal or adds to requirements of the Constitution need not be determined. The primary rule of construction is to ascertain and give effect to the real purpose of the Legislature, and that will prove sufficient here.

The word "franchise" is often used in such sense as not to include the grant by a city to a railway company of a right of way over its streets. *McPhee & McGinnity Co. v. Union Pac. R. Co.*, 158 Fed. 5, 87 C. C. A. 619. This court, however, has held that "franchise" in the quo warranto statute is to be interpreted as covering a right of that character acquired in that manner. *Olathe v. Railway Co.*, 78 Kan. 193, 96 Pac. 42. The statute now under consideration refers explicitly to franchises granted by a city to railway corporations. The rights ordinarily given by a city to such companies are of the kind granted by the ordinances here involved. And, inasmuch as the term "franchise" is a proper one by which to describe them, the fair conclusion is that they are the sort of rights the Legislature had in mind when it used the word.

The defendant also argues that, if the rights granted by the ordinances referred to are regarded as franchises, they are void because of the provision of the statute limiting the duration of franchise granted by the city to 20 years, and making other requirements which have not been met. Gen. Stat. 1915, § 1661, subd. 2. The limitation appears to apply to contracts, grants, rights, and privileges as well as franchises. The statute, however, contains a provision ex-

pressly excepting from its operation grants of "side track or switch privileges to railway companies for the purpose of reaching and affording railway connections and switch privileges to the owners or users of any industrial plant." Subdivision 7. Several of the ordinances in question contain express recitals showing that their grants are of that character, and in others that inference may reasonably be drawn.

Most of the ordinances by their terms required an acceptance by the railway company before becoming effective. The defendant, however, argues that no contract resulted because no obligations were imposed on the company and there was a want of mutuality. Provisions to the following effect are made in one or more of the ordinances: Under certain conditions the railway company is to pave the right of way in accordance with plans made by the city engineer; the company is to furnish such protection to the traveling public as the board of commissioners shall from time to time direct; the company is to maintain a driveway for the traveling public and a cement sidewalk by the side of a certain track or spur; the company is to hold the city harmless from claims for damages occasioned by its occupancy of the street; the city may compel the observance of the conditions laid down at any time it may elect. Some of the provisions relating to the conduct of the railway company may be mere expressions of legal obligations that would in any event be implied. But others are quite clearly contractual.

The defendant's disqualification results from the plain and unambiguous language of the statute. It is also as clearly within the purpose and spirit of the act. The Legislature obviously proceeded upon the assumption that a corporation holding a franchise from or contract with the city was likely by reason thereof to be drawn into controversy with it, and that a city officer who was required to take some action in relation to the matter, if he were an employee of the company in any capacity, might be influenced in his conduct by that circumstance. The provisions of the ordinances described are of such character that a dispute might readily arise out of conflicting interests, and the connection of a member of the commission with the company might prove an embarrassment. Whether that probability is strong enough to render it expedient to make such relationship an absolute disqualification is of course a matter for the Legislature to determine.

For the reasons stated, the judgment of the court has been rendered declaring the defendant disqualified to hold the office of city commissioner.

All the Justices concurring.

CLEMENTS et al. v. HALL, Secretary of State. (No. 1980.)

(Supreme Court of Arizona. Oct. 11, 1921.)

1. Constitutional law ¶7—Proposed amendment to which legislative measure is appended must be submitted to Governor.

If there is appended to a proposed amendment by the Legislature any measure essentially legislative or statutory in character, it must be submitted to the Governor for his approval before it can become a law.

2. Constitutional law ¶9(2) — Procedure of special elections called for submission of proposed constitutional amendments governed by Civil Code, and not by Constitution.

The procedure of special elections called for submission of proposed amendments to the Constitution is governed by Civ. Code 1913, pars. 3323-3339, and not Const. art. 4, § 1, subd. 11, the purpose of such constitutional provision having been to supply a guide as to procedure for submission of measures and proposed amendments during the interim between the adoption of the Constitution and the time when the Legislature should meet and pass laws especially providing the machinery for holding elections on measures and proposed amendments.

3. Constitutional law ¶9(1)—Act providing for submission of constitutional amendment at special election to be held under general election laws held "legislation" subject to referendum.

Laws 1921, c. 85, § 4, enacted under Const. art. 21, § 1, providing for submission of amendment to Const. art. 9, § 5, at a special election to be held on specified date "in manner provided by law for general elections," held legislation, in view of its adoption, by reference, to the general election laws, and therefore subject to the referendum under Const. art. 4, § 1, subds. 1, 2.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Legislation.]

4. Constitutional law ¶9(2) — Proposed amendment submitted at next general election where submission on date specified for special election is impossible by reason of referendum.

Amendment to Const. art. 9, § 5, proposed by Laws 1921, c. 85, will not be submitted to a special election on a specified date as provided for by section 4 in view of referendum petition filed against such section, making it impossible to hold the special election on the designated date, but will take its natural course and be submitted at the next general election.

Petition for mandamus by W. P. Clements and others against Ernest R. Hall, as Secretary of State of the State of Arizona. Writ denied.

Alexander & Christy and E. S. Clark, all of Phoenix, for plaintiffs.

Kibbey, Bennett, Gust & Smith and Will E. Ryan, all of Phoenix, for defendant.

S. H. Kyle, of Phoenix, amicus curiæ.

PER CURIAM. The plaintiffs, as residents, qualified electors, and taxpayers of the state of Arizona, instituted this proceeding against the defendant, Secretary of State, praying that a writ of mandamus issue against said secretary, directing him to submit at a special election called for November 8, 1921, a certain amendment to the Constitution of the state, proposed, as it is alleged, by the two houses of the Legislature, in accordance with article 21 of the Constitution. The proposed amendment to the Constitution is published in the Session Laws of Arizona of 1921, as chapter 85, p. 185, and reads as follows:

"Chapter 85. (House Bill No. 83.)

"An act proposing to amend the Constitution of the state of Arizona by amending section 5 of article 9 thereof, so as to provide for the issuance of state bonds to promote and assist in the reclamation and irrigation of arable and irrigable lands within the state of Arizona and providing for the submission of said proposed amendment to the electors of the state for their approval or rejection at an election to be called for such purpose. "Be it enacted by the Legislature of the state of Arizona:

"Section 1. That it is proposed to amend section 5 of article 9 of the Constitution of the state of Arizona to read as follows:

"Section 5. The state may contract debts to supply the casual deficits or failures in revenues, or to meet expenses not otherwise provided for; but the aggregate amount of such debts direct and contingent, whether contracted by virtue of one or more laws, or at different periods of time, shall never exceed the sum of three hundred and fifty thousand (\$350,000.00) dollars, except as hereinafter provided; and the money arising from the creation of such debts shall be applied to the purpose for which it was obtained or to repay the debts so contracted, and to no other purpose.

"In addition to the above limited power to contract debts, the state may borrow money to repel invasion, suppress insurrection, or defend the state in time of war; but the money thus raised shall be applied exclusively to the object for which the loan shall have been authorized or the payment of the debt thereby created. No money shall be paid out of the state treasury, except in the manner provided by law.

"In addition to the above limited power to contract debts, the state may loan its credit to promote and assist in the reclamation of arable and irrigable lands within the state lying within the confines of irrigation districts regularly organized and existing under the laws of the state of Arizona and for such purpose may create bonded indebtedness and issue its bonds as may be provided by law whenever the lands in any such irrigation district and the water supply therefor and the proposed irrigation works and system thereof have been thoroughly investigated and found to be adequate and sufficient and the cost thereof per acre reasonable, and the building of the whole project feasible and advantageous to the state, and when adequate provision has been made by such irrigation district for the payment of such

state bonds, interest and principal, as and when the installments of interest and principal thereof shall and may become due and payable.

"Section 2. It is hereby further provided that the state shall not be responsible or liable for more than five per cent. (5%) of the state's total taxable valuation; and it is hereby further provided that the state shall not be responsible or liable for more than one and one-half per cent. (1½%) of the state's total taxable valuation for any one project.

"Section 3. The validity of this amendment shall not be affected by the adoption of any other amendment to the said section 5 of article 9 of the Constitution of Arizona proposed or submitted by the regular session of the Fifth Legislature of the state of Arizona, and the adoption of this amendment shall not invalidate any other amendment to the said section 5 of article 9 of the Constitution of the state of Arizona proposed or submitted by the regular session of the Fifth Legislature of the state of Arizona.

"Section 4. That said proposed amendment shall be submitted to the electors of the state of Arizona for their approval or rejection at a special election which is hereby called for such purpose to be held in manner provided by law, for general elections, on the 8th day of November, 1921.

"Passed the House March 2, 1921.

"Passed the Senate March 10, 1921.

"House concurred March 10, 1921, in Senate amendments by unanimous vote.

"Approved March 14, 1921."

When the plaintiffs' petition was filed the court directed the issuance of an alternative writ to the Secretary of State, and upon the return day he filed his answer in which he set forth:

(I) That the proposed constitutional amendment was not entered upon the journals of the two houses in compliance with the terms of the Constitution; (II) that the special election was not legal, because no adequate provision is made therefor, and the attempt to adopt the general election law by reference is in violation of the Constitution; and, (III) that a referendum petition had been filed against section 4, legal in form, and containing the constitutional percentage of voters, and thereby his power to submit said proposed amendment to the special election was suspended.

The plaintiffs filed their motion to strike the defendant's answer because it was to the petition, and not the writ. They also demurred generally to the answer. The case was argued on the 3d and 4th of the month, and counsel for both sides filed with the court informal statements of their points, and cited us to the authorities upon which they rely. It is evident that they have not had at their disposal the time necessary to investigate a question of such moment, and it is likewise true that the tardiness of instituting the proceeding deprives us of the opportunity to make very much independent investigation. In the limited time we have we can do very little more than give our conclusions.

The authority to propose amendments to the Constitution is found in section 1, art. 21, of that instrument, and as much of what we shall say revolves around that section, it is here set out:

"Section 1. Any amendment or amendments to this Constitution may be proposed in either house of the Legislature, or by initiative petition signed by a number of qualified electors equal to fifteen per centum of the total number of votes for all candidates for Governor at the last preceding general election.

"Any proposed amendment or amendments which shall be introduced in either house of the Legislature, and which shall be approved by a majority of the members elected to each of the two houses, shall be entered on the journal of each house, together with the ayes and nays thereon.

"When any proposed amendment or amendments shall be thus passed by a majority of each house of the Legislature and entered on the respective journals thereof, or when any elector or electors shall file with the Secretary of State any proposed amendment or amendments together with a petition therefor signed by a number of electors equal to fifteen per centum of the total number of votes for all candidates for Governor in the last preceding general election, the Secretary of State shall submit such proposed amendment or amendments to the vote of the people at the next general election (except when the Legislature shall call a special election for the purpose of having said proposed amendment or amendments voted upon, in which case the Secretary of State shall submit such proposed amendment or amendments to the qualified electors at said [special] election), and if a majority of the qualified electors voting thereon shall approve and ratify such proposed amendment or amendments in said regular or special election such amendment or amendments shall become a part of this Constitution. Until a method of publicity is otherwise provided by law the Secretary of State shall have such proposed amendment or amendments published for a period of at least ninety days previous to the date of said election in at least one newspaper in every county of the state in which a newspaper shall be published, in such manner as may be prescribed by law. If more than one proposed amendment shall be submitted at any election, such proposed amendments shall be submitted in such manner that the electors may vote for or against such proposed amendments separately."

We think the courts all concur in holding, where the question has arisen, that the two branches of the Legislature, in proposing amendments to the Constitution, under provisions like ours, are exercising delegated powers and acting as agents in a sense and are not functioning in a legislative capacity. The text on the question in 6 R. C. L. 28, § 19, is as follows:

"The power of the Legislature to initiate changes in the existing organic law is a delegated power, and one which is generally to be strictly construed under the limitations by which it has been conferred. In submitting propositions for the amendment of the Consti-

tution, the Legislature is not in the exercise of its legislative power, or of any sovereignty of the people that has been intrusted to it, but is merely acting under a limited power, conferred upon it by the people, and which might with equal propriety have been conferred upon either house, or upon the Governor, or upon a special commission, or any other body or tribunal. The extent of this power is limited to the object for which it is given, and is measured by the terms in which it has been conferred, and it cannot be extended by the Legislature to any other object, or enlarged beyond these terms."

Under article 21, an amendment to the Constitution may be proposed by initiative petition filed with the Secretary of State and be submitted to the vote of the people and approved and ratified by a majority of those voting thereon and become a part of the Constitution without any action whatever upon the part of the members of the Legislature. In such case the proposed amendment would be submitted by the Secretary at the next general election as a matter of course. If, however, the Legislature should come to the conclusion that the public interest or the exigencies of the case demanded that the proposed amendment be voted upon at an earlier date than the general election, it is authorized by said article to call a special election for the purpose of voting upon the proposed amendment, whether initiated by the electorate or by the Legislature.

Whether the Legislature, in calling a special election acts in its capacity as a lawmaking body, or whether it is in the exercise of a delegated power that it makes the call, we think it unnecessary to decide in this particular case, for the reason that it seems to us that the Legislature has done very much more than to call a special election. If it has done anything it has provided the machinery for holding the election and authorized the incurring of the expenses necessary therefor. Section 4, against which the referendum is filed, not only calls the special election, but adopts by reference a system of general laws, to wit, the general election laws, whether applicable or not. In other words, the procedure provided in the general election laws is required to be followed in holding the special election on November 9, 1921, in every respect except as to date.

It is a common practice throughout this country for Legislatures to refer to other statutes and make them applicable to the subject of legislation in hand. Such reference statutes have for their object the incorporation into the act of which they are a part the provisions of other statutes by reference and adoption. This is done to avoid repetition. 25 R. C. L. 907, § 160.

In *People v. Crossley*, 261 Ill. 78, 103 N. E. 537, the court said:

"The effect of such reference is the same as though the statute or the provisions adopted had been incorporated bodily into the adopt-

ing statute. 2 Sutherland on Stat. Const. § 405. Such adoption takes the adopted statute as it exists at the time of the passage of the adopting act. * * *

In *Savage v. Wallace*, 165 Ala. 572, 51 South. 605, it was said:

"There is a class of statutes, known as 'reference statutes,' which impinge upon no constitutional limitation. They are statutes in original form, and in themselves intelligible and complete—statutes which refer to, and by reference adopt, wholly or partially, pre-existing statutes. In the construction of such statutes, the statute referred to is treated and considered as if it were incorporated into and formed a part of that which makes the reference. The two statutes coexist as separate and distinct legislative enactments, each having its appointed sphere of action; and the alteration, change, or repeal of the one does not operate upon or affect the other."

See *State v. Tausick*, 64 Wash. 69, 116 Pac. 651, 35 L. B. A. (N. S.) 802; *Hutto v. Walker County*, 185 Ala. 505, 64 South. 313, Ann. Cas. 1916B, 372.

The adoption of the general election law by reference, as is done in section 4, is then unquestionably legislation requiring not only the co-operation of the two houses of the Legislature, but the Governor of the state, in order to be effective.

The Oregon Constitution, art. 17, § 1, is:

"Any amendment or amendments to this Constitution may be proposed in either branch of the legislative assembly, and if the same shall be agreed to by a majority of all the members elected to each of the two houses, such proposed amendment or amendments shall, with the yeas and nays thereon, be entered in their journals and referred by the Secretary of State to the people for their approval or rejection, at the next regular general election, except when the legislative assembly shall order a special election for that purpose."

It will be observed that the manner of submitting the proposed amendment to the people is very much like ours. Our Legislature is authorized to "call" a special election, whereas the Oregon legislative assembly is authorized to "order" a special election. It is interesting to note that the legislative assembly of Oregon by separate act submits propositions to amend its Constitution to the people. At a special session of the Legislature of Oregon held in January, 1920, several proposed amendments to the Constitution were agreed to by the legislative assembly. Subsequently at the same session chapter 35 of the General Laws of Oregon of 1920 was enacted, with an emergency clause calling a special election to be held on May 21, 1920, concurrently with the general primary election to vote upon the proposed constitutional amendments, and also some statutes. Later, in *State v. Rathle* (Or.) 199 Pac. 169-177, the constitutionality of one of the amendments voted upon and approved at the special election was raised, and the court said:

"The power of the Legislature to submit the constitutional amendment to a vote at the special election is clear; article 17 of our present Constitution expressly so provides."

Thus the Legislature of Oregon, as well as its highest court, recognized that the ordering of a special election to vote upon amendments to the Constitution and providing for the manner and method of holding the election were legislation.

[1] If there be appended to a proposed amendment by the Legislature any measures essentially legislative or statutory in character, it must be submitted to the Governor for his approval before it can become a law. *Warfield v. Vandiver*, 101 Md. 78, 60 Atl. 538, 4 Ann. Cas. 692; *Nesbit v. People*, 19 Colo. 441, 36 Pac. 221. Chapter 85 took the ordinary course in enacting a law. It was presented to and approved by the Governor.

Whether the adoption by reference of the general election law concerning initiative and referendum measures (title 22, c. 1, Civ. Code 1913) includes the chapter of the Civil Code upon registration of voters, it may be doubted. If it does, it is not possible to comply therewith. Under the statute the period of registration is from May 1st to October 15th on even years only. Paragraphs 2880, 2883, Civil Code. If in adopting the general election law, supra, it was the purpose to confine the voting to those upon the great register, which closed October 15, 1920, it would result in denying a large number of persons entitled to vote the right or privilege of expressing their wishes upon the proposed amendment to the Constitution. It must be true that a great number of persons, both men and women, since last October, have, by reason of arriving at voting age, or by reason of residence, become entitled to vote upon this measure. Under the statute such persons cannot vote unless they are registered. Paragraph 2901, Civil Code. If electors entitled to vote have an opportunity to register and fail to do so, they may not reasonably complain. They should, however, be given an opportunity to register before they are disfranchised. The statute (paragraph 2879) provides that every citizen of the United States, 21 years of age or over, who shall have become a resident of the state one year next preceding the election, and of the county and precinct in which he claims the right to vote 30 days, shall be deemed to be an elector of the state and entitled to register for the purpose of voting at all elections which are now or may be hereafter authorized by law. In the nature of things it is impossible to preserve the rights of the citizens of the state who have become eligible voters since the close of the last registration, and yet under the statute they are entitled to register and vote at all elections. *Perry v. Whitaker*, 71 N. C. 475; *Capen v. Foster*, 12 Pick. (Mass.) 485, 23 Am. Dec. 632. So it may be said that the adoption of the general

law on elections by reference to guide the special election on the proposed amendment to the Constitution is not only legislation, but in its ultimate results it is vicious legislation. Its effect in excluding from the great register those entitled to be thereon, as was said in *Perry v. Whitaker*, supra, "was manifestly a fraud upon the popular vote, although doubtless no fraud was intended." Article 21 in one place provides that proposed amendments to the Constitution shall be submitted "to the vote of the people." This all-inclusive proposition certainly extends to all those persons who are "entitled to register for the purpose of voting at all elections."

The plaintiffs cite subdivision 11 of section 1, art. 4, of the Constitution, as governing the mode of procedure of special elections called for the submission of proposed amendments to the Constitution. That subdivision reads as follows:

"The text of all measures to be submitted shall be published as proposed amendments to the Constitution are published, and in submitting such measures and proposed amendments the Secretary of State and all other officers shall be guided by the general law until legislation shall be especially provided therefor."

[2] The clear purpose of subdivision 11 was to supply a guide to the Secretary of State and other officers in submitting measures and proposed amendments during the interim between the adoption of the Constitution and the time when the Legislature should meet and pass laws especially providing the machinery for holding elections on measures and proposed amendments. Chapter 1, tit. 22, Civil Code 1913, passed in 1912, especially provides how and when elections on such measures and proposed amendments may be had, and since its passage it, and not subdivision 11, is the guide to the Secretary of State and all other officers in submitting such measures and proposed amendments.

[3] Under the law, unquestionably section 4 of chapter 85, which calls for a special election on November 8, 1921, and provides how such election shall be held and who shall be entitled to vote thereat as well, also the form of the ballot, is legislation, and subject to the referendum under subdivisions 1 and 2, § 1, art. 4, Constitution.

[4] If section 4 had been entirely omitted from the proposed amendment, it would have gone to the next general election as a matter of course, and, since the time designated in section 4 has, or will have, passed, and the date therein for the special election become an impossible date, the proposed amendment must necessarily take the natural course.

We do not deem it necessary to register our conclusions upon other points made in the pleadings and in the argument, having

held that section 4 is subject to the referendum.

ROSS, C. J., and McALISTER and FLANIGAN, JJ., concur.

LAUTARIO v. STATE. (No. 509.)

(Supreme Court of Arizona. Oct. 19, 1921.)

1. Homicide \S 237—Evidence held insufficient to show insanity.

In a prosecution for murder, evidence that defendant attempted to commit suicide by taking poison, and as a result was spasmodic and had paroxysms of vomiting, is not sufficient to establish his insanity at the time of the crime.

2. Criminal law \S 761(2)—Instruction assuming facts not in record should not be given.

Requested instructions assuming a state of facts which do not exist in the record should not be given.

3. Homicide \S 294(1)—Mere attempt of accused to commit suicide held not to justify instruction as to sanity.

In a prosecution for murder, a mere attempt by accused to commit suicide after committing the crime is not sufficient evidence to submit by instruction the issue of his sanity to a jury.

4. Homicide \S 27—Instruction that if, from evidence, jury had reasonable doubt as to sanity of defendant, they should acquit, held erroneous.

In prosecution for murder, an instruction that, if the jury entertain a reasonable doubt as to the sanity of the accused at the time of the commission of the crime, they should acquit, does not correctly state the law, since the question of his guilt depends on his ability to distinguish between right and wrong.

5. Criminal law \S 1169(4)—Misconduct of attorney during trial, in order to be available on appeal, must appear in the record.

Misconduct of attorney in abusing defendant must appear in the record, in order to be available on appeal.

6. Homicide \S 354—Held that death penalty was not excessive.

In prosecution for murder committed deliberately and without legal justification, held, that death penalty was not excessive.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Ricardo Lautario was convicted of murder, and appeals. Affirmed.

W. J. Fellows, of Phoenix, for appellant.

W. J. Galbraith, Atty. Gen., and R. E. L. Shepherd, Co. Atty., of Phoenix, for the State.

ROSS, C. J. The appellant appeals from the verdict and judgment of conviction of

murder in the first degree entered against him on the 8th day of February, 1921, in the superior court of Maricopa county. The jury in its verdict fixed the punishment at death, and the court thereupon sentenced the appellant to be hanged on the 21st day of April, 1921, at the state penitentiary. The errors assigned by appellant are four in number, as follows:

"I. That the verdict and judgment are contrary to the law and evidence in this: That at the time of the commission of the crime the evidence shows that defendant was not rational, but was beyond doubt insane and unable to comprehend the wrongfulness of his act, and incapable of forming a criminal intent.

"II. That counsel for the prosecution were guilty of misconduct during the course of the trial and during the argument, neither of which, when once placed before the jury, could have been cured by rebuke or admonition from the court.

"III. The court erred in refusing an instruction on insanity offered by the defendant.

"IV. That the sentence is excessive and is too severe in this case."

[1] We have carefully examined the transcript of the testimony, and especially that part of it appellant cites and relies upon to sustain the proposition contained in his first assignment, to wit, "that defendant was not rational, but was beyond doubt insane," etc. There is not an iota of evidence to sustain this assignment. All the testimony appellant claims sustains the proposition pertains to his acts and conduct and condition after he had taken the life of the deceased and not before. When appellant was apprehended, a short distance from the place where he inflicted the mortal wound that killed deceased, he showed symptoms of poisoning, and stated that he had taken strychnine. Witnesses testified that he was having paroxysms of vomiting, and was spasmodic when found and for a time thereafter; and it is these things or acts appellant claims as evidence of insanity, together with the fact that he attempted to commit suicide. It was upon such evidence that appellant asked the court to instruct the jury on the question of insanity, the refusal of which he makes his third assignment.

[2,3] The instruction so requested is in the following language:

"You are instructed that all the evidence tending to prove insanity of the defendant is to be weighed by you in your deliberations, and that the fact that the defendant attempted to commit suicide must be weighed along with other facts tending to prove insanity of the defendant at the time of the commission of the crime, and after due deliberation, if you entertain a reasonable doubt as to the sound mind of the defendant at the time of the commission of the crime, you will return a verdict of not guilty."

It is elementary that instructions must be based upon the evidence. Requests assuming

a state of facts that do not exist in the record should never be given. We do not understand that the mere attempt to commit suicide by appellant would be evidence justifying the court to submit the issue of his sanity to a jury. *Hopkins v. State*, 4 Okl. Cr. 194, 108 Pac. 420, 111 Pac. 947. We think it would have been error for the court to have given the requested instruction, in the absence of some evidence on that issue. *Mitchell v. State*, 52 Tex. Cr. R. 37, 106 S. W. 124; *State v. Gruber*, 19 Idaho, 692, 115 Pac. 1; *Hulse v. State*, 111 Ark. 510, 164 S. W. 273; *State v. Buonomo*, 87 Conn. 285, 87 Atl. 977.

[4] The instruction was properly refused for another reason. It fails to correctly state the law. It is not enough that the jury "entertain a reasonable doubt as to the sound mind of the defendant at the time of the commission of the crime." They must entertain a reasonable doubt of his ability to distinguish between right and wrong as applied to the act involved.

"The authorities are unanimous in declaring that weakness of, or deficiency in, any one of the mental functions, is not of itself sufficient to excuse the perpetrator of a criminal act. The ancient and generally accepted test for determining the punishability of one taking life is the capacity to distinguish right from wrong." 13 R. C. L. 710, § 10.

[5] The second assignment is based upon misconduct of the attorneys for the prosecution during the course of the trial and during the argument. The appellant fails to point out anywhere in the record any fact whatever to sustain this assignment. He asserts in his brief that the attorney for the prosecution "abused the personality of defendant, calling him a dirty dog and a skunk." This language, if uttered by the attorney, is not to be found in the record, and we have only the assertion of the appellant that it was used. If the prosecution was guilty of any misconduct, this court would have to insist that it be evidenced in a more regular and solemn way than the mere statement of appellant in his brief.

[6] Turning to the fourth and last assignment, we give a succinct statement of the facts of the case in refutation of the proposition therein contained:

The appellant and the woman he killed, Adelina Sosa de Barillos, had been living for several months in illicit relations, and were so living in a tent as cotton pickers on the O'Neil ranch, about 7½ miles northwest of Phoenix, Ariz., on the 4th day of November, 1920, when they had a quarrel and the appellant left. Three days later, on the 7th day of November, the appellant saw the deceased in the city of Phoenix, and, according to his testimony only, she was with O'Neil, the rancher. The defendant procured a knife (a butcher knife made over, with a

pointed, stout, blade about six inches long) and returned to the ranch, to seek reconciliation with the woman. He stated she turned him down and refused to have anything more to do with him, that he waited at her bedside, she being in bed, in the tent, from 3 o'clock until 5:30 o'clock. In the morning of November 8, 1921, and, becoming convinced that the woman would have nothing more to do with him, he put the knife to her right temple with his left hand and drove it into her brain with his hand. He then ran out into the cotton field about 100 yards from the tent, took a dose of strychnine, and was later found by ranch hands. The scream of the deceased, at the time she was stabbed, awakened her brother, sleeping at the foot of her bed, and she embraced him saying, "Ricardo has killed me." The knife was removed from the woman's head at St. Joseph's hospital the same day, and the woman died that evening.

From the facts we are not surprised that the jury returned the verdict inflicting the death penalty. It would be difficult to conceive of a more cold-blooded, atrocious murder than the facts show in this case. The only excuse the appellant gave for taking the woman's life was that she had refused to live with him any longer. This in law was no excuse. The jury saw in his conduct the highest culpability, and came to the conclusion that the law demanded the infliction of the highest penalty, and we think rightly so. The record discloses that the appellant had a fair trial, and that the court's instructions to the jury submitted the issues according to the principles of law governing in such cases. The judgment of the lower court is affirmed.

The date, April 21, 1921, originally fixed for appellant's execution, having passed, it is ordered that judgment be entered by this court fixing the time when the original sentence of death shall be executed, as required by section 1177 of the Penal Code.

McALISTER and FLANIGAN, JJ., concur.

Ex parte SANDERS.

STATE v. SANDERS.

(No. 505.)

(Supreme Court of Arizona. Oct. 19, 1921.)

1. Habeas corpus §92(1)—Legality of imprisonment determined on habeas corpus.

Under Pen. Code 1913, § 1359, subd. 7, providing that, if it appear on the return of the writ of habeas corpus that the petitioner has been committed on a criminal charge without reasonable or probable cause, he may be dis-

charged, the legality of imprisonment may be determined on habeas corpus.

2. Embezzlement §15—Partnerships not included within statute enumerating persons liable for embezzlement.

Pen. Code 1913, § 503, enumerating persons who can be guilty of embezzlement, and further including any "person otherwise intrusted with or having in his control property for the use of any other person," does not include partners, as a partner combines in himself at once the character of principal and agent.

Appeal from Superior Court, Santa Cruz County; W. A. O'Connor, Judge.

Application of Lon Sanders for a writ of habeas corpus. From an order discharging the petitioner, the State appeals. Affirmed.

W. J. Galbraith, Atty. Gen., and Arthur H. De Riemer, Co. Atty., of Nogales, for the State.

S. F. Noon, of Nogales, for respondent.

ROSS, C. J. This is an appeal from an order of the superior court of Santa Cruz county, made in a habeas corpus proceeding discharging the petitioner, Lon Sanders, from custody, and is prosecuted by the state under subdivision 7 of section 1227, Civil Code 1913. The petitioner, after preliminary trial before committing magistrate in said county, had been regularly held to answer the charge of embezzlement. In his petition for a writ of habeas corpus the illegality of his imprisonment was alleged to be that he was committed without reasonable or probable cause, and as a part of his petition the testimony taken at the preliminary was made an exhibit. It appears from the testimony taken at the preliminary that the funds the petitioner is alleged to have embezzled were the property of a copartnership of which he was a member. The Attorney General therefore states:

"The sole question presented by this appeal is whether a partner may be tried and convicted under the Penal Code of this state for the embezzlement of partnership funds."

On this question we have only the view point of the Attorney General; the petitioner failing to make any appearance.

[1] The writ of habeas corpus was sought by the petitioner under subdivision 7 of section 1359 of the Penal Code, wherein it is provided that, if it appear on the return of the writ of habeas corpus that the petitioner has been committed on a criminal charge without reasonable or probable cause, he may be discharged. The right to have the legality of his imprisonment thus determined is well settled by the following cases: Ex parte Sternes, 82 Cal. 245, 23 Pac. 38; Ex parte Vice, 5 Cal. App. 153, 89 Pac. 983; Ex parte Baugh, 30 Idaho, 387, 164 Pac. 529.

[2] Embezzlement is purely a statutory offense. It was unknown to the common law. We must therefore look to our statute defining the crime of embezzlement and the relations under which it may be committed in order to determine whether a partner may be tried and convicted for misappropriating funds belonging to his partnership. We are asked to construe section 503 of the Penal Code to cover a partner who misappropriates partnership funds. That paragraph reads as follows:

"Every trustee, banker, merchant broker, attorney, agent, assignee in trust, executor, administrator or collector, or person otherwise intrusted with or having in his control property for the use of any other person, who fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement."

It is obvious that it does not in terms cover the situation. None of the employments or trust relations therein enumerated comprehends or approaches the relationship a partner sustains to the partnership funds, nor do we think the expression "or person otherwise intrusted with or having in his control property for the use of any other person" fits the case of a partner, for the reason the partner does not have control of the property "for the use of any other person," but rather for the use of himself and all the other members of the partnership.

In the case of *State v. Reddick*, 2 S. D. 124, 48 N. W. 846, under a statute for the purpose of this case just the same as ours, the court said, after quoting the statute:

"Upon these provisions of law the contention is made that defendant in error was a trustee of his copartner, that as such partner and consequent trustee he had in his control property for the use of another, and that a fraudulent appropriation of such property to a use or purpose not in the due and lawful execution of his trust, as charged in the indictment, rendered him guilty of embezzlement. It need hardly be stated that under the general statute defining embezzlement as a criminal offense the rule is that the fraudulent misappropriation of partnership funds by one of the partners does not constitute embezzlement, for each partner is the ultimate owner of an undivided interest in all the partnership property, and none of such property can be said, with reference to either partner, to be the property of another, and, as no one can be guilty of stealing or embezzling what belongs to him and of which he is legally entitled to the possession, the courts have uniformly held that a general partner cannot be convicted of embezzling partnership property which comes into his possession or under his control by virtue of his being such partner and joint owner. *Whart. Crim. Law* (9th Ed.) §§ 935, 1015, 1054; *State v. Kent*, 22 Minn. 41; *State v. Butman*, 61 N. H. 511; *Van Etten v. State*, 24 Neb. 734, 40 N. W. Rep. 289; *Napoleon v. State*, 3 Tex. App. 522."

The Attorney General cites as supporting his contention *State v. Kusnick*, 45 Ohio St. 535, 15 N. E. 481, 4 Am. St. Rep. 587. In that case it was held that the owner of shares of stock in a joint-stock banking company who was also the cashier of the company could be guilty, under the Ohio statute, of embezzling the funds of the banking company. The court in the *Reddick* Case, in commenting upon the decision in the *Kusnick* Case, used this language:

"It was his employment as cashier that imposed the duty and trust upon him, and at the same time afforded him the opportunity for their violation and abuse. And even then the court seems to have regarded it as important to demonstrate that the statute under which the conviction was had deliberately eliminated as an element of the offense the condition that the subject of the embezzlement should be the property of another."

The Illinois "court declines to follow the reasoning" of the *Kusnick* Case. *McElroy v. People*, 202 Ill. 473, 66 N. E. 1058; *People v. Dettmering*, 278 Ill. 580, 116 N. E. 205.

We have come to the conclusion that—

"A partner cannot be guilty of embezzlement of partnership funds, because such partner combines in himself at once the character of principal and agent. The partners have the community property and are interested in the partnership effects." *Napoleon v. State*, 3 Tex. App. 522; *Ray v. State*, 48 Tex. Cr. R. 122, 88 S. W. 761; *Gary v. Northwestern Masonic Aid Ass'n*, 87 Iowa, 25, 53 N. W. 1086.

The judgment of the lower court is affirmed.

McALISTER and FLANIGAN, JJ., concur.

Ex parte BEAVER.

BEAVER v. STATE.

(No. 516.)

(Supreme Court of Arizona. Oct. 19, 1921.)

1. Habeas corpus §92(1)—Sufficiency of evidence determined on habeas corpus.

Under Pen. Code 1913, § 1359, subd. 7, providing that, if it appear on the return of the writ of habeas corpus that the petitioner has been committed on a criminal charge without reasonable or probable cause, he may be discharged, the sufficiency of the evidence may be determined on habeas corpus.

2. Habeas corpus §85(1)—Evidence of homicide at preliminary trial held insufficient.

In a preliminary trial of one charged with murder, the evidence, falling to show that deceased came to his death by criminal means, and nothing to connect the petitioner with the homicide, except the fact that petitioner was seen going away from the building immediately

after the shooting, held insufficient, and accused entitled to discharge on habeas corpus.

Appeal from Superior Court, Yavapai County; E. Elmo Bollinger, Judge.

Application of Charles Beaver for a writ of habeas corpus. From an order refusing to discharge petitioner, he appeals. Reversed and remanded.

J. E. Russell and Leo T. Stack, both of Prescott, for appellant.

W. J. Galbraith, Atty. Gen., and John L. Sullivan, County Atty., of Prescott, for the State.

ROSS, C. J. This case comes to this court upon appeal from an order of the superior court of Yavapai county, made in a habeas corpus proceeding refusing to discharge the appellant from custody. The appellant upon a charge of murdering one Ed. F. Bowers on the 1st day of July, 1921, had been preliminarily tried before a magistrate and committed, without bail, to appear and answer before the superior court. His petition for writ of habeas corpus alleged that his imprisonment was illegal for the reason that he had been committed without reasonable or probable cause. Attached to his petition was a full and true transcript of the testimony taken at the preliminary. The testimony was that of the sheriff of Yavapai county, Warren G. Davis, and one Charles P. Myers.

The sheriff, after giving his name, stated that he was called to Weaver street, Prescott, about 4 o'clock p. m. on the 1st day of July, and when he arrived there he found that Ed. Bowers had been shot and killed. Myers testified that on the 1st day of July he heard four or five shots about 4 o'clock in the afternoon, and that he looked toward the house where the shots were being fired, and saw splinters flying from the building in which the shots were being fired; that the house was on Weaver street about 160 feet away; that soon after he heard the shots he saw the petitioner, Beaver, going away from the house.

This evidence falls far short of what should be shown in order to hold a person upon a criminal charge. It fails to show that Ed. Bowers came to his death by criminal means in the first place. It would be as reasonable to assume from a reading of the evidence that he was accidentally shot, or shot under justifiable or excusable circumstances. In the second place, there is nothing to connect the petitioner with the homicide except the bare fact that he was seen going away from the building immediately after the shooting. So far as the evidence shows his errand might have been for surgical or medical aid, or to report to the peace officers what had happened. Since the evidence failed to

show that any crime whatever had been committed, it is quite plain that under the provisions of subdivision 7, § 1359, Penal Code, and in accordance with the decision of this court in *Ex parte Sanders*, 201 Pac. 93, just decided, the court should have discharged the appellant.

The judgment of the lower court is reversed, and the cause remanded for further proceedings in accordance herewith.

McALISTER and FLANIGAN, JJ., concur.

NICHOLS v. McCLURE et al. (No. 1914.)

(Supreme Court of Arizona. Oct. 19, 1921.)

1. Brokers §86(6).—Evidence held sufficient to establish fraudulent intent of owner and purchaser in substituting new agreement.

In an action by a broker for commissions for procuring a purchaser for lands, evidence of conduct of the vendor and purchaser in repudiating their contract and substituting a new one held to justify a finding that such repudiation and substitution was done with the fraudulent intent to defeat the broker's claim for commission.

2. Evidence §589.—Credibility of testimony of party determined in view of interest.

In an action by a broker to recover commission for procuring a purchaser, the credibility of the testimony of defendant will be determined as other facts; the court being at liberty to disbelieve his testimony on ground of interest.

3. Brokers §56(3).—Claim of broker for compensation not defeated by substituting new contract.

A broker's right to commissions for procuring a purchaser for land is not defeated by a new agreement between the vendor and purchaser made for the purpose of depriving the broker of his commissions, which is in essence the same as the first contract.

4. Appeal and error §931(6).—Presumed that trial court ignored incompetent evidence.

In the trial of an action by a broker for commissions, the introduction of the carbon copy of a letter without a showing that the original letter was lost, destroyed, or unavailable held not prejudicial, other evidence being sufficient to substantiate a finding, and being presumed, if incompetent, to have been ignored by the court.

5. Courts §121(4).—Separate cause of action within superior court's jurisdiction, though insufficient when standing alone.

In an action on a claim for an amount within the jurisdiction of the superior court, it has jurisdiction for a separate cause of action for \$9.

Appeal from Superior Court, Yuma County; Fred L. Ingraham, Judge.

Action by Arnoldas H. McClure and another against Charles L. Nichols. Judgment for plaintiffs, and defendant appeals. Affirmed.

Peter T. Robertson, of Yuma, and D. T. Jenkins, of San Jose, Cal., for appellant.

Thos. D. Molloy, of Yuma, for appellee.

FLANIGAN, J. This is an action on contract for brokerage commission on sale of real property. The case was tried without a jury, and the defendant, upon the conclusion of the testimony, requested the court to make written findings of facts. In accordance with the provision of section 528, Revised Statutes 1913. Such findings were accordingly made, and in regular course judgment rendered thereon in favor of plaintiffs for the commissions claimed of \$1,750, as also for the cost of an abstract of title to the property involved paid for by plaintiffs in the sum of \$9, with interest on both items and costs. From this judgment the defendant has appealed.

[1] It appears from the facts so found that on September 8, 1918, the defendant, being the owner of an 80-acre tract of farm land, in Yuma county, Ariz., "authorized and employed the plaintiffs as defendant's exclusive agents to sell and dispose of said tract of land for the sum of \$14,250 net to the defendant, and agreed to pay plaintiffs as commission all they should secure in excess of said sum"; that plaintiffs accepted said employment, and on October 10, 1918, pursuant thereto, "procured and produced a purchaser for the land in the person of one Alfred M. Nuckols, who was then ready, able, and willing to purchase said premises for the sum of \$16,000," payable as follows: \$500 cash actually paid; \$500 on November 3, 1918, thereafter paid; \$3,000 evidenced by promissory notes for the sum of \$2,000 and \$1,000, respectively, and due on or before January 1, 1919; \$12,000 evidenced by three promissory notes in the sum of \$4,000 each, secured by mortgage upon the property, due respectively one, two, and three years after January 1, 1919—that these payments were made to defendant, and the notes and mortgage executed to him; that on November 21, 1918, the defendant accepted, ratified, and confirmed this sale and its terms and conditions, and then agreed to pay plaintiffs as commissions the sum of \$1,750 as their compensation for effecting the sale. It is further found:

"(6) That subsequent to November 21, 1918, and prior to January 1, 1919, the defendant, contriving in bad faith to cheat and defraud the plaintiffs, and to defeat them from collecting from him the said sum of \$1,750, conspired and agreed with the said purchaser, Alfred M. Nuckols, that they, the said Nuckols and said Nichols, would falsely state and represent to the plaintiffs that the said Nuckols was unable and unwilling to perform his agreement to pur-

chase said tract of land for said sum of \$16,000 on said terms and conditions, all with the fraudulent intent to cheat and defraud the plaintiffs as aforesaid, and in pursuit of said fraudulent scheme and device the defendant did as falsely state and represent to the plaintiffs, and on January 1, 1919, with said fraudulent intent and purpose, purported and pretended to annul and rescind said sale of October 10, 1918, of said tract of land to said Nuckols, and on January 8, 1919, with such fraudulent intent and purpose, pretended to enter in a new deal and agreement with said Nuckols whereby the defendant conveyed said tract of land to said Nuckols.

"(7) That on January 8, 1919, the defendant conveyed said described premises to said Alfred M. Nuckols for the sum of \$16,000, on substantially the same terms and conditions as the sale thereof by the plaintiffs on October 10, 1918, and said conveyance of said premises by the defendant to said Nuckols on January 8, 1919, was the consummation of the sale of said premises made by the plaintiffs for the defendant to said Nuckols on October 10, 1918, in pursuance of their said employment and authorization to sell said premises as set forth in the second finding of fact herein.

"(8) That no part of said sum of \$1,750 has been paid."

On behalf of appellant it is contended that certain findings are not supported by the evidence. Upon examination of the abstract of record we are satisfied that the contentions thus made cannot be sustained. We deem it unnecessary to set forth the evidence in the record supporting the findings attacked, other than that relating to findings 6 and 7, quoted. This we do because a determination that these findings are supported by evidence is decisive of most of the questions argued.

It appears that, the purchaser, Nuckols, not having paid the notes for \$3,000 due January 1, 1919, the defendant, a resident of Los Gatos, Cal., on January 2, 1919, wrote from that place to plaintiffs at Yuma that the deal "is called off, as the time expired on January 1st." Mr. Harrison, one of the plaintiffs, testified that he had theretofore informed the defendant that nothing could be done on the notes for \$3,000 until after January 2, the holiday intervening. On January 8, 1919, Nichols, according to his own testimony, conveyed the land to Nuckols for \$14,000, which, together with the \$1,000 already paid to Nichols and retained by him, made a total of \$15,000, being \$750 more than he would have received under the original deal; Nuckols, the purchaser thus receiving the benefit of a \$1,000 reduction from the first price. In the latter part of December, 1918, a Mr. Bondesson, of Yuma, who was the agent of the purchaser in this consummation, if not before, had gone to Los Gatos to talk to Nichols about the business. Bondesson in October had expressed his dissatisfaction with the commission of \$1,750 to be paid to plaintiffs, saying that "\$1,750 was too much

commission for any real estate man to get for the sale of any 80 acres of land." The final agreement concerning the conveyance of January 8 was made between Bondesson and Nichols at Los Gatos about January 3, 1919, it appearing from the testimony of Nichols that he then saw Bondesson, who "had papers, and forfeited the other deal," and that the \$1,000 already paid was forfeited, that Nuckols, through his agent, Bondesson, agreed to this, and he then entered into negotiations with Bondesson, and as the result conveyed the property to Nuckols for \$14,000 on January 8. There was evidence of an admission made by defendant to one of the plaintiffs that the price obtained on the sale to Nuckols was \$16,000, which testimony would support the court's finding to that effect. There was evidence also that under the original contract procured by plaintiffs a claim of \$500 due from Nuckols to defendant for rental of the property was to be relinquished by the latter; this item not being considered at all as a part of the consummated agreement, Nichols testifying it was "never mentioned," and that he presumed Nuckols would still owe him the rent, if he wanted to collect it. As we think it immaterial, so far as the defendant is concerned, whether he got \$16,000 or a lesser sum, in view of the court's findings on the issue of fraud, and as no point is made by appellant of any necessary correlation between the findings as to purchase price and fraud, we adopt the defendant's statement as to the consideration. We may also remark, in order not to be misunderstood, that, following counsels' presentation in the briefs, we shall not consider in our discussion the rental item.

The circumstances, terms, and conditions of the agreement finally consummated were not given by Nichols further than is precedingly stated, although he testified, nor were Bondesson or Nuckols called as witnesses, nor was any explanation given why they were not called. Without being unmindful of the rule that fraud must be shown by clear and satisfactory evidence, and not based on vague surmises or strained inferences, we cannot say the finding attacked is not fairly supported by the evidence. The ability of Nuckols to have performed on January 1 may be fairly inferred from his ability to conclude the agreement of January 8, involving an amount in money within \$1,000 of his original contract; it may also fairly be concluded that his unwillingness to go through with the first agreement was referable to the more advantageous terms of the last deal.

[2] As might have been expected, the defendant vouched for his own good faith in the transaction, but the court was not bound to accept the testimony of the defendant Nichols to that effect. The mere fact that he was interested in the result of the suit

was sufficient to require the credibility of his testimony to be submitted to the court as a question of fact, and the court was at liberty to disbelieve his testimony solely on the ground that he was interested. *Lentz v. Landers*, 21 Ariz. 117, 185 Pac. 821.

[3] The new agreement consummated by the conveyance of January 8, 1919, having been made by the defendant to Nuckols for the purpose of depriving the plaintiffs of their commission, it must be held that the contract so executed was, as found by the court, but the consummation of the executory agreement for the sale of the premises effected by the plaintiffs for the defendant on October 10. The defendant did not return the sum of \$1,000 paid by Nuckols, but pretended to forfeit it, which he had no legal right to do in the absence of agreement to that effect. He thus availed himself of the fruits of plaintiffs' services and closed the contract which they had procured for him. No element of bad faith being shown on the part of defendant, he would have been justified on plaintiffs' failure to perform in dealing with Nuckols directly. But under the circumstances shown it must be held that the new agreement was in essence the first contract, changed only in form for the purpose of impairing and defeating the claim of the plaintiffs. *Longworth v. Stevens* (Tex. Civ. App.) 145 S. W. 257; *Mooney v. Elder*, 56 N. Y. 238; *Kolp v. Brazer* (Tex. Civ. App.) 161 S. W. 899; *Anderson v. Crow* (Tex. Civ. App.) 151 S. W. 1080; *Wilson v. Sturgis*, 71 Cal. 226, 16 Pac. 772; *O'Connell v. Casey*, 206 Mass. 520, 92 N. E. 804; *Plant v. Thompson*, 42 Kan. 664, 22 Pac. 726, 16 Am. St. Rep. 512.

For the reasons just stated it cannot truthfully be said that the enforceability of the original agreement is a question in the case, as contended by appellant. It cannot now be maintained on his behalf that he has not received in the executed contract with Nuckols all he bargained for with plaintiffs, being the very consideration for which he stipulated to pay the commission of \$1,750. *Handley v. Shaffer*, 177 Ala. 636, 59 South. 286; *Coffman v. Dyas Realty Co.*, 176 Mo. App. 692, 159 S. W. 842.

Neither will the fact that defendant sold for a price below that originally agreed upon defeat the plaintiffs' claim:

"Where the terms of sale are fixed by the vendor, in accordance with which the broker undertakes to produce a purchaser, yet if, upon the procurement of the broker, a purchaser comes with whom the vendor negotiates, and thereupon voluntarily reduces the price of the property, or the quantity, or otherwise changes the terms of sale, as proposed to the broker, so that a sale is consummated, or terms or conditions are offered which the proposed buyer is ready and willing to accept, in either such case the broker will be entitled to his commission at the rate specified in his agreement with his principal." *Stiewel v. Lally*, 89

Ark. 195, 115 S. W. 1185; *Baker v. Murphy*, 105 Ill. App. 151; *Plant v. Thompson*, supra.

[4] Complaint is made that the court erred in admitting in evidence a carbon copy of a certain letter of instructions from defendant to the First National Bank at Yuma, concerning the disposition to be made of an escrow of certain instruments in writing, including, amongst others, the notes, the deeds by Nichols to Nuckols, and the mortgage back to Nichols, the original instrument not having been shown to be lost, destroyed, or unavailable. Of the several reasons appearing from the record to show that such act of the court was not erroneous, or, if erroneous, was not prejudicial, we content ourselves with pointing out that there was other sufficient evidence to substantiate the finding of the court on the issues which this copy was offered to prove, and that we will presume, the trial being to the court without a jury, that the evidence, if incompetent, was ignored by the court. *Shannon Copper Co. v. Potter*, 13 Ariz. 245, 108 Pac. 486.

[5] It is claimed that the judgment, so far as it is based upon the cause of action for the sum of \$9 paid for the abstract of title, is a nullity, because it was not within the jurisdiction of the superior court to render judgment thereon. This point was made in the case of *Webster v. Heywood*, 21 Ariz. 550, 192 Pac. 1069, and impliedly held to be without merit. We adhere to that ruling.

The remaining questions argued for appellant we do not discuss, either because they have become immaterial in view of the conclusions above stated, or because no assignment of error of any kind has been made requiring us to notice them.

There being no error in the case, the judgment must be affirmed.

ROSS, C. J., and McALISTER, J., concur.

REED v. CHAMBERS et al. (No. 1894.)

(Supreme Court of Arizona. Oct. 19, 1921.)

1. Appeal and error \S 430(1)—Notice of appeal required by statute held jurisdictional.

Under Civ. Code 1913, par. 1234, providing that a party taking an appeal must give notice of appeal in open court which shall be entered on the minutes of the court, or by written notice which shall be served upon the adverse party or his attorney and filed with the clerk of the superior court, such notice is jurisdictional.

2. Appeal and error \S 387(4)—Notice of appeal is essential to effect appeal, and bond without notice is invalid, though reciting that notice was given.

The mere fact that an appeal bond was given and had been approved and recited con-

trary to fact that notice of appeal had been given, does not effect an appeal, and a bond called a "Bond on Appeal" on file, where the notice of appeal required by statute was not given, is without validity either as an appeal bond or a supersedeas bond.

3. Appeal and error \S 1226—Notice of appeal given subsequent to filing of bond within statutory time vitalized the bond.

Under Civ. Code 1913, par. 1234, it is not necessary that notice of appeal should be given before the filing of the bond, but is sufficient if given within the statutory time, and, if subsequent to the filing of the bond, will vitalize the bond.

4. Appeal and error \S 436—Until notice of appeal is given, a bond on file is subject to order of the court.

Until notice of appeal is given, an appeal bond on file, being useless and performing no function, is subject to the order of the court, and treating it as a nullity and releasing its sureties is proper.

Appeal from Superior Court, Navajo County; J. E. Crosby, Judge.

Action by B. S. Reed against E. R. Chambers and another. From orders releasing sureties from liability on an appeal or supersedeas bond, plaintiff appeals. Affirmed.

Thorwald Larson, of Holbrook, for appellant.

C. H. Jordan and W. E. Ferguson, both of Holbrook, for appellees.

McALISTER, J. This is an appeal from an order of the superior court releasing from further liability the sureties on a bond which is claimed by appellant to be both an appeal and supersedeas bond, but by appellees to be only the former.

B. S. Reed, plaintiff-appellant, recovered on a promissory note judgment for \$1,500, together with attorney's fees, interest, and costs, against E. R. Chambers and R. G. Chambers, defendants and appellees. A demurrer to the complaint had been overruled March 6, 1920, and 10 days given for filing an answer, but, none having been filed, the default of the defendants was entered and a trial had May 7, 1920, resulting in a judgment for the plaintiff. On May 17th a motion for a new trial was filed, which was denied on May 27th by operation of law. No notice of appeal therefrom was given, nor from the judgment itself, but on June 5th a bond, entitled "Bond on Appeal," having been approved, was filed by defendants, and in it appears the statement that upon the denial of their motion for a new trial the defendants "gave notice of appeal in open court from said judgment and said order denying defendants' motion for a new trial to the Supreme Court of the state of Arizona." On June 26th thereafter an order was

entered releasing the sureties on this bond from further liability and a new bond, identical in form with it except as to dates and sureties, was approved and filed. Upon hearings orders were entered releasing W. W. Perkins and Jullo Sancet, sureties on the new bond, from further liability thereon, the first order being on October 1 and the second on October 30, 1920. The purpose of this appeal is to have this court set aside and hold for naught these two orders. No other error is assigned.

The sheriff of the county certifies under date of June 5th that, in pursuance of a writ of execution issued out of the superior court of Navajo county on May 7, 1920, he levied on 950 head of Navajo ewes, the property of one of the defendants, took them into his possession, and advertised them for sale, but before the sale took place he released them by direction of the plaintiff; the defendants having given a supersedeas bond in double the amount of the judgment. This certificate was made on the day the first bond was filed, but error is not based on the order of June 26th releasing the sureties on this bond from further liability.

[1] Notwithstanding the statement in both bonds that defendants gave notice of appeal in open court from the judgment and the order denying their motion for a new trial, it is established from the record that no such notice was given. In this jurisdiction an appeal is "taken by the party taking the same giving notice of appeal in open court, which shall be entered in the minutes of the court, or by a written notice which shall be served upon the adverse party or his attorney, and filed with the clerk of the superior court." Paragraph 1234, Revised Statutes of Arizona 1913. In the case of *Thomas v. Speese*, 14 Ariz. 556, 132 Pac. 1137, this court said that giving notice of an appeal is jurisdictional, using the following language:

"In all civil cases other than those where the appellant is not required to give bond on appeal the appeal is taken by the appellant giving notice of appeal in open court, which shall be noted on the docket and entered of record and within 20 days after giving such notice by filing with the clerk of the court an appeal bond. Paragraph 1496, Rev. Stats. Ariz. 1901, as amended, chapter 21, First Legislature, First Session 1912. Giving the notice of appeal, and in cases where a bond on appeal is required filing the appeal bond are jurisdictional. In this case the bond on appeal was filed, but the record fails to show that appellant gave the statutory notice of appeal. This is fatal, and this court has no jurisdiction of the case but to dismiss the appeal."

[2-4] Whether the bond was merely an appeal bond, or both an appeal and supersedeas bond, is immaterial for the purpose of this appeal, though it seems to have complied

with the requirements of both, notwithstanding it is denominated a "Bond on Appeal." It was, however, without any validity as either, since no appeal had, at the time it was filed or later, even been started. In no way can the machinery by which a case reaches the Supreme Court of this state on appeal be set in motion except by giving the required notice to that effect, and until that is done all proceedings looking toward an appeal are without force or effect. The fact that the bond had been approved, and recited, contrary to the fact, that notice of appeal had been given, does not relieve the party desirous of appealing from giving the necessary notice. It is not required, however, that it be given before the bond is filed to render the latter effective. If it be given within the statutory time, though subsequent to the filing of the bond, it will have the effect of vitalizing the latter. *Inspiration Consolidated Copper Co. v. Mendez*, 19 Ariz. 151, 166 Pac. 278, 1183. Until the notice of appeal is given a bond on file is subject to the order of the court, since under such circumstances it is entirely useless, performing no function whatever. So in this instance the bond was properly treated as a nullity, and a motion to release its sureties granted, the same as a request to strike it from the files could have been. It cannot be contended that it superseded the judgment; for, standing alone, it had no effect whatever, and necessarily could not have prevented a sale of the sheep levied on under the execution.

It follows that the orders releasing the sureties Perkins and Sancet, from further liability on the bond approved and filed June 26th were not erroneously entered, and are therefore affirmed.

ROSS, C. J., and FLANIGAN, J., concur.

KING v. STATE. (No. 517.)

(Supreme Court of Arizona. Oct. 24, 1921.)

1. Criminal law \S 576(5)—Right to dismissal of prosecution for failure to bring case to trial within required time held waived.

Where defendant announced himself ready for trial, and a jury was impaneled and duly sworn, there was a waiver of the right to dismissal of prosecution for failure of the state to bring the case to trial within 60 days after the filing of the information, under Penal Code 1913, \S 1274, subd. 2.

2. Criminal law \S 895—One may waive right intended for own benefit.

One may waive a right intended for his own benefit if it can be relinquished without detriment to the community at large.

3. Criminal law — 1938(17)—Record held not to present question of misconduct of prosecuting attorney.

Where record certified under Penal Code, 1913, § 1130, included motion for new trial, affidavits relating to misconduct of prosecutor and instruction of court relied on to cure misconduct, but the transcript of the reporter's notes did not contain such instruction, the misconduct of prosecutor will not be considered; the affidavits not being part of the record.

4. Homicide — 234(5) — Evidence held to prove defendant entered into common design with others to kill deceased.

In prosecution for murder, evidence held to prove that defendant had entered into a common design with others to kill deceased.

Appeal from Superior Court, Cochise County; A. C. Lockwood, Judge.

John King was convicted of murder in the second degree, and from conviction and from order denying motion for new trial, he appeals. Affirmed.

Lyman H. Hays and G. V. Hays, both of Wilcox, for appellant.

W. J. Galbraith, Atty. Gen., G. R. Hill, Asst. Atty. Gen., and R. N. French, Co. Atty., of Tombstone, for the State.

FLANIGAN, J. Under information filed July 10, 1920, appellant was convicted of the crime of murder in the second degree, and was thereupon adjudged to suffer an indeterminate imprisonment of not less than 10 years, the maximum sentence to be his natural life. From this judgment, and an order denying his motion for new trial, he appeals.

The defendant was not brought to trial until October 4, 1920. Eighty-five days had therefore elapsed between that time and the filing of the information. Appellant by his counsel announced himself ready for trial, a jury was impaneled, and on October 5, 1920, duly sworn to try the issue. After the jury had been sworn, counsel for defendant moved "the court to dismiss the cause under subdivision 2, par. 1274, of the Penal Code," which motion the court denied upon the ground that, the jury having been impaneled and sworn, and the defendant placed in jeopardy, his right to such dismissal was waived.

The relevant part of section 1274 is as follows:

"The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: * * * (2) If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment or the filing of the information."

[1] The record shows that the trial had not been postponed upon defendant's application, and that no cause was shown by the

state for the delay. The refusal of the court to order the prosecution dismissed is the basis of the first assignment of error. We think the ruling of the court was correct. Unquestionably, the section quoted is a construction of our constitutional guaranty that accused persons shall in criminal prosecutions have the right to a speedy trial (section 24, art. 2, Constitution), being in the nature of a legislative definition of the term. *Yule v. State*, 16 Ariz. 134, 141 Pac. 570; *Matter of Application of Von Feldstein*, 17 Ariz. 245, 150 Pac. 235.

[2] Appellant contends that the right thus constitutionally secured could not be waived by him. With this we cannot agree. The constitutional provision, as is shown by its origin and history, was designed to secure a benefit personal to the defendant, and—

"it is a recognized principle that every one may waive a right intended for his own benefit, if it can be relinquished without detriment to the community at large." *Reid v. Field*, 83 Va. 26, 1 S. E. 395.

That the right was here waived is plain.

People v. Hawkins, 127 Cal. 372, 59 Pac. 697, is directly in point, and construes the statute of California from which our provisions are taken. We quote from the opinion:

"The legal jeopardy of the defendant has attached when a jury has been 'charged with his deliverance,' and the jury stands thus charged when its members have been impaneled and sworn. *Cooley, Const. Lim.* (6th Ed.) p. 399. When, therefore, the defendant here moved for dismissal, he had been 'brought to trial,' and was upon trial, without previous objection that the limit of 60 days had expired. If he could then raise the objection for the first time, he could raise it as well on the announcement of the verdict, or at any other stage of the trial. We are satisfied that the statute never was designed for such uses, and must hold that defendant waived its benefit (if he was entitled thereto) by failure to claim it in proper season."

We hold that the assignment of error is without merit.

The next assignment is that the deputy county attorney in his argument to the jury used the following language:

"The defendant never explained why those blood spots were upon his clothes and his pistol."

There was testimony by a witness for the state that there were blood spots upon the defendant's clothes and pistol after the killing of Scott. The defendant did not testify although he introduced the testimony of others. The record of the action certified to this court in accordance with the provisions of section 1130, Penal Code, includes the motion for new trial, and an affidavit—

apparently a part of this motion—made by the defendant, in which he avers that the deputy county attorney used the language quoted in his opening argument to the jury, and also contains the counter affidavit of that officer that he had referred to the "defense" and not to the "defendant," admitting he was otherwise correctly quoted. It appears also that an instruction was requested to the effect that the jury should not in any manner consider the failure of the defendant to testify, and that such failure must not be referred to by counsel, which instruction was marked "given" and signed by the judge. The transcript of the reporter's notes purporting to set forth the instructions actually given, and signed by appellant's counsel as correct, does not contain this or any like instruction to the jury on the matter.

[3] The contention that as the affidavits referred to are a part of the record, we must therefore consider the error assigned, is obviously ill founded. From this record we merely know that the affidavits were filed, and that they are in form as set out, which is far from the authenticated showing of fact required. As the matter complained of is not presented in the proper manner, we may not consider the assignment. *Groce v. Territory*, 12 Ariz. 1, 94 Pac. 1108.

[4] The next assignment of error challenges the sufficiency of the evidence to prove that the defendant had entered into a common design with others to kill the deceased. There was testimony for the state introduced to prove that, in the early morning hours of June 2, 1920, at a resort known as "White City," near the military post, Ft. Huachuca, the deceased, a civilian, shot a soldier, one Scott. With the motive, apparently, of revenging the shooting of their comrade, other soldiers immediately pursued the assailant, overtaking him at a point about 200 yards away from the house where the first shooting occurred. After being overtaken, the fugitive was seen to be on his knees, his hands up, with some of the pursuing party (consisting then of four or five men) shooting at him, and others of them throwing sticks and stones at him. The deceased fell, his assailants closed in, and—as it appeared to a witness—beat and punched him about the head. Deceased died very soon afterwards as the immediate result of a gunshot wound, which penetrated his jaw and ranged downward through his neck and lungs, the bullet causing the wound being later taken from under his right arm. He was also shot across the abdomen, and the upper and back part of his head bore two

little punctured confused wounds, penetrating the head and fracturing the skull, pushing two little flaps of bone into it.

The defendant, a negro, was a soldier from the fort, and had, it seems, spent the night at "White City," being up and about the resort during the night and the early morning hours.

Very shortly after the wounding of the deceased the defendant and three other soldiers boarded an automobile going to the fort, being picked up by the driver of the car a short distance from where Scott was lying wounded. It was proved that the defendant was armed with a regulation army gun, a Colts model automatic 45-caliber pistol; that a few hours after the killing this gun showed powder stains in the barrel, and, from this and the odor of burnt powder, had evidently been recently discharged; that the weapon in various parts, including the butt, was splotted with blood, and that there were two little projections on the butt of the weapon which were approximately the same distance from each other, as were the penetrating wounds to the skull. It was further shown that five empty shells picked up a few hours after the homicide about 30 feet from where Scott's body had been lying, were peculiar in the fact that the firing pin, or plunger, had struck eccentrically a little further in the side of the caps in the cartridges than was ordinary in guns of that make or class, and that on each shell was a characteristic "swell" or bulge, not common to exploded shells from such weapons; that defendant's pistol exploding similar cartridges produced effects on them similar to those exhibited by the shells found at the scene of the killing; and that the bullet taken from the body of the deceased was of the same caliber and kind as those used in defendant's pistol.

This evidence we think was ample to prove that there was a common design of several persons to kill the deceased. That the appellant was a party to that design appears, it is true, by circumstantial evidence only, but it is evidence of a nature, if believed, sufficient to prove that appellant was not only a participant in the homicidal assault, but one of the chief actors in it. The assignment of error cannot be sustained.

The remaining assignment of error we think to be obviously without merit.

Finding no error affecting the judgment, it must be affirmed.

ROSS, C. J., and McALISTER, J., concur.

**SILVER KING OF ARIZONA MINING CO.
v. KENDALL. (No. 1881.)**

(Supreme Court of Arizona. Oct. 19, 1921.)

1. Master and servant §96(1)—Actionable injury must be caused by risk of employment.

Under Employers' Liability Law, the unavoidable risk and hazardous character of the occupation or employment in which the workman is at the time engaged must be the cause of the accident resulting in injury before damages are recoverable; the fault, wrong, or negligence of the employer being entirely immaterial.

2. Master and servant §282—Recovery under Employers' Liability Law limited to "compensatory damages."

Under the Employers' Liability Law, the amount of recovery for personal injury is limited to "compensatory damages," which means a sum which will compensate the injured employee for the injuries sustained, and no more.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Compensatory Damages.]

3. Master and servant §267(1)—Evidence that injured employee had dependent wife and daughter irrelevant.

In an action for damages under the Employers' Liability Law, the measure of damages is the loss the injured employee himself sustained, and evidence that he had a dependent wife and child who were supported by him up to the time of the accident is irrelevant and immaterial.

4. Appeal and error §1050(1)—Evidence that injured employee had dependents prejudicial error.

In an action for damages under Employers' Liability Law, evidence that employee had a dependent wife and daughter had a tendency to win the sympathy of the jury for the plaintiff and enhance the verdict, and thereby prejudice the rights of the defendant.

5. Appeal and error §1050(1)—Error in admitting evidence that injured employee had dependents not cured by pleading as a set-off payment for benefit of him and his family.

In an action for damages under Employers' Liability Law, an error in admitting evidence that employee had a dependent wife and daughter was not cured by pleading a set-off pursuant to Rev. St. 1913, § 3160, alleging payment of money for the benefit of employee and his family, and mention of his family in proof of payments, since the mention of his family in both answer and evidence was unnecessary and immaterial.

6. Appeal and error §1053(3)—Error in admission of evidence of number of dependents of an injured workman is not cured by correct instruction on damages.

In an action for damages by a workman under the Employers' Liability Law, an error in admitting evidence of the number of de-

pendents in the family of the injured is not cured by an instruction that recovery was limited to actual loss suffered by the injured as a proximate and direct result of the accident causing the injury.

7. Trial §105(2)—Jury may consider incompetent evidence if admitted.

In an action for damages under the Employers' Liability Law, the erroneous admission of evidence of the number of dependents in the family of the injured servant justified the jury in considering it.

8. Appeal and error §1050(1)—That improper evidence of the number of dependents in family of injured workman may have reached the jury otherwise would not cure error in admission of incompetent evidence.

In an action for damages under Employers' Liability Law, improper evidence of the number of dependents in the servant's family cannot be held harmless, though the same facts may have reached the jury otherwise.

9. Appeal and error §1140(1)—No affirmance on condition of remittitur where verdict was enhanced by incompetent evidence.

An excessive judgment will not be affirmed on condition of filing a remittitur in the amount held to be excessive, where the verdict was enhanced through the weight of immaterial, irrelevant, and incompetent evidence, since the court cannot estimate the amount the verdict was enhanced.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Action by Edward Kendall against the Silver King of Arizona Mining Company. From judgment for plaintiff and an order denying a new trial, defendant appeals. Reversed and remanded.

Alexander, Christy & Baxter and Bullard & Jacobs, all of Phoenix, for appellant.

F. C. Struckmeyer, C. E. Johns, and Thomas J. Croaff, all of Phoenix, for appellee.

McALISTER, J. This is an action under the Employers' Liability Law (Civ. Code 1913, pars. 3153-3162). Fifty thousand dollars as damages for personal injuries was prayed for, but judgment for \$18,700 less \$2,700 was entered in accordance with the verdict of the jury. From this judgment and the order denying its motion for a new trial the defendant, the Silver King of Arizona Mining Company, a corporation, appeals.

The plaintiff, Edward Kendall, while in the employ of the defendant company as a miner, was injured by a blast or explosion occurring near where he was working, which threw ore, dirt, and other materials over, against, and into his body, resulting in the total loss of his right eye and a partial loss of the left, thus depriving him of his sight to the extent that he will not be able again to follow any useful or gainful occupation requiring vision. It is also alleged and testif-

ed to that his hearing has been greatly impaired and that his head, face, arms, neck, legs and heart were injured as well. The answer admits that appellee suffered an injury while in its employ, but denies that it was the result of an accident which arose out of and in the course of his employment and was due to a condition or conditions thereof, but pleads affirmatively that it was caused by his own negligence. At the trial, however, appellant did not attempt to substantiate its pleadings in this respect, but admitted through its attorney "that the plaintiff has a cause of action against the defendant under the Employers' Liability Law." The parties were unable to agree on the extent of the injury, and consequently the amount that would properly compensate appellee therefor, so they presented to the jury for its determination the only question to be decided—how much has the plaintiff been damaged.

Over appellant's objection the following answers by appellee, in response to questions by his counsel upon his examination in chief, were permitted:

"Q. Are you married or single? A. Yes; I have a family.

"Q. Of whom does your family consist? A. We have a child.

"Q. Are you living with your family, Mr. Kendall? A. I am.

"Q. How old is your daughter? A. Twelve years old.

"Q. Are you or are you not the support of your wife and child? A. I was up until the accident."

And the following answers by Mrs. Marie Kendall, in response to questions by counsel for appellee, were permitted over the objections of appellant:

"Q. Are you the wife of Edward Kendall, the plaintiff in this action? A. I am.

"Q. How many children have you by Edward Kendall? A. I have one.

"Q. What is her name? A. Dorothy.

"Q. How old is Dorothy? A. She is 12."

The admission of this testimony, together with the denial of appellant's motion for a new trial based thereon, is the only error assigned.

[1, 2] The Legislature of this state, in obedience to a constitutional mandate based upon the proposition that industry should bear the burden of its own maintenance, has provided in the Employers' Liability Law a method by which an employee injured in a hazardous occupation may recover for the loss he has sustained therefrom when the accident causing the injury occurs through the fault of neither himself nor his employer. The unavoidable risks and hazardous character of the occupation or employment in which the workman is at the time engaged must be the cause of the accident resulting in the injury before damages are recoverable under this law; the fault, wrong, or negligence of the employer being

entirely immaterial. The amount of recovery, therefore, for a personal injury resulting from an accident due to a condition of the employment, is limited purely to compensatory damages. *Arizona Copper Co., Ltd., v. Burciaga*, 20 Ariz. 85, 177 Pac. 29. By this term is meant a sum which will compensate the injured employee for the injuries sustained, and no more. *McKnight v. Denny*, 198 Pa. 323, 47 Atl. 970; *Morgan v. Southern Pac. Co.*, 95 Cal. 501, 30 Pac. 601; *Sachra v. Town of Manilla*, 120 Iowa, 562, 95 N. W. 198; *Louisville & N. R. Co. v. Gordan* (Ky.) 72 S. W. 311.

[3] It being true, then, that the loss the injured employee himself has sustained is the proper measure of damages, we are unable to see wherein the fact that appellee has a wife or child, or that they were supported by him up to the time of the accident, is either relevant or material. It is not a matter of their loss but of his, and this would be the same whether he was married or single, whether he had children or had not, or whether he was their support up to the time of the accident or not. His earning power during the remainder of his life, had he not been injured, would have been so much, and the fact that he was married would neither lessen nor increase it. As said by the Supreme Court of Alabama in *Louisville & Nashville R. Co. v. Binion*, 107 Ala. 645, 18 South. 75:

"The damages sued for are for the injury inflicted on the plaintiff, and not on his family, and for which the law allows him compensation, no more and no less in case he is single than if married and the father of a child or children. The recovery is for his benefit solely."

The Supreme Court of Utah, in considering the same proposition, used the following language in *Bakka v. Kemmerer Coal Co.*, 43 Utah, 345, 134 Pac. 888:

"The plaintiff, over the defendants' objections, was permitted to show that he had a wife, and six children from 2½ to 16 years of age. Complaint is made of this. * * * We think the evidence complained of was improperly received. It had no legal relevancy to prove what was claimed for it. The character and extent of the injury and plaintiff's ability to labor and produce were in question. * * * His injuries and his ability or disability to labor were the same whether he had no family or a large family. Nor was the evidence material."

To the same effect are the following and numerous other authorities: *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141; *Union Pacific R. Co. v. McMan*, 194 Fed. 393, 114 C. C. A. 311; *Lacorazza v. Cantalupo*, 210 Fed. 875, 127 C. C. A. 459; *Chicago v. O'Brennan*, 65 Ill. 160; *Rio Grande So. R. Co. v. Campbell*, 44 Colo. 1, 96 Pac. 986; *Sanitary Can Co. v. McKinney et al.*, 52 Ind. App. 379, 100 N. E. 785; *Crouse v. Chicago & N. W.*

Ry. Co., 102 Wis. 196, 78 N. W. 446, 778; *Simpson v. Foundation Co.*, 95 N. E. 10, 201 N. Y. 479, Ann. Cas. 1912B, 321; *Williams v. St. Louis, etc., Ry. Co.*, 123 Mo. 573, 27 S. W. 387; *Gallon v. Lauer*, 55 Ohio St. 392, 45 N. E. 1044.

[4] Whatever may have prompted the offering of this testimony, its introduction shed no light on the question to be decided, and could only have had the effect of winning the sympathy of the jury for appellee and thereby prejudice the rights of appellant. Hence it cannot be said that it did not result in enhancing the amount of the verdict in favor of the former; its tendency was undoubtedly in that direction. As said by the court in *Carille v. Bentley*, 81 Neb. 715, 116 N. W. 772:

"The tendency of such evidence is to inflame the minds of the jurors and arouse their sympathies, and thus unduly enhance the amount of the recovery. Such evidence was neither relevant nor material, and its admission was prejudicial error."

The Supreme Court of Illinois, speaking of the same matter, used the following language in *Chicago v. O'Brennan*, 65 Ill. 160:

"Was this evidence admissible? If it was, then it would have been competent to have gone farther, and shown all the circumstances of the family: Such as that the mother was an invalid; that one of the daughters was blind; that one son had accidentally lost a leg, etc., if such had been the case, so as to present a most pitiable picture of a helpless family dependent upon appellee for support. * * * For, as the evidence had no place in the case but as a stimulant to the sympathy of the jury, it would be just as competent to make the stimulant strong as weak."

The proposition is so plain that the citation of other authorities is unnecessary, though the following are in point: *Atchison, T. & S. F. Ry. Co. v. Ringle*, 71 Kan. 839, 80 Pac. 43; *Hecke v. Dunham et al.* (Mo. App.) 192 S. W. 120; *City of Gallon v. Lauer*, 55 Ohio, 392, 45 N. E. 1044; *Kreuziger v. Chicago, etc., Ry. Co.*, 73 Wis. 158, 40 N. W. 657; *Alberti v. New York, etc., R. Co.*, 118 N. Y. 77, 23 N. E. 35, 6 L. R. A. 765.

[5] It is urged by appellee that, even though it be error as a general proposition to permit such evidence to go to the jury, appellant in this case is not in a position to take advantage of it, for the reason that its answer alleges that since the accident appellant has expended in behalf of appellee, because of the accident and injuries sustained by him, and for the support of himself and his family, the sum of \$2,750, and for the further reason that evidence was introduced in support of this allegation which had the effect of curing any error attached to its admission upon the direct examination of appellee and Mrs. Marie Kendall. In pursuance of paragraph 3160, Revised Statutes of 1913, appellant had alleged by way of set-off the sums

advanced after the injury for the benefit of appellee and his family, and in proof of this allegation the witness George D. Christy, an officer of the appellant corporation, testified to the amounts paid, and in so doing referred to a conversation with Mrs. Kendall but made no reference to the number constituting appellee's family. It did not appear therefrom that he had a child nor that he was the support of his wife and child up to the time of the accident. The payments were not denied in either the pleading or proof of appellee, though the exact amount was not known; hence no issue was made thereon. The mere reference in the answer to the fact that appellant advanced money for the benefit of appellee and his family did not justify the admission of the evidence complained of, for a set-off is permitted only when the sum contributed or paid is for the benefit of the employee injured, and it does not matter whether it goes to his family or to some other cause so long as its payment is for his beneficial use and on account of the injury suffered by him. Manifestly, the words "his family" in the answer, as well as that part of the testimony that the money was advanced for the benefit of "his family," were entirely unnecessary and immaterial and called for no statement as to the number thereof by appellant, and none was given. It could not therefore have had the effect of curing the error admitting the testimony objected to.

[6, 7] It is further contended that the error was cured by the instructions. It is true that the court correctly instructed the jury as to the proper measure of damages when he advised it that the amount of recovery was limited to compensation; that is, to the actual loss suffered by appellee as a proximate and direct result of the accident causing the injury. The husband and father himself being the plaintiff, the loss sustained by the wife and child was not an element of damage, though in a death case, where the action is prosecuted for the benefit of the widow and children, their loss as measured by his worth to them as a husband and father would be the guide. The admission of this evidence, however, justified the jury in considering it, as well as all the other testimony in the case, in arriving at its verdict. Who can say, then, what effect the child and its need of care and an education may have had on the result? As stated by the Supreme Court of Illinois in *Pittsburg, etc., R. Co. v. Powers*, 74 Ill. 341:

"It is impossible for us to know what portion of the verdict in this case was allowed because appellee had a family. The evidence was before the jury for the purpose of enhancing the damages, and we have no doubt it produced that result."

The error, perhaps, could have been cured by cautioning the jury in its instructions

against increasing the amount of the verdict on account of the plaintiff's having a wife and child, and that he had supported them up to the time of the injury. Nowhere, however, was the jury admonished to disregard this evidence, though doubt as to its admissibility was expressed by the court at the time it was offered. The failure to do this, however, even though the instructions were otherwise correct, is ground for a reversal of the judgment. *Gallon v. Lauer*, above; *Kinsley v. Morse*, 40 Kan. 577, 20 Pac. 217; *Central Passenger Ry. Co. v. Kuhn*, 86 Ky. 578, 6 S. W. 441, 9 Am. St. Rep. 309; *Vosburg v. Putney*, 78 Wis. 84, 47 N. W. 99.

[8] The fact that appellee had a wife and child may have reached the jury otherwise would not justify a holding that no improper result followed its admission. It is true that evidence having no proper place in the record sometimes reaches the jury as an inseparable part of evidence otherwise competent, but this is not ground for admitting the incompetent evidence when disassociated from that which is competent. As said by the Supreme Court of Kansas in *Atchison, T. & S. F. Ry. Co. v. Ringle*, above:

"It is further suggested that the rule which forbids the introduction of this kind of evidence ought to be abandoned because the information imparted to the jury by the answer to these questions might have been obtained by them as well by the calling of the children as witnesses, or by their presence in court. This reasoning does not appeal to us as being sound. That incompetent evidence may sometimes reach the jury as an inseparable element of competent evidence does not warrant courts in permitting the introduction of the incompetent evidence alone. This class of evidence has been condemned because of the prejudice, or bias, which it is likely to excite in the minds of a jury, and in this case, after carefully examining the evidence relative to the character of the injury, we are not prepared to say, in view of the size of the judgment, that they were not unduly influenced thereby."

[9] Appellee contends further that if the erroneous admission of evidence has, in the judgment of this court, resulted in an excessive verdict, he should have the privilege of curing it by remitting the excess. It is true that this court has the power in a proper case to affirm a judgment upon the filing by the appellee of a remittitur in the amount held to be excessive, but such is not true where the excess has been brought about through the weight of immaterial, irrelevant, and incompetent evidence. It is impossible, as was said in *Pittsburg*, etc., *R. Co. v. Powers*, above, for us to say just how much the verdict was enhanced as a result of the introduction of this evidence. For this reason we feel that a jury uninfluenced by it should say how much appellee has

been injured. His injury is serious, and he is undoubtedly entitled to substantial damages. This is admitted even by appellant, but the jury can more accurately determine the extent of the damage than this court.

The judgment is reversed and case remanded to the superior court for a new trial.

ROSS, C. J., and FLANIGAN, J., concur.

NEW MEXICO MOTOR CORPORATION v. BLISS. (No. 2474.)

(Supreme Court of New Mexico. June 20, 1921. Rehearing Denied Oct. 19, 1921.)

(Syllabus by the Court.)

1. Landlord and tenant \S 108(2)—Equity, in absence of fraud, accident, or mistake, may relieve against forfeiture by breach of rent covenant.

A court of equity, even in the absence of special circumstances of fraud, accident, or mistake, may relieve against a forfeiture incurred by the breach of a covenant to pay rent, on the payment or tender of all arrears of rent and interest by a defaulting lessee.

2. Landlord and tenant \S 108(1)—Equity may not relieve against statutory forfeiture for failure to pay rent.

While a court of equity has power to relieve against a forfeiture for nonpayment of rent, even though the contract or lease provides for such forfeiture, it has no power to relieve against forfeiture imposed by statute.

3. Landlord and tenant \S 108(2)—Forfeiture not effective until 3 days after notice during which tenant can pay rent and avoid.

The effect of Code 1915, \S 2384, which gives a right of action in forcible entry and unlawful detainer "when the tenant fails to pay the rent at the time stipulated for payment," and section 2386, which provides for 3 days' notice to quit before suit can be brought, is to work a statutory forfeiture, but the forfeiture does not become effective until the expiration of the 3 days after the notice, during which time the tenant can pay the rent and avoid the forfeiture.

4. Landlord and tenant \S 108(2) — 3 days' statutory notice to quit held to take place of common-law demand.

The 3 days' notice to quit where the rent is not paid was designed to take the place of the common-law demand, and to provide a short time within which the tenant might pay the rent, and thus save the forfeiture.

5. Landlord and tenant \S 108(2) — Where landlord gave 10 days' notice instead of statutory 3, tenant has 10 days to tender rent and avoid forfeiture.

Where the statute provides for the forfeiture of the lease by giving 3 days' notice to

quit for nonpayment, of the rent, and the landlord, instead of giving the statutory 3 days' notice, gives a 10-day notice to quit, the tenant has the 10 days in which to tender the rent and avoid forfeiture.

6. Appeal and error — 781(4)—Writ of error not dismissed as involving only a moot question.

Whenever the judgment, if left unreversed, will preclude the party against whom it stands as to a fact vital to his rights, though the judgment, if affirmed, may not be directly enforceable by reason of lapse of time or change of circumstances pending appeal, a writ of error will not be dismissed as involving only a moot question.

Appeal from District Court, Bernalillo County; Hickey, Judge.

Action by the New Mexico Motor Corporation against E. E. Bliss. Defendant's motion for judgment on pleadings was granted, and the complaint dismissed, and, pending appeal by plaintiff, temporary injunction was allowed to remain in force. Motion to dismiss appeal denied, judgment of trial court reversed, and cause remanded, with instructions to proceed according to the opinion.

Simms & Botts, of Albuquerque, for appellant.

H. B. Jamison, of Albuquerque, for appellee.

RAYNOLDS, J. The New Mexico Motor Corporation, appellant herein, brought suit in Bernalillo county against E. E. Bliss, appellee, seeking to be relieved from forfeiture in the payment of rent under certain lease of a store building in the city of Albuquerque, owned by Bliss, and praying a temporary injunction to restrain Bliss from molesting it in the possession of the real estate pending the litigation, and for a perpetual injunction on final hearing. A temporary injunction was granted, and, upon trial of the case, the defendant, Bliss, moved the court to deny the plaintiff the right to introduce testimony, which motion was sustained. Motions for judgment on the pleadings were made by both plaintiff and defendant, and defendant's motion was granted. Thereafter the complaint was dismissed, and pending the appeal to this court the temporary injunction was allowed to remain in force.

Appellant assigns four errors which may be considered as one assignment, namely, that the court erred in granting defendant's motion for judgment on the pleadings, and dismissing plaintiff's complaint.

Appellant held under a lease from one Mrs. Sallie Garcia, who was the former owner of the property in question. Appellee, Bliss, had purchased the property and had received rent from the appellant. The lease provided, among other things:

"And it was expressly understood and agreed by and between the parties that if the rent above reserved or any part thereof shall be behind or unpaid on the date of payment whereon the same ought to be paid as aforesaid * * * it shall and may be lawful for the party of the first part, his heirs, etc., at his election, to declare said term ended, and into the premises or any part thereof, either with or without due process of law, re-enter, and the said party of the second part, or any other person or persons occupying in or upon the same to expel, remove, or put out, using such force as may be necessary in so doing."

It is admitted that the rent for the month of October, 1909, due on the 1st day of October of that year, was not paid, and that on the 28th day of October, 1909, the defendant, Bliss, served on the appellant a written notice of forfeiture, and demanded that plaintiff vacate within 10 days. Before the expiration of the 10 days appellant alleges that it tendered to the appellee all the rent then due and owing, and offered to pay the expenses and charges for water. The tender was refused.

[1] This action was begun to prevent the enforcement of the notice of forfeiture and the expulsion of the appellant from the premises. There is some dispute as to whether the tender made by the appellant was a sufficient tender, but we need not consider that point, because not decided below. The proposition involved in this appeal is as to whether equity in this jurisdiction can relieve against a forfeiture for nonpayment of rent.

It is argued by the appellant that the general power of the equity court to relieve against forfeiture for nonpayment of rent is in full force in this jurisdiction. The general principles in regard to jurisdiction of equity to relieve against forfeiture for nonpayment of rent are well established. As is said in *Kann v. King*, 204 U. S. 43, 54, 27 Sup. Ct. 213, 216 (51 L. Ed. 360):

"That a court of equity, even in the absence of special circumstances of fraud, accident, or mistake, may relieve against a forfeiture incurred by the breach of a covenant to pay rent, on the payment or tender of all arrears of rent and interest by a defaulting lessee, is elementary. *Sheets v. Selden*, 7 Wall. 416."

See, also, R. C. L. vol. 16, par. 666, *Landlord and Tenant*; notes 86 Am. St. Rep. 844; 69 L. R. A. 866.

[2, 3] On the other hand the appellee argues that, where a statute exists such as does in this jurisdiction on the subject of forcible entry and detainer (Code 1915, § 2384), by which a right of action is given "when the tenant fails to pay the rent at the time stipulated for payment," that such statutory enactment prevents equity from

taking jurisdiction and relieving against the forfeiture. The appellee's position is stated by the following quotation:

"There is a marked difference between a forfeiture imposed by statute and one arising under the contract of the parties. The Legislature can impose it as a punishment, whilst individuals can only make it a matter of contract. In the one case it cannot be relieved against, in the other it may." *Woodson v. Skinner*, 22 Mo. 13.

If section 2334 stood alone, appellee's position would be correct, but it must be read in connection with section 2386, which provides:

"Before suit can be brought in any except the first of the above classes, 3 days' notice to quit must be given in writing to the defendant."

Consequently it requires two things to work the statutory forfeiture, viz. nonpayment of rent and a 3 days' notice to quit for such default. Appellant argues that the action of forcible entry and detainer above mentioned is an action for possession of the property in question, and is only intended to prevent a breach of the peace, and not to give possession to the landlord for nonpayment of rent, and, further, that the statute does not work a forfeiture against which courts of equity cannot give relief; in other words, that it is not by its terms a statutory forfeiture. But in this appellant is in error, because the statute expressly by its terms works a forfeiture, and after the forfeiture is complete a court of equity would have no power to grant relief. But, as stated, the forfeiture is not effective nor complete until the expiration of the 3 days' notice required by section 2386. During this time the lessee can pay the rent and avoid the forfeiture. This section, as stated by the Supreme Court of Illinois in the case of *Chadwick v. Parker*, 44 Ill. 326—

"was obviously designed to dispense with the necessity of making the common-law demand of the rent on the very day it fell due, and to give a remedy where the lease contains no clause for a re-entry."

[4] Under the common law, before the landlord could declare a forfeiture, where the lease provided for the termination of the same upon the nonpayment of the rent, it was always incumbent upon the landlord to make a demand upon tenant for the payment of the rent on the very day when it became due, and at the place of payment provided for in the lease. This 3 days' notice to quit where the rent is not paid was evidently designed to take the place of the common-law demand, and to provide a short time within which the tenant might pay the rent, and thus save the forfeiture. It is inconceivable that the Legislature would provide for a forfeiture for nonpayment of the rent without

even a demand being made upon the tenant for the payment of the same. Many leases run for a long term of years, and frequently valuable improvements are placed upon the leased premises by the tenant, which might all be swept away by an inadvertent failure to pay the rent at the precise time stipulated in the lease, and this without his attention having been called to the forfeiture, or the fact that the landlord intended to insist upon the strict terms of the lease. No case has been cited to us under a similar statute holding that the tenant may not pay the rent before the expiration of the notice, and thus save his default.

In *Tiffany on Landlord and Tenant*, vol. 2, p. 1769, the author says:

"The statute, in providing for a notice to quit, occasionally provides that the rent may be paid within the period named for the notice, or requires the notice to be in the alternative, for the payment of rent or delivery of possession. But it has been decided that, even when the statute does not in terms provide for the payment of overdue rent within the period during which the notice is to run, the purpose of the provision, for a certain length of notice before the tenant is liable to suit for dispossession, must have been to enable the tenant to pay, and that he has until the expiration of the notice in which to pay or tender the rent, and so prevent his expulsion.

"After the period of the notice has expired, it has been held, the tenant has no longer this right, and a like view has been taken as regards a tender after the commencement of the proceeding."

The case of *Chadwick v. Parker*, supra, contains an extended discussion of the history of the common law and the statutory changes in regard to the whole subject. See, also, *So. Penn. Oil Co. v. Edgell*, 48 W. Va. 348, 37 S. E. 596, 86 Am. St. Rep. 43, and note at page 48.

"No court, so far as our researches have extended, has held that, without a demand of rent from the tenant in some form, a forfeiture could be predicated upon a failure to pay the same. Such a law would be so manifestly unjust, and would lead to such serious consequences, that we cannot give to our statute such a construction, unless required to do so by language clearer and more pointed than that used in the law we are now considering. Large interests and valuable improvements are frequently involved in leases, and to hold that a tenant without notice or demand absolutely forfeits his lease by a failure to pay or tender his rent within three days after the same may become due, though prevented by sickness or accident or the absence of his landlord from making the payment, and without notice that the landlord will insist upon such a forfeiture, might often result in the grossest injustice and wrong. A construction, however, that makes the service of notice to quit a demand, thereby relieving the landlord from the necessity of

making the common-law demand, and which gives the tenant the three days in which to pay his rent after such demand, it seems to us, carries into effect the clear intent of the law making power." *Dakota Hot Springs Co. v. Young*, 9 S. D. 577, at 581, 70 N. W. 842, 843.

[5] Under the authorities above cited, we conclude that the notice to quit is a demand, and that by the terms of the statute payment within three days after notice would defeat the forfeiture for nonpayment of rent. In this case, however, the landlord, instead of giving the 3 days' statutory notice to quit, gave the tenant a 10-day notice. Within that time, as admitted by the pleadings, the tenant tendered the rent in arrears and interest thereon. Where the statute provides for a forfeiture of the lease by giving a 3 days' notice to quit for nonpayment of the rent, and the landlord, instead of giving the statutory 3 days' notice, gives a 10-day notice to quit, the tenant has the 10 days within which to tender the rent due and avoid the forfeiture. Whether the tender in this case was sufficient or not, we do not decide, as that proposition was not passed upon in the lower court.

[6] Since the submission of this cause on the merits appellee has filed a motion to dismiss the appeal upon the ground that appellant, on September 1, 1920, vacated the premises, the lease to which was the subject of this controversy. In said motion it was asserted that the questions involved in this appeal are now moot, and that the courts would have no power to grant relief. This contention is, however, untenable, because, if the appeal be dismissed, the judgment of the trial court would remain in full force and effect under which it was adjudicated that appellant had forfeited all his rights under the lease. If he had no rights under such lease he would be a trespasser, and appellee would be entitled to recover full damages for his occupancy of the premises; whereas, if he had a right to hold under the lease, his liability would be measured by the rental stipulated thereby. Further, the appellant would be liable on the injunction bond which it gave for attorney's fees, and any damage which appellee might have sustained by reason of the injunction. The rule in such cases is well stated by the syllabus in the case of *Kaufman v. Mastin*, 66 W. Va. 99, 66 S. E. 92, 25 L. R. A. (N. S.) 855, as follows:

"Whenever the judgment, if left unreversed, will preclude the party against whom it stands as to a fact vital to his rights, though the judgment, if affirmed, may not be directly enforceable by reason of lapse of time or change of circumstances pending appeal, a writ of error will not be dismissed as involving only a moot case."

It follows that the motion to dismiss the appeal should be denied, and the judgment of the trial court reversed and the cause remanded, with instructions to proceed in conformity with this opinion, and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

HAWKINS v. BERLIN. (No. 2494.)

(Supreme Court of New Mexico. April 4, 1921. Rehearing Denied June 4, 1921.)

(Syllabus by the Court.)

1. Vendor and purchaser \S 345 — Vendor, agreeing to release a mortgage deed, and failing, cannot plead mortgage's invalidity.

Where parties to a contract involving the sale of lands enter into a supplemental agreement whereby the seller obligates himself to obtain a release or satisfaction of a specified mortgage deed, he cannot, after failing to obtain such release, assert or plead in excuse or justification that such mortgage was void, and hence there existed no necessity for a release thereof.

2. Vendor and purchaser \S 344—In vendee's action for breach, rule of rescission, requiring placing in statu quo, held inapplicable.

Held, that this is a suit by which appellee seeks to recover damages resulting from appellant's breach of contract, and that the rule that a party to a contract cannot rescind and cancel without placing or offering to place the opposite party in statu quo is not applicable.

3. Appeal and error \S 1078(1)—Assignments, not briefed, regarded as abandoned or waived.

Assignments of error, not argued in the brief, will be regarded as abandoned or waived.

Appeal from District Court, Quay County; Leib, Judge.

Suit by J. H. Hawkins against G. Berlin. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

H. H. McElroy, of El Paso, Tex., and R. A. Prentice, of Tucumcari, for appellant.

H. A. Kiker, of Raton, and E. F. Saxon, of Tucumcari, for appellee.

BRATTON, District Judge. Appellee instituted this suit to recover damages in the sum of \$1,627 alleged to have been sustained by him as the result of appellant's breach of a certain contract entered into between them, together with a subsequent modification thereof, whereby appellant agreed to sell to appellee certain lots situated in Obar, N. M., with a certain building thereon, and a stock of merchandise. As a part of the purchase price therefor appellee executed 28 notes in the sum of \$50 each, payable one each month,

which were to be placed in escrow in the First National Bank of Tucumcari, with the provision that appellant's deed and abstract showing clear title should also be placed in said bank, and should be delivered to appellee when he had paid off all of such notes. Later, and while this contract was in process of being carried out, and after appellee had paid 10 of these notes, he made a contract with one Roy Johnson whereby he agreed to sell said premises to Johnson at a profit of \$200. After this contract was made, appellee for the first time examined the abstract which appellant had furnished, and then objected to the title, by which objection he asserted there existed an unreleased mortgage deed covering said premises executed by New Mexico Land & Immigration Company to the Bank of Topeka, securing a note of \$3,700. Immediately after this objection was made, appellant, appellee Johnson, and their respective attorneys had a conference at which this objection to the title was discussed, and it was there agreed that the appellant would obtain a release of such mortgage deed, and in consideration thereof appellee would pay to him \$823 in cash in lieu of the 18 notes of \$50 each which then remained unpaid, and in addition thereto Johnson agreed to pay him \$25 in cash, whereupon appellee executed an order to the First National Bank of Tucumcari directing it to pay to appellant \$823 when the abstract was approved by Johnson's attorney. This order was delivered to and kept by said attorney for about one month, and was then returned to appellee by mail. Up to the time this conference was held and this agreement had appellee had promptly paid the notes due appellant as they matured, but he paid none of the remaining notes.

About two months after the supplemental agreement was had with reference to the release of the mortgage deed, appellant took possession of the premises and placed some of his personal effects in the building, and when found there by appellee and asked why he was in such possession, he told and advised the appellee that he had annulled the contract and taken possession of the building. The filing of this suit followed, by which appellee seeks to recover the damages which he claims to have suffered on account of appellant's breach of the contract. Appellant by cross-complaint sought to recover certain enumerated damages alleged to be due him. The trial court submitted to the jury only two elements of damages upon which appellee might recover, namely, the amount of money he had paid appellant on the purchase price of the property, and the loss of any profits he may have made by his sale to Johnson, which was never consummated on account of this mortgage. A verdict in favor of appellee for \$729.75 was returned, judgment thereon rendered, from which this appeal was perfected.

[1] Appellant first contends that there was no defect in the title because the mortgage deed in question was void, and constituted no lien upon the premises nor defect in the title thereto, because it was executed by a corporation without the corporate seal being thereto attached; that the form of acknowledgment to such instrument did not comply in many respects with the statutes governing the same; that therefore it was not subject to record, nor should be considered even though placed of record. We think a determination of these questions of law is unnecessary to a decision of the case. It affirmatively appears from the pleadings and the evidence that, after appellee had examined the abstract and made objections to the title, appellant, for a valuable consideration, agreed and obligated himself to obtain a release of such mortgage, and after a breach of such agreement he will not be permitted nor heard to say that the mortgage was invalid, and hence no necessity for such release existed. This agreement to obtain such release constituted a special contract with respect to this particular phase of the title, and appellant was bound to perform its provisions without reference to the necessity for the same. Appellant pleaded that he had performed such agreement by obtaining and recording such release, but he offered no evidence whatever to sustain such issue.

[2] By proper assignment of error appellant urges that appellee cannot rescind and cancel the contract without restoring or offering to restore to appellant everything received from him under the same; that a restoration or offer to restore status quo is indispensable to the right to maintain such a suit, and that his inability so to do will not excuse him from such obligation; that, if he is unable to so restore, his remedy is to sue for damages. Conceding, but not deciding, this to be a correct statement of law, it can avail appellant nothing because appellee did sue for damages alleged to have been sustained by him as the result of appellant's breach of the contract. This is not a suit to cancel and rescind the contract, but one to recover damages from a breach thereof. What we have here said fully disposes of the question last presented in appellant's brief, wherein he urges that, if appellant did threaten to rescind the contract and took possession of the premises under such circumstances as to constitute a trespass, such would not authorize appellee to rescind. A complete answer to this is that this is not a suit to cancel nor rescind.

The only remaining question presented by appellant is that neither the \$500 item nor the \$200 item for which the jury returned a verdict for appellee resulted from the failure of appellant to secure or obtain the release of the mortgage, because it does not appear from the evidence that Johnson refused

to consummate his contract with appellee because of the existence of such mortgage. With this contention we do not agree. We think it satisfactorily appears that the appellant's failure to obtain such release was the cause of Johnson failing to perform his contract and accept the premises.

[3] Other questions are presented by the assignment of error, but they are not otherwise presented by appellant in his brief. This court has repeatedly held that matters presented by the assignments of error and not followed up and argued in the appellant's brief will be deemed to have been abandoned or waived by him. *Riverside Sand & Cement Co. v. Hardwick*, 16 N. M. 479, 120 Pac. 323; *Brobst v. E. P. & S. W. Ry. Co.*, 19 N. M. 609, 145 Pac. 258; *Clark v. Queen Insurance Co.*, 22 N. M. 368, 163 Pac. 371.

Failing to find any reversible error in the record, the judgment will be affirmed; and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

In re McDONALD. (L. A. 6527.)

(Supreme Court of California. Sept. 30, 1921.)

Newspapers §3(3)—Held "printed and published" in a town, within statute defining "newspaper of general circulation."

Where a newspaper is published and circulated in a particular town, and where the publisher has its office and pays the tax for conducting the business in such town, the newspaper is a "newspaper of general circulation," within Pol. Code, §§ 4460, 4462, defining such newspaper and requiring it to be "printed and published," in the town in which the publication, notice by publication, or official advertising is given or made, though the mere setting up of the type and making the impressions on the paper is done in another town; the words "printed and published" in a town not requiring the physical act of printing to be done therein.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Newspaper of General Circulation; Printed and Published.]

In Bank.

Appeal from Superior Court, San Bernardino County; Rex B. Goodcell, Judge.

In the matter of the application of D. D. McDonald, publisher, to have the standing of the Ontario Weekly Herald, of Ontario, Cal., as a newspaper of general circulation, as defined in section 4460 of the Political Code, ascertained and established, contested by the California Press Association. Judgment for petitioner, and contestant appeals. Affirmed.

Geo. D. Squires, of Redwood City, and Archie D. Mitchell, of Ontario, for appellant.

McNabb & Hodge, of San Bernardino, for respondent.

LAWLOR, J. This is an appeal by the contestant from a judgment in favor of the petitioner, on a petition to have a publication declared to be a newspaper of general circulation, as that term is defined in section 4460 of the Political Code.

The petitioner, D. D. McDonald, was the editor and publisher of the Ontario Weekly Herald. In accordance with the provisions of section 4462 of the Political Code, he petitioned the superior court of San Bernardino county to have the said publication declared a newspaper of general circulation, and entitled to print publications, notices by publication, official advertising, or public or legal notices. Section 4462 provides:

"Whenever a newspaper shall desire to have its standing as a newspaper of general circulation, as that term is defined in section four thousand four hundred and sixty, ascertained and established, it may * * * file a verified petition in the superior court of the county, or city and county, in which it is established, printed and published, setting forth the facts which justify such action. * * *"

Section 4460 of the Political Code is as follows:

"A newspaper of general circulation is a newspaper published for the dissemination of local or telegraphic news and intelligence of a general character, having a bona fide subscription list of paying subscribers, and which shall have been established, printed and published at regular intervals, in the state, county, city, city and county, or town, where such publication, notice by publication, or official advertising is given or made, for at least one year preceding the date of such publication, notice or advertisement."

The material allegations of the petition were to the effect that the Herald was a newspaper published for the dissemination of local and telegraphic news; that it had a bona fide subscription list; that it was established July 18, 1918; that it was published at Ontario, Cal., every Thursday for more than one year preceding the filing of the petition; and that it was not devoted to or published in the interests of any particular class or group. The petition was contested by the California Press Association; the only objection to its sufficiency being that it did not allege that the paper was "printed" at Ontario.

Upon the trial, petitioner, who was the only person examined, testified that the physical printing of the paper was not done at Ontario, but at Colton, Cal., but that the office was at Ontario, which was the princi-

pal place of circulation, and that a city license to conduct the business of a newspaper was paid to the city of Ontario. Judgment was rendered for petitioner, and the contestant appeals.

The only question to be decided is whether the fact that the physical printing of the paper is done in one town, and the publication and circulation in another, prevents it from being a newspaper of general circulation within the meaning of the statute. Appellant contends:

"The point in this case is that the Legislature has undertaken to define a newspaper of general circulation, a term often used by it in the Codes and statutes of the state, for the evident purpose of securing publicity for public or official advertising and preventing the abuses in public affairs which would result from its concealment in newspapers devoid of standing, character and circulation."

And it insists it is—

"not unreasonable to assume that the Legislature, when it defined a newspaper of general circulation, meant all that it said in section 4460, and that all of the words therein used are to be given force and effect. * * * The petition in this case at bar assiduously eschews all reference to the place where said paper is printed."

It was said in the case of *In re Le Favor*, 35 Cal. App. 146, 169 Pac. 413:

"From these findings made by the trial judge, it is very apparent that the only ground upon which the denial of the petition was made was because seven issues of the newspaper were not actually 'printed' in the city of Watts. The newspaper was circulated there and was a paper local to that community. We think to construe the statute in such a close and literal sense is to narrow its meaning more than was intended by the Legislature. The object to be accomplished was to define newspapers in which public notices might be made and which would fairly express such notices to the particular community intended to be reached. * * * The case of *Bayer v. Hoboken*, 44 N. J. L. 131, is directly in point. There a statute required the printing of a notice in a newspaper 'printed and published' within the limits of a municipality. The newspaper in which the publication was made was printed altogether on presses in the city of New York, but was distributed in Hoboken. The court held that such a newspaper was 'printed and published' as required by the statute."

In *Stanwood v. Carson*, 169 Cal. 640, 647, 147 Pac. 562, 565, it was said that—

"The vital consideration being notice by publication, such publication is the publication contemplated by law, with little or no regard paid to the mere place of printing, even when the word 'printing' coupled with publication is embraced in the statutory requirement. *State v. Hoboken*, 44 N. J. L. 131; *Ricketts v. Hyde Park*, 85 Ill. 111; *Brown's Estate v. West Seattle*, 43 Wash. 26, 85 Pac. 854; *Hinchman*

v. Barnes, 21 Mich. 558; *Greenlee v. Marks*, 62 Ind. 420; *Hart v. Smith*, 44 Wis. 229."

In *Nebraska Land, Stock-Growing & Investment Co. v. McKinley-Lanning Loan & Trust Co.*, 52 Neb. 410, 72 N. W. 357, in considering a statute which required a notice to be published in a paper "printed" in a county, the court said:

"We do not think that the word 'print' was by the Legislature used in the specific and somewhat technical sense of designating the purely mechanical act of impressing the characters upon the paper. The object of the statute was to give notice, and, if the Legislature had the distinction at all in view, it would not, for that purpose, have selected the place of printing, instead of that of publication. 'Print' is familiarly used in the sense of 'publish,' and in that sense the word receives recognition in many, if not all, of the dictionaries, and in that sense we are satisfied the Legislature used it."

The *Standard Dictionary* gives one definition of "print" as follows:

"To put in print, or cause to be put in print or issued from the press; carry or send forth in print; publish; as, the newspaper *printed* the story."

The *Century Dictionary* defines it thus:

"To cause to be printed; obtain the printing or publication of; publish."

And in *Webster's Dictionary* this definition is given:

"To publish a book, article, music, or the like."

To give a reasonable construction to the language of the statute, and keeping in view the object sought to be served by the legislation—that of having an effective medium of publicity for legal notices in the community—it must be held that by the conjunctive "and" it was not intended to require that the physical act of printing was to be done in the place of publication, but merely that the paper be printed and circulated there. We think it clear from this fact and the authorities cited that the word "printed" was used in the statute in the sense of the definitions we have given.

In this case the office of the paper is at Ontario, where it is established, and the tax for conducting the business is paid there. The paper is caused to be printed in Ontario; the printing matter is obtained in, it is published in, and it is circulated at, Ontario. In the production of the publication, everything is done at Ontario, save the setting up of the type and making the impressions on the paper. It would be giving too narrow a meaning to the word "printed" to hold that these acts alone were contemplated by its use in the statute. The only reasonable construction that can be given to "printed and published" is that the paper must be

produced in the community where it is aimed to have it recognized as a legal advertising medium.

Appellant cites numerous authorities to the well-recognized principle that—

"Some effect is to be given to every word in the statute, without rejecting any word as redundant or treating it as merely synonymous with some other word or words."

But in arriving at our conclusion we have not failed to give effect to the word "printed." Appellant also cites *Application of Devlin & Judah*, 12 Cal. App. 403, 107 Pac. 583, but that case is not in point for the reason that another statutory qualification was involved—the necessary period the publication must have been established.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; SLOANE, J.; SHURTLEFF, J.

IN RE FREES' ESTATE. (L. A. 6784.)

(Supreme Court of California. Sept. 30, 1921.)

1. Statutes \S 270—Provision of Civil Code that no part is retroactive unless expressly so declared applicable to amendments.

Civ. Code, \S 3, providing that no part of the Civil Code is retroactive unless expressly so declared, is applicable to amendments to the Civil Code.

2. Statutes \S 263—Not construed retrospectively, unless legislative intent is clear.

Statutes should not be construed retrospectively, unless it is clear that such was the legislative intention.

3. Husband and wife \S 247—Amendment to statute defining community property not retroactive.

Civ. Code, \S 164, as amended by St. 1917, p. 827, defining "personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state" as community property, held inapplicable to personal property acquired prior to enactment of the amendment in view of section 3.

4. Taxation \S 866—Property passing to wife held husband's separate property, and as such subject to inheritance tax.

Personal property acquired by husband in other state before becoming domiciled in California, prior to the taking effect of St. 1917, p. 827, amending Civ. Code, \S 164, making such property, though acquired while domiciled elsewhere, community property, held subject to tax under Inheritance Tax Act of 1917, notwithstanding section 1, subds. 1, 2, making the act inapplicable to community property which goes to surviving wife under Civ. Code,

\S 1402, since such property, having been acquired by the husband prior to the amendment of section 164, was not community property, but was the separate property of the husband.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

In the matter of the estate of Benjamin M. Frees. From an order fixing inheritance taxes, the Controller of the State appeals. Reversed, with instructions.

John W. Carrigan and Karl R. Levy, both of Los Angeles, for appellant.

Allen E. Rogers, of San Diego (James L. Atteridge, of Sacramento, of counsel), for respondent.

WILBUR, J. This is an appeal by the controller of the state from an order fixing inheritance taxes. The question involved is as to the exemption of the wife's interest in community property under the Inheritance Tax Act of 1917 (Stats. 1917, p. 880), in effect at the time of the death of the decedent, which occurred May 28, 1920.

The deceased left property appraised by the inheritance tax appraiser at \$1,526,858.76. The inheritance tax appraiser in his report had fixed a tax upon the widow's interest of \$91,506.18, said amount being estimated upon \$933,301.47, appraised as follows: Bequest, \$100,000; residuary legacy, \$833,301.47. This report was objected to by the widow, Ella R. Frees, the respondent, who claimed a deduction from the appraised value of the property bequeathed to her of an amount equal to one-half the value of the entire community property, to wit, of \$677,706.82. The court sustained the widow's contention and made the deduction claimed from the value of the estate bequeathed to the widow (\$933,301.47), leaving a balance of \$255,594.65 upon which the tax was estimated, after allowing a \$25,000 exemption. The amount of the tax thus fixed was \$15,069.47. The appellant claims that the order fixing the tax was erroneous because of the deduction of \$677,706.82.

Ella R. Frees, the respondent, was married to Benjamin M. Frees April 10, 1867, in the state of Wisconsin. At the time of their marriage the husband had property valued at \$20,000. It was admitted by the respondent that this amount, together with 5 per cent. interest per annum, aggregating \$23,000, was separate property. The deceased and his wife, the respondent, went to Chicago, Ill., immediately after their marriage, and remained as residents thereof until November, 1910, at which time they came to California, and resided here from that time until the death of the husband. At the time the amendment of 1917 of section 164, Civil Code, went into effect, there had been accumulated

as rents, issues, and profits of the property brought to California by the decedent \$300,000, and thereafter up to the time of his death from the same sources the estate was increased \$200,000. The balance of the property, about \$1,000,000, was personal property accumulated in the state of Illinois. The decedent left a will wherein a legacy of \$100,000. was made to his wife, and she was also made the residuary legatee. The latter bequest is appraised at \$833,301.47. No question is raised as to the value of the estate given to the wife or as to the proper interpretation of the will. The only question presented is as to the proper interpretation of the Inheritance Tax Act of 1917, with relation to community property, and as incidental thereto the question of the effect of the new definition of community property contained in the amendment to section 164, Civil Code (Stats. 1917, p. 827), which was approved May 23, 1917, and went into effect July 27, 1917, on the same days that the Inheritance Tax Act of 1917 was approved and took effect.

Section 1, subdivisions 1 and 2, of the Inheritance Tax Act of 1917, is as follows:

"Section 1. (1) This act shall be known as the 'inheritance tax act.' (2) The words 'estate' and 'property' as used in this act shall be taken to mean the real and personal property or interest therein of the testator, intestate, grantor, bargainor, vendor, or donor passing or transferred to individual legatees, devisees, heir, next of kin, grantees, donees, vendees, or successors, and shall include all personal property within or without the state; provided, that for the purpose of this act the one-half of the community property which goes to the surviving wife on the death of the husband, under the provisions of section one thousand four hundred two of the Civil Code, shall not be deemed to pass to her as heir to her husband, but shall, for the purpose of this act, be deemed to go, pass, or be transferred to her for valuable and adequate consideration and her said one-half of the community shall not be subject to the provisions of this act; provided, further, that in case of a transfer of community property from the husband to the wife, within the meaning of subdivisions (3) or (5) of section two of this act, one-half of the community property so transferred shall not be subject to the provisions of this act; and provided, further, that the presumption that property acquired by either husband or wife after marriage is community property, shall not obtain for the purpose of this act as against any claim by the state for the tax hereby imposed; but the burden of proving such property to be community property shall rest upon the person claiming the same to be community property." (Italics ours.)

Section 1402, Civil Code, referred to in the above-quoted section provides that—

"Upon the death of the husband, one half of the community property goes to the surviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his de-

scendants, equally. * * * In case of the dissolution of the community by the death of the husband, the entire community property is equally subject to his debts, the family allowance, and the charges and expenses of administration."

For a definition of community property we must look to section 164, Civil Code, above referred to. As amended in 1917, that section reads as follows:

"164. What is community property. All other property acquired after marriage by either husband or wife, or both, including real property situated in this state, and personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, is community property; * * * (Italics ours.)

The property involved in this litigation is all personal property, and it is conceded that under the provisions of section 164, Civil Code, it would be community property if that section is retroactive and constitutional. Sections 172, 172a, Civil Code, were amended on the same day as section 164, Civil Code. Previous to the amendment, section 172, Civil Code, gave the husband the management and control of all the community property with like power of disposition other than testamentary as he has of his separate estate, except that he could not give it away without consideration or sell the household furniture or wearing apparel without the written consent of the wife. By the amendment his absolute power was confined to personal property (section 172, Civ. Code; Stats. 1917, p. 829), and as to community real property the husband was given the management and control thereof, subject to the requirement that the wife must join in any conveyance or incumbrance thereof except a lease for a year or less.

Two rules have uniformly been adhered to in the interpretation of section 164, Civil Code, and its amendments: First, that the law has been construed as applying only to property acquired in California, or by persons domiciled here; second, that amendments are not to be construed as retroactive, unless the language thereof compels such a construction. Thus, notwithstanding that the definition of community property has in terms included all property acquired by the husband or wife after marriage, other than that acquired by gift, bequest, devise, or descent, it has uniformly been held that property acquired in other states by persons domiciled therein, and subsequently brought to California by them at the time of establishing residence in this state, retained the status that it had in the state where it was acquired, regardless of our definition of community property. As in most of the states property acquired after marriage was the separate property of the husband, it re-

mained such, when brought to this state by the husband. *Kraemer v. Kraemer*, 52 Cal. 302; *Estate of Burrows*, 136 Cal. 113, 68 Pac. 488; *Estate of Nicolls*, 164 Cal. 368, 129 Pac. 278; *Estate of Warner*, 167 Cal. 691, 140 Pac. 583; *Estate of Boselly*, 178 Cal. 715, 175 Pac. 4; *Estate of Arms*, 199 Pac. 1053. Under the law of the state of Illinois the personal property acquired by the decedent during his marriage and while domiciled in the state of Illinois would constitute his separate property. *Estate of Arms*, supra; *Kraemer v. Kraemer*, supra. It was so stipulated on the hearing of the report of the inheritance tax appraiser. Thus section 164, Civil Code, as originally enacted, was construed to have no extraterritorial force, but the amendment of 1917 to section 164, Civil Code, expressly applies extraterritorially to "personal property wherever situated, acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state," and the decision in this case hangs upon the proper application of this section to the facts. The Inheritance Tax Act of 1917 exempts from taxation the portion of the community property to which the wife succeeds under section 1402 of the Civil Code. The determination of that question in turn depends upon the definition of community property. We must therefore determine the rights of the wife as successor or heir to the community property in order to determine the proper deduction from her bequests.

The appellant advances two propositions with reference to the proper construction of these sections: First, that section 164, Civil Code, is unconstitutional in so far as it seeks to convert the separate property of the husband or wife theretofore recognized as such by the laws of California into community property; and, second, that the statutes of 1917 should not be given a retroactive effect. In support of the first proposition, the appellant relies upon the decision in *Spreckels v. Spreckels*, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170. If however, the statute cannot be given any retroactive effect, we need go no further in this case for all the property acquired in the state of Illinois by the spouses was acquired and brought into the state before section 164, Civil Code, was amended.

[1,2] The Civil Code expressly provides that "no part of it is retroactive unless expressly so declared" (Civ. Code, sec. 3), and this rule applies to the amendments to the Civil Code as well (*Sharp v. Blankenship*, 59 Cal. 288; *Central Pacific Railroad Co. v. Shackelford*, 63 Cal. 261; *Bank of Ukiah v. Moore*, 106 Cal. 673, 680, 39 Pac. 1071; *Estate of Richards*, 133 Cal. 524, 527, 65 Pac. 1034). It is also a general rule of statutory construction that statutes should not be construed retrospectively unless it is clear that such was the legislative intention. *Bascomb*

v. Davis, 56 Cal. 152. In *Cooley on Constitutional Limitations*, it is said:

"* * * It is a sound rule of construction that a statute shall have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively." 7th Ed., p. 529.

In *Endlich on the Interpretation of Statutes* (page 362), it is said:

"* * * Indeed, the rule to be derived from the comparison of a vast number of judicial utterances upon this subject, seems to be that, even in the absence of constitutional obstacles to retroaction, a construction giving to a statute a prospective operation is always to be preferred, unless a purpose to give it a retrospective force is expressed by clear and positive command, or to be inferred by necessary, unequivocal, and unavoidable implication from the words of the statute taken by themselves and in connection with the subject-matter, and the occasion of the enactment, admitting of no reasonable doubt, but precluding all question as to such intention."

See, also, *Greer v. Blanchard*, 40 Cal. 194, 197; *Gates v. Salmon*, 28 Cal. 320, 321; *Pignaz v. Burnett*, 119 Cal. 157, 51 Pac. 48; *Willcox v. Edwards*, 162 Cal. 455, 123 Pac. 276, Ann. Cas. 1913C, 1392; Cyc. 1205.

[3] The clause of section 164, Civil Code, as amended, now under consideration, construed prospectively and not retrospectively, as required by our Code (Civ. Code, sec. 3) and by our decisions, should be read as follows:

"Personal property wherever situated [hereafter] acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this state, is community property."

So construed, all of the personal property owned by the decedent at the time he removed to the state of California would be his separate property, in accordance with the laws in force at the time of the transfer (1910), and would be unaffected by the amended definition of community property. Section 1402, Civil Code, providing for the succession to the community property of deceased, would have no application to such separate property, and section 1 of the Inheritance Tax Act of 1917, which refers only to the community property to which the wife would succeed under section 1402, Civil Code, would have no application to such separate property. If this is the proper construction of section 164, Civil Code, we are not concerned with the question of whether or not the Legislature could exempt such separate property so acquired from inheritance or succession taxes, or could provide that the wife should succeed to one-half thereof. Conceding such power, it was not exercised in the passage of the laws in question.

[4] From this conclusion it results, not only that the million dollars or thereabouts

brought to the state of California by the decedent, but also the \$200,000 rents, issues, and profits thereafter accumulated in this state before 1917, and that the \$300,000 rents, issues, and profits thereto accruing subsequent to the enactment of the amendment of 1917 to section 164, Civil Code, was the separate property of the decedent. Although the \$300,000 was the product of property acquired elsewhere, which property would have been community property if acquired in this state, it is not acquired in another state, nor the product of such property acquired in another state after the enactment of the law of 1917, because from and after 1917 the \$1,300,000 principal was in contemplation of law within the state, and the rents, issues and profits were therefore the separate property of the husband. Civ. Code, § 163.

Judgment reversed, with instructions to the trial court to fix the inheritance tax payable by the widow, upon the valuations already determined and in accordance with this opinion.

We concur: ANGELLOTTI, C. J.; SHAW, J.; SLOANE, J.; SHURTLEFF, J.; LENNON, J.; LAWLOR, J.

FRY v. TITLE INS. & TRUST CO. (L. A. 6553.)

(Supreme Court of California. Oct. 5, 1921.)

Libel and slander ⇨ 130—Vendor cannot recover as damages for slander of title amount paid to secure release of judgment as condition precedent to issuance of title guaranty.

In a vendor's action against a title insurance company for slander of title, where defendant represented to purchaser that property was subject to a judgment lien, plaintiff, though he tendered a registrar's certificate of title issued under Land Registration Act, § 91, providing that no judgment shall be a lien until a certified copy is filed and a memorial entered, cannot recover amount paid to secure release of such judgment as a condition to issuance of a guaranty of title, whether or not law was invalid or defendant so believed, plaintiff's loss being due, not to defendant's interference, but to his own voluntary payment.

In Bank.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by Lawrence Armstrong Fry against the Title Insurance & Trust Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Jas. W. Bell, of Los Angeles, for appellant.
Chas. H. Brock and J. N. Hastings, both of Los Angeles, for respondent.

WILBUR, J. This is an action to recover \$1,000 damages for slander of title. The defendant interposed a general demurrer to the complaint, which was sustained and judgment entered accordingly, from which plaintiff appeals. The main question thus presented for our consideration is as to whether or not the complaint states facts sufficient to state a cause of action. The slander complained of is alleged as follows:

"That on the 30th day of December, 1919, * * * the defendant maliciously and without cause spoke in the presence of Jacob Bosma and others of and concerning the plaintiff and his property as follows: 'That said property was subject to the lien of a judgment for \$5,479.65 plus costs and attorneys' fees, and that said title could not be transferred free and clear until the release of said judgment lien,' and 'that the said statement was false, which defendant then and there knew.'"

The other allegations of the complaint may be summarized as follows:

"The defendant is engaged in the business of searching titles. The plaintiff and one Jacob Bosma entered into a written contract whereby plaintiff agreed to sell to Bosma a certain piece of real estate for the consideration of \$4,500, and to furnish in connection with such sale a certificate of title from the defendant showing said property to be free and clear of all incumbrances. The plaintiff was the owner of the fee-simple title 'subject only to' a mortgage of \$14,000 and certain street proceedings. 'That plaintiff's title was evidenced by registrar's original and owner's duplicate certificates of title No. 7928, dated November 29, 1919, issued pursuant to the provisions and requirements of the law enacted by the people of the state of California on the 3d day of November, 1914, under the reserved legislative power, known as the initiative, entitled 'An act to amend an act entitled "An act for the certification of land titles and the simplification of the transfer of real estate," approved March 17, 1917,' and brought under first registration by certificate No. C-4318 on the first day of May, 1918.' That the plaintiff deposited with the defendant his owner's duplicate of title, No. 7928, together with a deed to Bosma and releases of the incumbrances "and instructed defendant to deliver an owner's duplicate certificate to the said Bosma, together with its certificate showing the said title to be vested in him free and clear of all incumbrances, and thereupon to turn over to plaintiff the balance of said purchase price, and the said Bosma joined in said instruction." That the said defendant, with the consent of plaintiff, retained the sum of \$1,000 out of the money so deposited as aforesaid for the purpose of procuring a release of said property from the said alleged judgment lien, and plaintiff consented thereto solely on the representation of the defendant that there was such a lien and on the further representation of the defendant that it would not issue its said certificate showing said property free and clear of incumbrances unless a release of said

alleged judgment lien be procured, and that it could and would procure such release for the sum of \$1,000. That thereupon the plaintiff sought to obtain from the said Bosma a rescission of said contract, but the said Bosma refused to consent to a rescission thereof, and notified plaintiff that he would insist upon a specific performance of all its terms and conditions and of the issuance of the said certificate by defendant title company showing said property to be vested in him free and clear of all incumbrances, including said alleged judgment lien, and also at the same time notified plaintiff that any unusual delay in completing said transaction would cause him loss and damage in excess of \$1,000. That plaintiff thereupon sought legal advice, and, after stating all the facts and circumstances fairly and fully to his attorney, was advised that said contract could be specifically enforced by the said Bosma. That solely by reason of the facts and circumstances as herein alleged, plaintiff yielded to the demand of the defendant and authorized it to retain the sum of \$1,000 out of the purchase price of said property and to close the transaction in accordance with instructions theretofore given. That the defendant during all the times mentioned in the complaint "maliciously represented that the said registration law under which plaintiff's title for said property was registered was invalid and unsafe, and that the defendant would not and did not recognize said law nor attach any force and effect thereto in its business of making reports and issuing contracts of guaranty of title."

It is not alleged that there was no judgment for the amount of \$5,479.65 of record in the county recorder's office, or in the office of the county clerk, except as such fact may be inferred from the plaintiff's allegation that the statement of the defendant, "That the property was subject to the lien of a judgment," etc., was "false, which the defendant then and there well knew." Taking the complaint as a whole, it is apparent that the plaintiff was claiming, as he now does, that the real property was not subject to any liens not shown on the registrar's certificate, and that the defendant "maliciously" claimed that the certificate was not conclusive because the law for its issuance was invalid. The plaintiff's allegation that defendant's statement as to the judgment lien is false evidently takes issue with the defendant upon the validity of the lien, rather than upon the existence of the judgment. That this is the proper construction of the complaint is made manifest by the statements of the attorney who drew it, made in his brief on behalf of appellant in this court, wherein he states as follows:

"The amended complaint alleges that there was no judgment lien as claimed by defendant, and that the defendant 'maliciously represented that said registration law under which plaintiff's title to said property was registered was invalid,' etc. In view of the decisions of this court in *Robinson v. Kerrigan*, 151 Cal. 42, 90 Pac. 129, 121 Am. St. Rep. 90, 12 Ann. Cas.

829, and in the *Application of Scott*, 182 Cal. 83, 187 Pac. 9, and of the appellate court, Second division, in the *Application of Julius Seick* (Civ. No. 2559) decided February 26, 1920, 189 Pac. 314, we believe that the defendant merits the charge of malice. Section 91 of the Land Registration Act (Stats. 1915, p. 1932) provides: 'No judgment, or decree, or order of any court shall be a lien on or in any wise affect registered land, or any estate or interest therein, until a certified copy of such judgment, decree, or order, under the hand and official seal of the clerk of the court in which the same is of record, is filed in the office of the registrar, and a memorial of the same is entered upon the register of the last certificate of the title to be affected.'

"In the *Application of Seick*, supra, the court, in construing section 77 of the same act, requiring notice of tax sale to be filed with the registrar within five days, the contention being that the statute is directory, and not mandatory, says: 'We cannot accede to this construction of the plain and unambiguous language of the act.' And again the court says in the same opinion: 'The prime purpose of the Torrens Law is that there shall be in the registrar's office in the book known as the "register of titles" a leaf or folium to which any person dealing with any particular piece of land that has been brought under the act may look in order to ascertain the exact condition of the title before purchasing, leasing or loaning money secured by mortgage.'

"All of the allegations of the amended complaint for the purpose of the demurrer are to be taken as true. It is clear, therefore that the amended complaint states a cause of action for slander of title, and if the proof sustains the allegations plaintiff is entitled to recover."

It is apparent from a reference to the cases cited by appellant in this paragraph of his brief, and from the brief itself, that the allegation of the plaintiff that the statement of the defendant was "maliciously false" was made in the complaint, because the Torrens Land Law is plain in its terms, and has been upheld by the courts in the cases cited, and that therefore the statement by the defendant of the condition of the title could not have been an honest expression of opinion. In short, the situation disclosed by the complaint is as follows: The plaintiff presented to his vendee a duplicate certificate of title issued by the registrar under the Torrens Land Law; the purchaser demanded as additional assurance of title a guaranty of the defendant, and this the plaintiff agreed to furnish; the defendant declined to furnish such a guaranty of title unless a judgment of \$5,479.65 of record was specifically released; the plaintiff agreed to secure such release, and paid \$1,000 for such purpose to the defendant; thereupon the defendant wrote its guaranty of the title to the purchaser, and the plaintiff secured the purchase money; he now seeks to recover the \$1,000, which the defendant required him to pay as a con-

diction of entering into a guaranty with a third person, plaintiff's vendee, leaving the defendant obligated by its guaranty; if the defendant had retained the \$1,000 as a consideration for its outstanding guaranty, could the plaintiff recover it and his purchaser retain the guaranty secured by the payment of the \$1,000? Obviously not. If not, it is even more clear that, where the \$1,000 was paid out to so perfect the title that the purchaser would accept it, and the defendant guarantee it, the plaintiff, having consented to this transaction and enjoyed the benefit of it, ought not be allowed to recover the money he paid out in order to get the benefit.

The question as to whether the Torrens Land Law was valid or invalid, or whether the defendant honestly so believed, is entirely beside the question. The plaintiff knew all about his title; the purchaser did also. Both knew of the registrar's certificate, and they differed as to its effect, the purchaser being unwilling to accept the certificate alone. Plaintiff contracted to buy for his purchaser a guaranty issued by the defendant. The defendant sold to plaintiff the required guaranty, for its usual fees, plus \$1,000, to be paid to a lien claimant. Plaintiff agreed to pay this amount after securing the advice of an attorney and with full knowledge of the facts solely because he felt bound to his purchaser to do so, and being fully aware that defendant's contention was based upon a "maliciously" wrong and "false" view as to the effect of a statute. It is therefore clear that the loss or damage to the plaintiff was due, not to the interference by the defendant with the contractual rights and obligations of the parties to the contract, nor to the prevention of any sale, but to the defendant's insistence that it would not furnish a certificate of title unless the plaintiff conformed to its demand for the satisfaction of the judgment lien.

The defendant had a right to fix the terms upon which it would enter into the contract of guaranty. *Allen v. Railroad Commission*, 179 Cal. 68, 175 Pac. 466, 8 A. L. R. 249; *Taggart v. Graham*, 39 Cal. App. 621, 179 Pac. 688. The damages alleged by plaintiff did not result from a slander of title. In the case of *Burkett v. Griffith*, 90 Cal. 532, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151, an agreement of sale had been entered into between the plaintiff and his vendee. The vendee, because of the alleged slander of title, declined to carry out his agreement. It was held that the plaintiff could not recover. This court there stated the rule as follows:

"In an action like the present, the plaintiff can recover only such damage as he may have sustained by reason of an intending purchaser being prevented from making the contract; but the complaint herein shows that, whatever statements or declarations were made by the defendant prior to the making of the contract did not have the effect to prevent Sketchley from entering into the same, and those which he made thereafter have not caused the plaintiff any damage which can be said to have resulted therefrom. We know of no case in which it has been held that, when the plaintiff has a valid contract of sale, he can recover damages for its breach against one whose words, however false and malicious, have induced the other contracting party to violate such agreement."

The court held that, if the purchaser was released by the vendor on account of the slander, such release was his own voluntary act, and the vendor could not recover. 90 Cal. 541, 27 Pac. 527, 13 L. R. A. 707, 25 Am. St. Rep. 151. If not, that he had not been damaged. Here the plaintiff with less justice is complaining, not that he lost a sale, but that he was forced to complete one. It is clear in any view of the case that the statement of the defendant as to the condition of plaintiff's title was not the proximate cause of his loss, which resulted from his voluntary payment, with full knowledge of all the facts. *Burkett v. Griffith*, supra. See, also, as to voluntary payments, *Brumagim v. Tillinghast*, 18 Cal. 265-271, 79 Am. Dec. 176; *Burke v. Gould*, 105 Cal. 277, 88 Pac. 733.

We cannot see that plaintiff has made out a case of payment under duress. Plaintiff in this behalf relies upon *Burke v. Gould*, supra, and *McTigue v. Arctic Ice Cream Co.*, 20 Cal. App. 708, 718, 130 Pac. 165. These cases recognize that the possessor of personal property may exercise duress over the owner in certain cases by unlawfully refusing to surrender the possession thereof to the owner until his illegal demands are met, and have no applicability to the facts of this case, for the defendant had no possession of any property which it refused to deliver. The payment made by plaintiff was not made to secure his property from the defendant, but to secure a contract of guaranty from the defendant which it would not otherwise have entered into.

Judgment affirmed.

We concur: ANGELLOTTI, O. J.; LENNON, J.; LAWLOR, J.; SLOANE, J.; SHURTLEFF, J.

MILLOTT et al. v. ASSOCIATION OF MARE ISLAND EMPLOYEES et al. (Sac. 3218.)

(Supreme Court of California. Oct. 3, 1921.
Rehearing Denied Oct. 31, 1921.)

1. Corporations — 82—Shares held by stockholder in excess of certain number held stock, and not evidence of indebtedness, though articles provided for repurchase.

Though articles of incorporation of corporation organized by employees of navy yard to operate ferry for benefit of such employees provided for the creation of a fund to repurchase stock held by any stockholder in excess of 10 shares, but under the by-laws all shares of stock drew dividends and were transferable, the stock held by a stockholder in excess of 10 shares was corporate stock, and not merely evidence of indebtedness.

2. Corporations — 82—Corporations held not compelled to repurchase stock held by a stockholder in excess of certain number of shares.

Where articles of incorporation of corporation organized by employees of navy yard to operate ferry in the interests of such employees provided for the creation of a fund wherewith to purchase the stock held by a stockholder in excess of 10 shares, the corporation and its officers could not be compelled to repurchase such excess stock before distribution of assets on dissolution of corporation.

In Bank.

Appeal from Superior Court, Solano County; W. T. O'Donnell, Judge.

Petition for writ of mandate by J. P. Millott and others against the Association of Mare Island Employees, a corporation, and its directors. Judgment denying writ, and petitioners appeal. Affirmed.

See, also, 186 Pac. 378.

L. G. Harrier, of Oakland, and Theodore W. Chester, of Sacramento, for appellants. W. H. Morrissey and Frederick M. Shipper, both of San Francisco, for respondents.

ANGELLOTTI, C. J. This is an appeal by plaintiffs from a judgment of the superior court, given upon sustaining a demurrer to the petition, denying an application for a writ of mandate requiring the corporation and its directors to repurchase from the funds of the corporation certain corporate stock styled "excess stock," prior to a distribution of the assets of the corporation among the stockholders.

It appears from the petition that the corporation has sold all of its personal property and is preparing to dissolve, with the result that the money constituting its net assets will be distributed among the stockholders. Petitioners seek to compel purchase by the corporation from the assets before distribu-

tion of all the so-called "excess stock" for an amount per share specified in the by-laws and the consequent extinction of such stock. The result would be that upon a division of the residue pro rata among the remaining stockholders a larger amount would be received by them than if the distribution was made without such purchase among all the stockholders, including those holding "excess stock."

The theory of petitioners is that under the articles of incorporation this "excess stock" — is not "stock" in the real sense of the word, but that it in fact simply evidences a loan to the corporation which should be paid before distribution, and that in any event it is the duty of the corporation and its officers to purchase the same at the price fixed by the articles and by-laws.

The corporation was one formed by employees of the federal government at the Mare Island navy yard; its special object being to acquire and operate a ferry between the city of Vallejo and Mare Island in the interest of employees of such navy yard. The articles provided for the sale and issuance of the stock "with the object of keeping" it, so far as permitted by law, in the hands of employees of the yard, and "under such proxy conditions as to voting same as will assure equal voice and vote to all the stockholders." One of the purposes was to operate such ferry "at a transportation charge that will pay the expenses of operating the ferry together with eight (8%) per cent. per annum to all stockholders subscribing for stock in the corporation, and to create a fund to pay all money borrowed by the corporation and to purchase all the stock that any stockholder may have obtained or acquired in the corporation in excess of 10 shares, the stock of the corporation to be sold and issued with the condition that the corporation may at any time call in and acquire each share of stock that any stockholder holds or has acquired in excess of 10 shares by paying therefor the par value of each such share together with interest at the rate of eight (8%) per cent. per annum on the par value of the stock from the date of its issue, provided that all interest theretofore paid on said stock shall be deducted from the interest to be paid by the corporation in the event of its purchasing such stock." It was provided that the capital stock shall be \$75,000, divided into 75,000 shares of the par value of \$1 each.

The term "excess stock," as used in these proceedings refers to the stock that "any stockholder holds or has acquired in excess of 10 shares." So far as the articles of incorporation are concerned, there is nothing to distinguish it from any other stock issued by the corporation, and the articles simply in effect provided that all stock should be

sold subject to the condition that the corporation might call in, on payment of the specified price and interest, any stock held by a stockholder in excess of 10 shares; in other words, that all stock should be sold subject to the condition that the corporation might at any time reduce any stockholder's holding to 10 shares, by purchasing at the specified rates the additional amount held by him. All was included in the 75,000 shares of the par value of \$1 each.

Examination of the by-laws discloses nothing to indicate that any stock issued by the corporation was not to be considered as ordinary stock, or its holders other than ordinary stockholders. The holders of all stock were undoubtedly "stockholders" within the meaning of article II, relative to the election of directors, and of article IV. All stock was to share in dividends under paragraph 2 of article V, whereby the directors were authorized to declare dividends out of the surplus profits, "when such profits shall, in the opinion of the directors, warrant the same, and after all debts have been paid, and eight per cent. (8%) interest to all stockholders." All stock issued was to be issued as ordinary stock, the only limitation as to issuance to one stockholder of more than 10 shares being that in such event a power of attorney or proxy, designed to secure "equal voice and vote to all stockholders," be executed. Paragraph 3, art. V, and article XIII. All stock was to be transferred in the same way. Article XIV. All stock issued was "subscribed stock" and its holders "stockholders" within the meaning of articles XV and XVI relative to meetings and voting. The contention of petitioners is necessarily based on certain other provisions to which we will now refer. By article XX it was provided that all stock was to be sold "subject to the right of the corporation to repurchase the same at any time upon paying" \$1 per share and interest, and to such other conditions as the board of directors may deem advisable, "except that no compulsory action shall be taken by the corporation that will reduce the ownership of stock to less than ten shares for each member." It is further declared in this article that this provision is "to the end that the business and affairs of the corporation shall be conducted, maintained, and carried on, in the interest of the majority of its stockholders," and that "the corporation shall repurchase (the financial condition of the corporation permitting), first, such shares of stock owned and held by any stockholder in excess of 10 shares, thereby limiting the ownership of stock to 10 shares for each stockholder, and giving to each equal rights and privileges." It is then provided that—

"The corporation may at any time through its board of directors, pursuant to the terms and conditions of sale and issuing of stock, repurchase the same whenever it is deemed for the

best interests of the corporation and stockholders so to do."

It is then provided:

"To the end that the stockholders may have equal say and voice, it is deemed advisable that a form of proxy, agreement of sale, and power of attorney be executed and required of each stockholder as a condition to be complied with before any stock in excess of 10 shares may be purchased by any person."

The form of this is set forth. By it the purchaser appoints some specified stockholder his agent and attorney to represent him and vote said stock at all meetings while he remains owner of the stock, limiting the power of such attorney to vote "as the majority of the persons present as stockholders voting cast their votes," and agrees that, if he revokes the power of attorney, he will sell the stock for \$1 per share (its par value) to said agent, as of the date of revocation. It is further declared that this power of attorney and proxy is not to affect the right of the corporation to purchase said stock "at any time * * * by paying me" \$1 per share and interest.

In article XVII it is provided that no repeal or amendment to the by-laws shall affect the obligations of the corporation to pay 8 per cent. interest "to its stockholders, or any funds that it may borrow, or any security it may give for funds borrowed, or affect the obligation of the corporation to pay one dollar (\$1.00) per share and interest at eight per cent. (8%) to stockholders who have assisted the corporation by purchasing more than 10 shares of stock to permit it to raise funds with which to purchase equipment of the ferryboats Vallejo, Ellen, equipment," etc.

The corporation has during its existence repurchased from stockholders so-called excess stock of the value of approximately \$16,000. It is in such financial condition that it can repurchase all such stock without detriment to claims of creditors. It sufficiently appears that it had closed the business for which it was incorporated, sold its property, and is preparing to dissolve, and that the real burden of the complaint of petitioners, who with other stockholders presumably belong to "the 10 share only" class, is that the value of their shares will be smaller on distribution of the assets, by reason of the existence of the so-called excess stock, than it would be if such stock were repurchased by the corporation before distribution at \$1 per share and interest. The corporation has finished its work, and no reason whatever appertaining to the conduct of the affairs of the corporation as a going concern exists for the purchase of any outstanding stock.

[1] There appears to us, in the light afforded by the articles of incorporation and

the by-laws, no lawful foundation for a conclusion that this so-called "excess stock" is evidence of an indebtedness, or its holders simply creditors of the corporation. The object of the issuance of all the stock was, of course, to secure money to buy property essential to the establishment and maintenance of the proposed business, but we had thought that such was always a purpose of the issuance of stock. Each person who acquired stock, whether 10 shares only or more, became a stockholder in the corporation with all the rights and liabilities of a stockholder as to all of the stock held by him for so long as he continued to hold it, subject only in so far as any amount over 10 shares was concerned to the right of the corporation, under the terms of the contract, to repurchase the same from him at its par value, with interest at 8 per cent. per annum. The provision for the payment of par value and interest was simply the fixing by the parties of a purchase price in the event of the exercise of its option by the corporation. The provision in article XVII precluding repeal or amendment of the by-laws in certain particulars, in so far as material here, simply precludes any repeal or amendment of the provisions securing to the stockholder the designated price in the event of a repurchase by the corporation. The general guaranty of 8 per cent. interest on stock, whatever it means or may be worth, runs invariably, in so far as the by-laws are concerned, to all stockholders.

[2] The remaining question is whether the corporation officers can be compelled to repurchase at the fixed price all stock held by any stockholder in excess of 10 shares, under the existing circumstances. We may concede for the purposes of the decision the validity in all respects of the provisions of the by-laws relative to this matter. Careful consideration of articles and by-laws leaves no doubt as to the full purpose and scope of these provisions; the same being substantially stated therein. The object was to have the business of this corporation, which was to be confined as far as possible to employees of the Mare Island navy yard, run, in so far as was practicable, according to the desires of the majority of persons who were stockholders rather than according to the desires of the holders of the majority of stock. Equality of "say and voice" to every individual stockholder in the management of the business of the corporation as a going concern, regardless of the amount of stock held by him, was the sole object of all these provisions as to repurchase, as it was with regard to the provisions as to manner of voting, and requirement of proxy. There is to our minds nothing in articles or by-laws to warrant a conclusion that for some purpose not at all incident to the management of the corporation as a going concern, in this case

in the closing of the affairs of the corporation, the mere increase in value of certain stock held by certain stockholders to be attained by extinguishing by purchase of their stock the rights of others to participate as stockholders in the distribution of the corporate assets, the corporation or its officers can compel a retransfer of any stock. As we have seen, this corporation has ceased to do business, has sold its property, and is about to dissolve, and apparently has a large residue of money to distribute pro rata among its stockholders. So far as the corporation is concerned and the management of its affairs, there is no longer any necessity for or propriety in the repurchase of any stock. The only thing remaining to be done is to dissolve and distribute the assets among the existing stockholders according to their respective holdings. We are satisfied that respondents are not acting in violation of articles of incorporation or by-laws in refusing at this stage to attempt a repurchase of any stock.

The judgment is affirmed.

We concur: WILBUR, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

COULTER v. POOL, County Auditor, et al.
(S. F. 9792.)

(Supreme Court of California. Oct. 7, 1921.)

1. Counties ~~61~~—Statutes ~~89~~—County engineer act held unconstitutional in that it creates offices and delegates authority to supervisors, and permits departure in uniformity of county government.

St. 1919, p. 1290, providing for the appointment of a county engineer, held unconstitutional in that it creates a county office and delegates to the board of supervisors of counties not having charters under Const. art. 11, §§ 7½, 7½a, authority to fix the compensation of such county officer in violation of section 5, and in that it permits a departure from uniformity in county government provided for by section 4, by making it optional with supervisors of county as to whether such officer shall be appointed; the county engineer so provided for being a county officer, and not a mere employee, notwithstanding provision of statute that he shall be deemed an "employee and not a county officer."

2. Statutes ~~181~~(1)—Construed according to legislative intent.

A statute will be construed according to the legislative intent if consistent with the real object and purpose of the statute.

3. Constitutional law ~~47~~—Constitutionality not dependent on legislative declaration as to purpose, but on scope and effect of statute.

A legislative declaration, whether contained in the title or in the body of a statute, that the

statute was intended to promote a certain purpose, is not conclusive on the courts, and they must inquire into the real as distinguished from the ostensible purpose of the statute, and determine whether it in its scope and effect departs from the declared legislative design and contravenes the Constitution.

4. Officers —3—Test as to whether statute creates public office or really provides for employment of employees.

Whether a statute creates a public office or provides for the employment of the employee depends, not upon the name given the particular office, but upon the power granted, the duties and functions to be performed, and other circumstances manifesting the true character of the position.

5. Officers —1—"Public officer" defined.

A "public officer" is a public agent, and acts only on behalf of the public, whose sanction is generally necessary to give his act the authority and power of a public act or law, a public officer being distinguished from a mere employee in that a public duty is delegated and intrusted to him, and in that there is a fixed tenure of position, the execution of a public oath of office, and generally of an official bond, the liability to be called to account for misfeasance or nonfeasance in office, and the payment of a salary from the general county treasury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Officer.]

6. Counties —61—"County officer" defined.

A "county officer" is a public officer who fills a position usually provided for in the organization of counties and county governments, and is selected by the county to represent it continuously and as part of the regular and permanent administration of public power in carrying out certain acts with the performance of which it is charged in behalf of the public.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, County Officer.]

7. Statutes —89—"System" within constitutional provision as to system of county governments, defined.

The word "system," within Const. art. 11, § 4, providing that the Legislature shall establish a "system" of county governments which shall be uniform throughout the state, means an organized plan or scheme in keeping with which the constituent parts thereof are rendered similar and are connected and combined into one complete harmonious whole, and imports both a unity of purpose and entirety of operation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, System.]

8. Highways —113(4)—Contractor who performed work on order of county supervisors entitled to compensation.

Contractor who performed work on order of county supervisors under Pol. Code, §§ 2641, 2645, subsequent to appointment of county engineer, held entitled to payment in view of the invalidity of the county engineer act.

In Bank.

Appeal from Superior Court, Sonoma County; Emmet Seawell, Judge.

Application by Paul Coulter for a writ of mandamus against C. A. Pool, as Auditor of the County of Sonoma, and others. Writ refused, and plaintiff appeals. Reversed.

W. F. Cowan, of Santa Rosa (R. M. F. Soto, of San Francisco, of counsel), for appellant.

G. W. Hoyle, Dist. Atty., of Santa Rosa, for respondents.

LENNON, J. In this proceeding the plaintiff sought, and was denied, mandamus to compel the defendants, respectively the auditor and the treasurer of the county of Sonoma, to audit and pay the claim of plaintiff presented against said county in the sum of \$39.24 for labor alleged to have been performed by the plaintiff upon certain of said county's highways.

The claim in controversy is founded primarily upon the admitted fact that plaintiff performed labor upon said highways under and by virtue of the direction and authority of one of the supervisors of said county elected from and representing the supervisorial district in which the labor was performed, and who, by virtue of his office, was road commissioner for said district, and, as such commissioner was given supervision of the highways in his district. Pol. Code, §§ 2641, 2645. The labor which is the basis of the claim in controversy was performed on July 26, 1919, subsequent to the appointment by the board of supervisors of a county engineer, made pursuant to the provisions of an act entitled:

"An act providing for a county engineer for each county in this state, * * * his appointment, manner of removal, qualifications, compensation and duties; transferring to such engineer certain powers, functions and duties heretofore vested in and performed by county surveyors and members of the board of supervisors; * * * to provide for abolishing the office of county surveyor and for the fixing and levying of taxes for road purposes." Stats. 1919, p. 1290.

Section 13 of this act provides that it shall be known and designated as "the county engineer act," and it will be hereinafter referred to by that title. Stats. 1919, pp. 1290, 1295. In keeping with the provisions of this act, the board of supervisors, when appointing the county engineer for a term of four years, fixed his salary at the sum of \$350 per month, and the number and compensation of his assistants. Said labor was performed by plaintiff without, and never has had, the authority, inspection, and approval of said county engineer as required by the provisions of subdivision "b" of section 5 of

said act. The claim in question was, however, approved and allowed by the board of supervisors as a legal charge against the county, apparently upon the theory that, inasmuch as an ordinance passed subsequent to the ordinance appointing the county engineer, with apparent intent to do so, excluded the supervisorial district in which the labor involved was performed from the scope and operation of the ordinance appointing the engineer, it thereby, in effect, left the supervisor of that district as the *ex officio* road commissioner thereof in control of the work to be done on the highway therein to the exclusion of the authority and direction of the county engineer. The writ seeking an order directing the auditing and payment of the claim thus allowed was denied by the court below upon the theory that the county engineer act, having been adopted by the board of supervisors of Sonoma county, applied throughout that county; that the board of supervisors had no authority to except one district of that county from the operation of the act, and that plaintiff's claim was therefore void on its face because the work performed by plaintiff was not performed under the provisions of the county engineer act. The proceeding in mandamus is now here upon appeal of the plaintiff.

[1] We shall concern ourselves only with the constitutionality of the act, for if it be held, as we think it must, to be unconstitutional, then it does not invalidate the plaintiff's claim, and there is no need to discuss and decide the several remaining questions involved in the appeal.

[2, 3] At the outset we are satisfied that the act in question contemplates the creation of a county office, and does, in fact, provide for something more than a mere employment by the board of supervisors of a person to be known as the county engineer. And we are convinced that this is so despite the verbiage of the act, industriously employed, which, among other things, declares that the county engineer appointed by the board of supervisors "shall be deemed an employee and not a county officer * * * subject to the control and supervision of the board of supervisors." We are not unmindful of the cardinal rules of statutory construction which require an interpretation of a statute which will give effect to the legislative intent, which, if consistent with the real object and purpose of the statute, must be adopted, and doubtless the express legislative declaration found in section 1 of the act purporting to designate the official character of the county engineer and specifying the category in which, when appointed, he and his duties must be considered and treated, tends in some degree to show the legislative intent to provide that the county engineer was to be a mere employee of the board of super-

visors, and not a county officer who was to be part and parcel of that uniform system of county government contemplated and commanded by the Constitution. Const. of California, art. 11, § 4. While ordinarily it is the rule that, when the lawmaking power distinctly states its design in the enactment of a particular statute, no room is left for construction, nevertheless, as the District Court of Appeal well said during its discussion of this phase of the case:

"The label placed by the Legislature upon its work cannot be permitted to give it a meaning not fairly contemplated within its terms."

In other words, a legislative declaration, whether contained in the title or in the body of a statute, that the statute was intended to promote a certain purpose, is not conclusive on the courts, and they may and must inquire into the real, as distinguished from the ostensible, purpose of the statute, and determine the fact whether, after all has been said and done by the Legislature, the statute, in its scope and effect, departs from the declared legislative design and contravenes the fundamental and supreme law of the state. *Matter of Jacobs*, 98 N. Y. 98, 110, 50 Am. Rep. 636; *State v. Redmon*, 134 Wis. 89, 107, 114 N. W. 137, 14 L. R. A. (N. S.) 229, 128 Am. St. Rep. 1003, 15 Ann. Cas. 408; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205. This being so, it cannot be rightfully held that, standing alone, the legislative declaration in the instant case compels the conclusion without more ado that the act in question did no more than provide for the mere employment of a county engineer, and did not, in truth and in fact, attempt to create a county officer to be known as the county engineer. A proper construction of the act requires that due regard be given to the real object of the act. *People v. Dana*, 22 Cal. 11; *Genilla v. Hanley*, 6 Cal. App. 614, 92 Pac. 752. This may, we think, be readily ascertained, despite the legislative declaration to the contrary, by a consideration of the requirements of the act as gathered from the context of the act in its entirety.

[4] Looking, then, to the context of the act in its entirety for the purpose of ascertaining its real, as distinguished from its ostensible, purpose, we are first brought to a consideration of the question of what distinguishes a public office from a mere employment. The words "public office" are used in so many senses that it is hardly possible to undertake a precise definition of the meaning and purpose of the phrase which will adequately and effectively cover every situation. It is far less difficult to conceive and comprehend the requirements which characterize a public office than it is to formulate a definition thereof which will have universal application

and be entirely free from fault. Its definition and application depend, not upon what the particular office in question may be called, nor upon what a statute may call it, but upon the power granted and wielded, the duties and functions performed, and other circumstances which manifest the true character of the position and make and mark it a public office, irrespective of its formal designation. *Knox v. L. A. County*, 58 Cal. 59; *Mechem on Public Offices*, § 4; *Hartigan v. Board*, 49 W. Va. 14, 38 S. E. 698. A public office is ordinarily and generally defined to be the right, authority, and duty created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period an individual is invested with power to perform a public function for the benefit of the public. *State v. Jennings*, 57 Ohio St. 415, 49 N. E. 404, 63 Am. St. Rep. 723.

[5] A public officer is a public agent, and as such acts only on behalf of his principal, the public, whose sanction is generally considered as necessary to give the act performed by the officer the authority and power of a public act or law. The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and intrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting. There are other incidents which ordinarily distinguish a public officer, such, for instance, as a fixed tenure of position, the exaction of a public oath of office, and, perhaps, an official bond, the liability to be called to account as a public offender for misfeasance or nonfeasance in office and the payment of his salary from the general county treasury. *U. S. v. Hartwell*, 6 Wall. 385, 18 L. Ed. 830; *U. S. v. Germaine*, 99 U. S. 511, 25 L. Ed. 482; *People v. Langdon*, 40 Mich. 673; *State v. Jennings*, *supra*; *Knox v. L. A. Co.*, *supra*.

[6] As a matter of course, in keeping with these definitions, a county officer is a public officer, and may be specifically defined to be one who fills a position usually provided for in the organization of counties and county governments and is selected by the political subdivision of the state called the "county" to represent that governmental unit, continuously and as part of the regular and permanent administration of public power, in carrying out certain acts with the performance of which it is charged in behalf of the public. *Sheboygan County v. Parker*, 70 U. S. 93, 18 L. Ed. 33; *State v. Samuelson*, 131 Wis. 490, 111 N. W. 712; *State v. Higginbotham*, 84 Ark. 537, 106 S. W. 484.

Measuring the provisions of the act hereinabove referred to by the authorities just cited, it seems evident, beyond argument, that

the so-called "employee" provided for in the statute in question is, in fact, a public and a county officer. The act specifies (section 2) that the tenure of the position of county engineer shall be a term of four years from the date of his "appointment," providing for removal only in the event of inefficiency, malfeasance, or misconduct in office, and then upon written charges filed with the board of supervisors and after a hearing of the charges by said board, and, if found guilty, the board must forthwith remove him from "office" and shall immediately appoint his "successor" in the manner provided in the act. The act also requires (section 2) that "prior to entering upon the duties of his employment the county engineer shall file with the county clerk the *oath of office as prescribed for the county officers* and a bond conditioned upon the faithful performance of his duties, with sufficient sureties approved by a judge of the superior court, in the sum of five thousand dollars." (Italics ours.) The salary, which is to be fixed by the board of supervisors, "shall be paid monthly out of the county treasury of the county in which he is appointed and in the same manner as county officers; * * * provided, however, that the compensation of the county engineer in any county shall not be less than the compensation received by the county surveyor of that county at the time said county engineer is first appointed." Section 3. With respect to duties, it is provided that, among other things, "the county engineer shall be ex officio road commissioner of and for each and every road district of his county, and, subject to the control and supervision of the board of supervisors as herein provided" (section 4), and "shall * * * make, or cause to be made, all surveys, maps, plans, specifications and estimates necessary or required for the construction, improvement, maintenance and repair of the county roads, highways and bridges, and shall, from and after the first Monday in September, 1919, have and exercise all the powers and duties, and perform all the functions which are now by law conferred or imposed upon county surveyors * * *" (section 5 [a]). The act further provides that the county engineer "may also hold and perform the duties of the office of county surveyor, but in all such cases no salary or other compensation shall be paid to him as county surveyor" (section 5 [f]), and that he shall, at regular monthly meetings of the board make a report to the board containing "the recommendation of acceptance or rejection of any public work, completed, and all official announcements or statements which the engineer is required to make to the board" (section 5 [h]), and "submit to the board of supervisors a certificate over his signature and official seal to the effect that such work by the contractors thereof has

been completed in accordance with the specifications thereof and recommending its acceptance" (section 9). The act in terms provides that, upon the appointment of the county engineer, the county office of county surveyor shall, in certain specified contingencies, be deemed abolished. Nevertheless, as is evidenced by some of the provisions above set forth, the office and duties of the county surveyor are, in effect, by the act in question merged into the office and duties of the county engineer. The county surveyor, under the general law in force throughout the state, is a county officer (Pol. Code, § 4013), and as such is required to do certain designated county work, not specially mentioned in the act in question, pertaining to the governmental functions of the county (Pol. Code, § 4214 et seq.). The Legislature therefore attempted to transfer the burden of the duties of the county surveyor to the so-called county engineer, in conjunction with the added and different duties imposed upon him by the act in question. That this is so is further evidenced by an amendment to the county engineer act in 1921 by which a provision was added to the effect that, upon the petition of a certain percentage of qualified electors of the county, the board of supervisors in any county which shall have adopted the provisions of the act "shall discontinue such office of county engineer by ordinance declaring their intention so to do and in such ordinance the board shall provide that the person holding the office of county engineer at the time the ordinance becomes effective shall be and become the county surveyor of such county until the next ensuing general election. * * * Stats. 1921, p. 934.

That the position of county engineer is in fact a county office is apparent, in view of the authorities previously cited, from the provisions of the act above quoted and referred to, namely, the provision for trial and removal of the county engineer in the event of misfeasance or nonfeasance in office, the fixing of the tenure of office, the requirement of a bond and the taking of the oath prescribed for county officers, payment of salary from the general county treasury, the political and governmental nature of his duties, and the relation between the position of county engineer and the office of county surveyor. "Clearly, it was a county office." *Reed v. Hammond*, 18 Cal. App. 442, 123 Pac. 346. This being so, it may be stated, in passing, that it follows that the county engineer act is practically inoperative for the reason that the act itself specifies no compensation for the office, and any ordinance of a board of supervisors attempting to fix the salary of a person appointed to the position of county engineer is void to that extent for the reason that the Constitution imposes upon the Legislature exclusively the duty of regulating

the compensation of all county officers, unless a county has adopted a charter in accordance with the provisions of sections 7½ or 7½a of article 11 of the Constitution, or there is some other express constitutional exception. The state Legislature cannot directly delegate to the boards of supervisors of the various counties the power of fixing the compensation of a county officer. *Const. Cal. art. 11, § 5; Dougherty v. Austin*, 94 Cal. 601, 28 Pac. 834, 29 Pac. 1092, 16 L. R. A. 161.

Concluding, as we do and must, that the position of "county engineer" which the Legislature attempted to provide for by the act under consideration is in truth and in fact a county office, we are then confronted with the question of whether or not the act, if permitted to become operative, is in keeping with and does not violate the mandatory provision of the Constitution which requires that "the Legislature shall establish a system of county governments which shall be uniform throughout the state. * * *" *Const. Cal. art. 11, § 4.*

We may concede, for the purpose of discussion, that the rule prohibiting the delegation of legislative powers by a state Legislature does not necessarily prohibit a conditional statute, the taking effect of which in each locality may be made to depend upon such subsequent event as its approval by the electors of that locality. Likewise it may be conceded that the act in question may be said to be a general and uniform law because the general provisions thereof are applicable alike to every county in the state. The fact remains, however, that the Constitution contemplates and commands that the system of county governments shall be uniform throughout the state, except in those special instances where the Constitution itself sanctions a departure from uniformity, such, for instance, as in the case of counties or consolidated cities and counties which adopt charters in accordance with the provisions of sections 7½ and 7½a of the Constitution. There is no section of the Constitution which specially excepts the political functions dealt with by the act in question from the requirement that the general scheme of county governments provided for by the Legislature must be uniform throughout the state. Therefore, if the county engineer act will, in its operation, necessarily tend to interfere with this uniformity, it is unconstitutional and void.

Section 1 of the act provides that—

"The board of supervisors of any county at their option may appoint, and upon petition therefor signed by qualified electors of the county equaling in number not less than twenty-five per cent. of the total vote cast in the county for governor at the last preceding election at which a governor was elected, they must appoint a competent civil engineer * * * as county engineer."

Section 11 provides that, if the provisions of the act are adopted in a county by the appointment of a county engineer, the office of county surveyor shall be abolished either upon the date upon which the appointment is made and accepted if the person who holds the office of county surveyor is the one appointed county engineer, or, in other cases, upon the expiration of the term of the person who holds the office of county surveyor at the time the appointment of county engineer is made. By the 1921 amendment previously mentioned, the office of county engineer may be abolished, and that of county surveyor reinstated, upon the petition of a certain percentage of electors. It is evident, therefore, that the act is not mandatory in its operation. To the contrary, it is provided in the act that the question as to whether its provisions shall become operative in any particular county or whether that county shall continue under the provisions of the general law on the subject heretofore in force is a matter to be determined, in the last analysis, solely by a percentage of the electors of that county. This being so, the act by its express terms renders possible and probable a situation where in one or more of the counties of the state the duties of surveying and fixing the boundaries of the public lands and roads, etc., would be performed by the county surveyor, an officer elected by the people of the respective counties and subject to the rules governing elected officials, while in another or other counties there might be an arrangement whereby these same duties would be performed by an official appointed by the board of supervisors, which official would, in addition to the duties prescribed by the general law for county surveyors, also perform the various duties set forth in section 5 of the county engineer act. In the counties operating under the general law each supervisor is ex officio road commissioner in his supervisorial district, whereas in counties electing to adopt the provisions of the county engineer act the county engineer would be "ex officio road commissioner of and for each and every road district of his county."

[7] The word "system," as employed in the Constitution, means an organized plan or scheme in keeping with which the constituent parts thereof are rendered similar and are connected and combined into one complete, harmonious whole, and it necessarily imports both a unity of purpose and entirety of operation. *Welsh v. Bramlet*, 98 Cal. 219, 83 Pac. 66; *Board v. State*, 26 Okl. 366, 109 Pac. 563; *State v. Rlordan*, 24 Wis. 484. As previously indicated, uniformity means consistency, resemblance, sameness, a conformity to one pattern. In this resemblance, in this sameness, in this conformity of a class to one pattern, consists the uniformity of system which is essential to the creation and

continuity of a uniform system. And therefore the constitutional mandate to establish a uniform system of county government throughout the state means one system applicable alike in all its parts and continuously operating equally in all of the counties of the state. If a particular county were expressly exempted from the operation of the act in question, there would be no doubt but that it would violate the uniformity of system contemplated and required by the Constitution. And, while in the act under consideration no particular county is expressly exempted from the operation of the law, nevertheless people of any one or more counties may, without regard to any action taken by the remaining counties, determine that they will or will not be subject to the operation of the law, and thereby, of their own volition, create an exception to the general and uniform system of county government. In other words, the Legislature by the act in question attempted to do by indirection that which it could not do directly; that is to say, having no power to exempt one or more counties from the operation of the act, it could not confer that power upon the people of the different counties. The Legislature itself must by its own enactment establish in the first instance a system of county government uniform throughout the state, and it necessarily follows that such system when once established must, in so far as its uniformity is concerned, be kept intact by the Legislature, and must not be impaired by any subsequent legislation authorizing in counties a material difference in the manner of performing functions of government intrusted to them.

Inasmuch as the county engineer act provides for a county office involving the exercise of political functions, we conclude that the said act violates the constitutional requirement that the system of county governments prescribed by the Legislature shall be uniform throughout the state, by reason of the fact that it is not mandatory in its operation, but that it is optional with each county whether or not the office provided for by the act shall be established therein. *L. A. County v. Kirk*, 148 Cal. 385, 83 Pac. 250.

This conclusion is not in conflict with the cases relied upon by respondents. In *Scott v. Boyle*, 164 Cal. 321, 128 Pac. 941, the court had under consideration a statute which authorized the appointment of sealers of weights and measures, but left the determination as to whether or not this authorization should be availed of to the different counties and municipalities. The statute dealt with an office which was specifically provided for by a special section of the Constitution (Const. art. 11, § 14), and which the court held was "distinct from the general political functions of counties and cities and

the general scheme of county or municipal government." Likewise the statute upheld in the case of Board of Law Library Trustees v. Board of Supervisors, 99 Cal. 571, 34 Pac. 244, left to the election of the different counties the matter of the establishment of law libraries, but such institutions are not part of the system of county government, at least in so far as the execution of "political functions" is concerned, and consequently the point here presented was not discussed in that case. In *Tulare County v. May*, 118 Cal. 303, 50 Pac. 427, the act provided for one additional deputy sheriff and two deputy clerks in any county in which an additional judge of the superior court was created by the Legislature. This provision was valid, for, as stated in the opinion, it operated in each county alike upon the creation of an additional judge in that county by the Legislature.

[8] The employment of plaintiff to perform the work in question was ratified by the board of supervisors by allowing his claim for compensation for the work (*Power v. May*, 123 Cal. 147, 55 Pac. 790), and, in view of the fact that the county engineer act must be held unconstitutional, the record discloses no valid objection to the payment of the claim thus allowed. Disregarding the findings concerning the proceedings under the said county engineer act, the remaining findings of the trial court are sufficient to support a judgment in plaintiff's favor. Accordingly the judgment is reversed, with directions to the trial court to grant the relief prayed for in plaintiff's petition.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; WILBUR, J.; LAWLOR, J.

PACIFIC PORTLAND CEMENT CO., CONSOLIDATED, v. PLACER COUNTY LAND CO. (Sac. 2912.)

(Supreme Court of California. Oct. 6, 1921.)

1. Vendor and purchaser §31—Conveyances of land in chain of title, naming center line of track as a boundary held notice to purchaser of railroad's claim.

A call in several conveyances in chain of title for the center line of a railway track as one of the boundaries gave notice to purchaser of the adverse occupation and claims of a railroad right of way extending to the fence bordering on the apparent right of way.

2. Vendor and purchaser §44—Evidence held not sufficient to support finding that the inclusion of right of way of a railroad in a deed was a mutual mistake.

On a purchaser's claim for deficiency in quantity, evidence that the inclusion of railroad

right of way in the deed was a mutual mistake held not sufficient to support judgment for purchaser.

3. Vendor and purchaser §31—Purchaser, with notice that railroad claimed right of way, had duty to investigate extent of claim.

Where a purchaser claiming damages for deficiency in quantity had notice from conveyances in chain of title and from a fence on the land that a railroad occupied and claimed a right of way in the land, he was bound to investigate the extent of the railroad's rights.

4. Vendor and purchaser §31—Public statute of Congress, granting right of way to railroad, was constructive notice to purchaser of railroad's claim.

The act of Congress under which a right of way was granted to railroad company, being a public statute, was constructive notice to both vendor and purchaser of the adverse claim of the railroad company.

5. Vendor and purchaser §37(3)—In absence of fraud or an agreement, express or implied, for a good or particular title, purchaser of land buys at his peril.

In absence of fraud or an agreement, express or implied, for a good or particular title, a purchaser of land buys at his peril, and the vendor's representation that he had title to a disputed strip occupied as railroad right of way, of which the purchaser had notice, was a mere statement of opinion.

6. Vendor and purchaser §37(3)—Mere expressions of opinion by vendor as to sufficiency of title do not constitute fraud or deceit.

Mere expressions of opinion as to sufficiency of title, when means of information are equally accessible to both parties and no confidential relation exists between them, do not constitute fraud or deceit on the part of the vendor.

7. Vendor and purchaser §31—Purchaser with notice of adverse possession of part of land cannot avoid liability for purchase price.

Where the purchaser had notice, through conveyances in chain of title, naming as a boundary the middle of a railroad track, and from the fact that the railroad ran across the land and its right of way was fenced, that part of the land was held by the railroad as a right of way, he cannot avoid paying the purchase price of the entire tract for which he bargained.

In Bank.

Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by the Pacific Portland Cement Company, Consolidated, against the Placer County Land Company. From judgment for defendant, plaintiff appeals. Reversed.

Pillsbury, Madison & Sutro, of San Francisco, and A. E. Roth, of Stanford University, (Marshall P. Madison, of San Francisco, of counsel), for appellant.

Geo. W. Hamilton, of Auburn, for respondent.

SLOANE, J. This action was begun by plaintiff to foreclose a purchase-money mortgage on land conveyed by plaintiff to defendant. There was a cross-complaint by defendant to recover damages from failure of title to a portion of the land. Judgment was for the defendant, and the plaintiff appeals.

The only matters in dispute arise under the averments of the cross-complaint that the agreement with and deed to the defendant called for a tract containing 22½ acres, whereas plaintiff only had title to 16 acres of the tract conveyed. The deed to defendant described the land by courses and distances as follows:

"Beginning at the northeast corner of the west half of the northeast quarter of section 10 in township 12, north, range 8 east, Mount Diablo base and meridian, and running thence south along the line between the east half and the west half of the northeast quarter of section 10 a distance of 1320 feet to a stake; thence at right angles west a distance of 802 feet to the center line of the Central Pacific railway track; thence in a northerly direction along said center line of said railroad track to its intersection with the north line of said section 10; thence east along the north line of said section 10 a distance of 669 feet to the place of beginning; being a fractional part of the north half of the west half of the northeast quarter of said section 10."

No reference is made in the deed to the acreage of the tract, but it is in evidence that a computation of the area inclosed within the described boundaries shows that it comprises 22½ acres.

[1] It is conceded that the Southern Pacific Company, as successor to the Central Pacific Railway Company, at all times affected by these proceedings, owned a strip of the above-described premises 200 feet in width along the entire westerly line, described as the "center line of the Central Pacific Railway track," and to the east thereof, comprising about six acres, and to which strip the plaintiff at no time had any title. For many years prior to the conveyance in question the railway companies had occupied the westerly part of this strip as a right of way for their tracks, and had maintained a fence on the easterly line between such strip and the remaining premises covered by plaintiff's deed. It is from the failure to obtain title to this strip of land under the deed from plaintiff to defendant that the controversy on this appeal arises.

The trial court, after finding the facts as above stated, further found that the plaintiff and its agents had knowledge of "the existence of the tracks and fence lines constructed and maintained over and across such mortgaged premises," and were advised and informed of the fact that all the right, title, or interest or estate that they or either of them had in or to said strip was "subject and subordinate to the rights, claims and title of the

railway company," but that neither plaintiff nor its agents advised or informed the defendant thereof. This finding is followed immediately by the further inconsistent and apparently irreconcilable finding that neither the plaintiff nor the defendant "had knowledge or were otherwise informed or advised" of the fact of ownership and right of possession by the railway company of the strip or parcel of land hereinbefore described.

As the evidence indisputably shows that all of the parties to this action knew and had known for years that the railway company was maintaining its tracks upon this strip of land and was maintaining the fence hereinbefore referred to, and as the deed itself carries the west line of the land conveyed to and along the center of a railway track, the only explanation for the finding that neither plaintiff nor defendant knew of the railway's ownership or right of possession is that the court intended to find that neither of them was informed of the nature or validity of the railway company's right or title. That such was the situation is a fair inference from the testimony in the case. It is clearly evident from the testimony of the agents of defendant who conducted the negotiations for the purchase of this land that they knew of the occupancy of this strip, or some portion of it, by the railway company, and that it was claimed and used by said company for a right of way, and that the railway company was maintaining the fence along the easterly border of this strip, thus separating it from the main part of the tract. Before the purchase was consummated defendant was furnished with an abstract of title to the entire tract, and in one of the transfers set out in the abstract there was a reservation "saving and excepting the right of way of the said Central Pacific Railroad Company." The call in each of the several conveyances for the "center line of the Central Pacific Railroad track," as one of the boundaries, must have served as notice that the railway company was claiming and occupying some portion of the tract as a right of way. Defendant's agents admitted that they had previous knowledge of litigation between the railroad and other landowners over this 200-foot right of way extending across adjacent lands. This 200-foot strip is claimed by the railway under an early congressional grant. The title of the company had, it was claimed, in one instance at least, been successfully contested, and defendant's agent and representative testified to knowledge that similar litigation had occurred on other sections of the railway line in that neighborhood, and "that sometimes the railroad company wins and sometimes loses." That defendant had notice that some portion of the tract it was bargaining for was occupied and claimed as a railroad right of way is beyond question.

That such claim extended from the railway track to the line of fence was suggestively apparent. The only reasonable conclusion is that both parties to the transaction understood that the disputed strip was included in the conveyance, as it had been in the several previous deeds in the chain of title, to pass to the grantee any interest that might be maintained against the railroad company, but with full knowledge of the railway's possession and subject to any valid claim it might have.

[2, 3] The theory upon which the trial court made its findings in favor of defendant, namely, that the inclusion of the entire acreage in this conveyance was the result of the mutual belief of both parties to the transaction that plaintiff had an undisputed title to this right of way strip clearly cannot be maintained, and upon no other theory presented by the facts or the findings can the defendant defeat plaintiff's action or recover on its cross-complaint. Fraud is not alleged in the pleadings, and the defendant at least had sufficient notice of the railroad's right of way to put it on inquiry. Indeed, it knew of the adverse claim to some portion of this tract, and the duty was imposed upon it to make investigation as to the extent of the railroad's rights.

[4] That the deed to defendant calls for this 200-foot strip is undisputed, but it is equally clear that the grantor knew that it did not have title thereto, or at least that the railroad company was occupying and claiming it adversely, and the grantee was aware that at least some portion of the strip was claimed and occupied by the railroad as a right of way. Even the act of Congress under which the 200 feet of land claimed by the railway company was granted, being a public statute, was constructive notice to both parties of this adverse claim. *Central Pac. Ry. Co. v. Droge*, 171 Cal. 32, 42, 151 Pac. 663.

[5] Eliminating the findings of mutual mistake, and any question of fraudulent misrepresentation, or express covenants of title, and the application of the rule of caveat emptor becomes too plain to require argument or authority. The general rule applicable is stated in 39 Cyc. p. 1252, as follows:

"It is well settled that, in the absence of fraud or an agreement, express or implied, for a good or particular title, a purchaser of land buys at his peril, and is bound to look to the title and

competency of the vendor. Therefore a purchaser cannot rescind on the ground that he was mistaken as to his vendor's title. But where both parties are under a mistake as to the vendor's title, equity will relieve the purchaser from the contract."

[6] The most that can be said in support of defendant's case here is that the plaintiff, its vendor, represented that it had title to this disputed strip; but in the face of the fact that both parties to the transaction had knowledge of the adverse claim and possession of the railroad company, this representation becomes a mere statement of opinion as to the legal effect of the adverse claim.

"Mere expressions of opinion as to the sufficiency of the title, when the means of information are equally accessible to both parties, or the same facts are within the knowledge of both parties, and when no confidential relation exists between them, do not constitute fraud or deceit upon the part of the vendor. It is a mere statement of opinion, and does not justify the party to whom the statement is made in relying thereon." *Choate v. Hyde*, 129 Cal. 580, 62 Pac. 118; *Nounnan v. Sutter County Land Co.*, 81 Cal. 1, 22 Pac. 515, 6 L. R. A. 219; *Rheingans v. Smith*, 161 Cal. 362, 119 Pac. 494, Ann. Cas. 1913B, 1140.

[7] If defendant was misled in entering into this purchase, it was not because of any mistake as to the acreage of the tract. It is not disputed that the deed purported to convey the entire 22½ acres bargained for. The mistake, if any, was as to the title to the strip included in the railroad's right of way, and, as has been pointed out, both parties were in possession of the facts which showed that plaintiff's claim of title was at least doubtful and its representation of ownership merely matter of opinion.

The undisputed facts in this case clearly indicate that the conveyances of this strip by the owners of record through a considerable chain of title were accepted with knowledge of the adverse claim of the railroad, and the defendant here in its turn took a sporting chance, which it confessedly thought at the time of the purchase was good, that the railroad's title could be defeated. Under such conditions it cannot avoid its liability for the purchase price.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; WILBUR, J.; LAWLOR, J.

STANDARD LUMBER CO. v. MADARY'S PLANING MILL et al. (Chv. 2337.)

(District Court of Appeal, Third District, California. Aug. 30, 1921.)

1. Trespass ¶10—Public right to use railroad spur does not carry right of access over adjoining land.

The right of the public to the use of a spur track of a railroad does not carry with it the right of access thereto over an adjoining owner's lands not dedicated to public use.

2. Injunction ¶12—Not refused for injury accomplished where continuation threatened.

Injunction will not be refused because injury has been accomplished where apparent continuation is threatened.

3. Injunction ¶135—Granting temporary injunction largely discretionary.

The granting of a temporary injunction is largely discretionary.

Appeal from Superior Court, Tuolumne County; G. W. Nicol, Judge.

Action by the Standard Lumber Company against Madary's Planing Mill and others. From an order granting a temporary injunction, defendants appeal. Order affirmed.

J. C. Webster and J. T. B. Warne, both of Sonora, for appellants.

Morrison, Dunne & Brobeck, of San Francisco, and J. B. Curtin, of Sonora, for respondent.

FINCH, P. J. This is an appeal from an order granting a temporary injunction. The Sugar Pine Railway and a spur track therefrom run through plaintiff's land. Included in said land and line between the spur track and plaintiff's east boundary line is a triangular parcel about 400 feet long from north to south and 60 feet wide at the north side. The land immediately east of the triangle belongs to the railway company. From the southerly point of the triangle for about 200 feet in a northerly direction along the west side of the spur track are skids for the purpose of loading lumber on cars. These skids seem to cover an area 30 or more feet in width. The plaintiff's east boundary line runs diagonally through the space occupied by the skids, somewhat less than half of such area being on the plaintiff's land.

[1] Appellants state that the land which the defendants are enjoined from using had "become subject to the use of a common carrier of freight, the Sugar Pine Railway Company and its shippers." Defendant Madary, in his affidavit in opposition to the motion for a temporary injunction, states that for more than four years "said lands have been

* * * used under claim of right, by the Sugar Pine Railway Company, a common carrier, for its spur track and for loading facilities to permit defendants, as shippers of lumber, to load their cars for shipment." This evidence is contradicted by that of the plaintiff. D. H. Steinmetz, secretary and general manager of the plaintiff, testified that three or four different men were given personal permission by plaintiff to use its lands and the skidway for the purpose of loading cars, but that such permits had been revoked; and that, during the year 1919, Madary's planing mill used part of said lands of plaintiff, but without "right or permission or authority so to do." If the evidence produced by plaintiff is true, and for the purposes of this appeal it must be taken as true, then the principle announced in *Southern California Railway Co. v. Slauson*, 138 Cal. 342, 71 Pac. 352, 94 Am. St. Rep. 58, and *Gurney v. Northern California Power Co.*, 160 Cal. 699, 117 Pac. 906, 36 L. R. A. (N. S.) 185, cited by appellant, has no application. The right of the public to the use of the spur track does not carry with it the right of access thereto over the plaintiff's lands not dedicated to a public use.

[2] It is contended that any damage to plaintiff's land was suffered prior to the commencement of the action, and that therefore the plaintiff was not entitled to an injunction. As said in *Smithers v. Fitch*, 82 Cal. 158, 22 Pac. 935:

"The evidence indicated that the trespasses already committed would probably be repeated indefinitely, and to avoid a multiplicity of actions, for damages, and perhaps breaches of the peace, an injunction was called for and properly awarded."

A trespass of a continuing nature may be enjoined. *Kellogg v. King*, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74; *United Railroads v. Superior Court*, 172 Cal. 80, 155 Pac. 463.

"It is almost axiomatic to say that an injunction against a continuing trespass will not be denied merely because acts of trespass actually have been accomplished." *Farrel v. City of Ontario*, 36 Cal. App. 754, 173 Pac. 392.

It may be further stated, in support of the holding of the trial court, that the plaintiff introduced evidence to the effect that it had a million feet of lumber ready for shipment, and needed all of said lands for its use in handling and shipping such lumber, and that the use of said lands by the defendants would prevent the plaintiff from using the same and shipping such lumber. It was also shown that there is another spur track on the opposite side of the main line available for the use of the defendants.

[3] The granting of a temporary injunction is largely in the discretion of the trial

court, and there is nothing in the record to indicate an abuse of such discretion.

The order appealed from is affirmed.

We concur: BURNETT, J.; HART, J.

PEOPLE v. SPENCER. (Cr. 575.)

(District Court of Appeal, Third District, California. Aug. 23, 1921.)

1. Larceny \Leftrightarrow 5—Intoxicating liquors not the subject of larceny.

Intoxicating liquor manufactured for beverage purposes after Const. U. S. Amend. 18, has taken effect cannot be the subject of larceny, since such liquor cannot in legal contemplation be property, inasmuch as there cannot be ownership thereof, in view of Volstead Act of the United States and Civ. Code, § 654.

2. Burglary \Leftrightarrow 2 — One who enters building with intent to take intoxicating liquor cannot be convicted of burglary.

One who entered building with the intent to take intoxicating liquor which had been manufactured for beverage purposes since Const. U. S. Amend. 18, has taken effect is not guilty of burglary, since the liquor is not in legal contemplation property, inasmuch as it is not subject to ownership, in view of the Volstead Act of the United States and Civ. Code, § 654.

3. Burglary \Leftrightarrow 23—Information need not describe particular property defendant intended to steal.

Information charging burglary need not describe the property which defendant intended to steal.

Appeal from Superior Court, Mendocino County; H. S. Preston, Judge.

Annet Spencer was accused by information of the crime of burglary with intent to steal intoxicating liquors, and from order sustaining demurrer to the information, the People appeal. Amrmed.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

Charles Kasch, of Ukiah, for respondent.

HART, J. The defendant was accused by an information filed by the district attorney of Mendocino county in the superior court of said county of the crime of burglary.

The defendant demurred to the information on the grounds: (1) That said information does not state facts sufficient to constitute a public offense; (2) that said information contains matters which, if true, would constitute legal bar to the prosecution of said offense. The demurrer was sustained, and the information thereupon dismissed. The people appeal from the judgment of dismissal after demurrer sustained.

The charging part of the information reads as follows:

"That the said defendant, Annet Spencer, on the 19th day of February, A. D. 1921, at the said Mendocino county, state of California, and before the filing of this information, did then and there willfully, unlawfully, and burglariously enter the outhouse of one Lorenzo Albonico at the ranch of said Lorenzo Albonico, about 1¼ miles east of the town of Covelo, in said county, with the intent then and there and therein to steal, take, and carry away certain intoxicating liquor, to wit, wine containing more than ½ of 1 per cent. by volume of alcohol, said wine having been manufactured since January 20, 1921, for beverage purposes of the value of less than \$50 and more than \$1 lawful money of the United States of America and of the personal property of one Lorenzo Albonico, contrary," etc.

The theory upon which the demurrer was sustained by the court below and upon which insistence upon an affirmance of the judgment is urged in this court is that the article which the information charges that the defendant entered the building with the intent to steal is not property or a thing of value and consequently is not a subject of larceny. This theory is founded upon the provisions of the act of Congress, known as the Volstead Act (41 Stat. 305), which was enacted for the purpose of properly enforcing or of facilitating the proper enforcement throughout the United States of the provisions of the Eighteenth Amendment of the federal Constitution, prohibiting the manufacture, sale, transportation, possession, etc., of intoxicating liquors.

Under the provisions of said act any liquors which contain one-half of 1 per centum or more of alcohol by volume to be used as beverages, come within the ban of the statute. It will be noted that the information in this case alleges that the wine which the defendant is charged with having stolen contained more than one-half of 1 per cent. by volume of alcohol and that the same had been manufactured, for beverage purposes, since January 20, 1921.

Section 8351b of said act, as the same has been codified (Barnes' Federal Code, 1921 Supplement), provides that—

"No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this act. * * *"

Section 8351t of the same act declares that any room, house, building, or other structure, where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, etc., is a common nuisance and annexes a penalty for the maintenance of such nuisance.

Section 8352, among other things, provides:

"It shall be unlawful to have or possess any liquor or property designed for the manufac-

ture of liquor intended for use in violating this title or which has been so used, and no property right shall exist in any such liquor or property."

It is clear, from the foregoing provisions of the Volstead Act, that intoxicating liquors are not property within the meaning of the law. Civ. Code, § 654. Said section reads:

"The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property."

[1] It is obvious that there cannot be under the law as it exists to-day in this country an ownership of intoxicating liquors manufactured for beverage purposes since the enactment of the Volstead Act, and manifestly, if there cannot be an ownership of such liquors, they cannot be in legal contemplation property. It necessarily follows that the charge of larceny cannot be predicated of the act of taking intoxicating liquors by one from the possession of another.

[2] It is true that the gist of the crime of burglary is the entering of a building with the intent to commit either grand or petit larceny or other felony, and, although no property may be taken by a person so entering a building or other felony committed therein, the crime is nevertheless consummated upon an entry of the building being effected with the intent to commit any of the crimes mentioned in the statute. The description or specific mention in this case of the particular property which the defendant entered the building with intent to steal is evidentiary, wholly surplusage, and unnecessary to incorporate into that pleading, and it seems to us that the district attorney has thus "surplusaged" himself out of court in this case, for, having alleged in the information that the defendant entered the building with the intent to steal the particular property described therein, we are authorized to assume that he could only support the charge so preferred by evidence showing that the defendant did enter the building with the intent to steal the wine that was stored therein, and with no intent to steal any other property which might be in said building; in other words, we have a right to assume from the nature of the averments of the information that the district attorney thus purposely restricted himself to the right to prove the case by showing that the intent of the defendant in entering the building was only to take the wine, and this probably for the reason that the evidence available to him to establish the allegations of the information would and in fact could only show, if anything at all, that the defendant entered the building with the intent to take no other article therefrom than the wine which was stored or kept therein. This being so, the

defendant could not be guilty of the crime of burglary, since, as we have above suggested, wine or other intoxicating liquors which come within the prohibition of the Eighteenth Amendment and the Volstead Act, not being property, cannot be the subject of larceny. Although a person, himself having no right to its possession, may intend to and in fact take intoxicating liquor from the possession of another, he cannot be proceeded against either criminally or civilly because of such intent or of the taking thereof.

The soundness of the foregoing views would seem to be unquestionable; yet we are not without authority for their support. In *People v. Caridis*, 29 Cal. App. 186, 154 P.2d 1061, the defendant was charged by an information with the crime of grand larceny in that he had feloniously stolen and taken from another person a certain lottery ticket of a certain lottery company. A demurrer to the information was sustained upon the ground that the facts stated therein did not constitute a public offense, "in the particular that it affirmatively appeared that the subject-matter of the alleged larceny had no legitimate value," and the action was thereupon dismissed. The people appealed, and in affirming the judgment the court said:

"The lottery ticket which was the subject-matter of the larceny charged in the present case had no relative value save, as affirmatively alleged in the information, as the evidence of a debt due from an enterprise which was denounced by law, and which apparently existed and was conducted by its promoters in defiance of the law. Pen. Code, § 319 et seq. It is a well-settled principle that an obligation which exists in defiance of a law which denounces it has, in the eye of the law, neither validity nor value."

In *State v. Lymus*, 26 Ohio St. 400, 20 Am. Rep. 772, the indictment charged the defendant with the crime of entering a building in the nighttime with intent to steal a dog kept therein, the property of the owner of the stable, of the value of \$25. The trial court sustained a motion to quash the indictment, and upon appeal the Supreme Court said, in upholding the judgment, that under the laws of the state of Ohio a dog was not property and therefore could not be the subject of larceny. The court further said:

"It will be time enough for the courts to say that a dog is the subject of larceny when the lawmaking power of the state has so declared. 'Constructive crimes are odious and dangerous.'" *Findlay v. Bean*, 8 Serg. & Rawle (Pa.) 571.

Parenthetically we may observe that in this state dogs, in derogation of the common-law rule, are declared to be personal property, "and their value is to be ascertained in the same manner as the value of other property." Pen. Code, § 491.

There are other cases to the same effect as the above, but, as before stated, the proposition seems to be so clearly tenable that further citations are deemed unnecessary.

[3] It may be suggested that the district attorney, if he conceived it proper or necessary to name the specific property which the accused entered the building with the intent to steal, could have mentioned the bottles or other vessels containing the wine, and thus have described what in law is property and subject to asportation. But, be that as it may, the judgment, for the reasons herein given, should be affirmed; and it is so ordered.

We concur: FINCH, P. J.; BURNETT, J.

NORRIS v. CAMPBELL ELECTRIC CORPORATION et al. (Civ. 3878.)

(District Court of Appeal, First District, Division 2, California. Aug. 23, 1921. Rehearing Denied Sept. 20, 1921.)

1. Appeal and error \S 880(2)—Error in finding as to common ownership of defendant corporations held available only to those with which plaintiff had no contract.

Though a finding of the court, in an action against two manufacturing corporations and a sales corporation to recover commissions due under a contract with the latter for the sale of products of the former, that all three corporations were owned and operated by the same persons, and that plaintiff's services were rendered at the request of all, was not supported by the evidence, such error was available on appeal only to the manufacturing corporations, with which the evidence showed plaintiff had no contractual relations.

2. Work and labor \S 22—Complaint for services under express promise held sufficient.

In an action to recover commissions on sales, the complaint, alleging that defendants were indebted to plaintiff for services rendered at their special instance and request, being in the form of a common count for services rendered under an express promise to pay therefor, was sufficient on demurrer.

3. Principal and agent \S 89(4½)—Manufacturing corporations and sales agent properly joined in action to recover commissions.

In an action to recover commissions due on a contract with a sales corporation for the sale of products of two manufacturing corporations, for which it was sales agent, all three corporations were properly joined as joint debtors.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by George F. Norris against the Campbell Electric Corporation and others.

Judgment for plaintiff, and defendants appeal. Affirmed in part.

Arthur H. Barendt, of San Francisco, for appellants.

Louis H. Brownstone and Louis E. Goodman, both of San Francisco, for respondent.

LANGDON, P. J. This action is to recover money alleged to be due the plaintiff as commission on sales of X-ray equipment and similar articles manufactured and sold by the defendant corporations. Plaintiff alleged that each of the defendants was a corporation organized under the laws of a state other than California; "that within two years last past the said defendants became indebted to plaintiff in the sum of \$4,832.43 for services rendered to said defendants by plaintiff at said defendants' special instance and request, in the sale of merchandise for said defendants."

It is then alleged that a portion of said sum has been paid and that there remains due and unpaid the sum of \$1,566.54, for which sum judgment is prayed. A joint judgment was rendered against the defendants for the sum of \$1,294.15, from which they appeal.

Respondent justifies the joint judgment rendered in this case by the finding of the trial court:

"That the defendants herein, while organized as three distinct corporate entities, are owned by and operated by the same persons and have the same officers and the same place of business in Lynn, Mass., and the services rendered by the plaintiff herein were rendered to, for, and at the request of all of said three defendant corporations."

That finding is attacked by the appellants as being unsustained by the evidence. The testimony of the plaintiff regarding at least one of the defendants, Vacuum Glass Company, is so vague and unsatisfactory as to give it little value as evidence. The record contains, then, practically undisputed, the following testimony of Fred R. Campbell, the treasurer of all three corporations defendant, and the only officer common to the three corporations:

"The Campbell Electric Company was incorporated in 1909 for the purpose of manufacturing X-ray and electro-medical and other electrical apparatus with factory and offices in the Keith Bldg., at 54 Central Square, Lynn, Mass. The Vacuum Glass Company was incorporated in 1909 for the purpose of manufacturing incandescent lamps, X-ray tubes and electro-medical glassware, and took up its quarters in the Fabens Building at 316 Union street, Lynn, Mass. In the year 1912 the Vacuum Glass Company sold its machinery for the manufacture of incandescent lamps, but continued the manufacture of X-ray tubes. In 1913 the Campbell Electric Company bought a large factory building at 17 Stewart street, and

moved its quarters from the Keith Building in Central Square to the building at 17 Stewart street. At the same time the Vacuum Glass Company was rented small quarters in the building at 17 Stewart street, to which its machinery for the manufacture of X-ray tubes was removed, and where it manufactures in entirely separate quarters from the Campbell Electric Company or the Campbell Electric Corporation."

It also appears by the testimony of the same witness that the Campbell Electric Corporation was incorporated in 1917 for the purpose of selling the Campbell Electric Company's apparatus and supplies, and maintains entirely separate quarters from either of the other two defendants, and has its own corps of clerks entirely distinct from the Campbell Electric Company or Vacuum Glass Company. The list of directors of the Campbell Electric Corporation is furnished, and Mr. Campbell stated, in answer to interrogatories, that "none of these directors except myself were officers of either the Campbell Electric Company or Vacuum Glass Company, and none of them except myself were identified in any way with the Campbell Electric Company or Vacuum Glass Company."

[1] There is no evidence to support the portion of the finding relating to the ownership of the three corporations and no inquiry was made as to that fact. Though the finding as a whole is not, therefore, supported by the evidence, the error is available on this appeal only to the Campbell Electric Company and the Vacuum Glass Company. The evidence is without conflict that plaintiff's services were rendered under contracts, both written and oral, with the Campbell Electric Corporation, which was the sales agent for the products of the other concerns, and that plaintiff had no contractual relations with the other corporations. The written contract of the plaintiff with the Campbell Electric Corporation provided for payment of commissions to the plaintiff of 33½ per cent. on all goods sold, with certain exceptions. Payments of such commissions were to be made, not only on cash sales, but as to all sales which were made on installments and where notes were accepted in part payment, the agent was to be paid a portion of the cash actually received until two-thirds only of the commission had been paid. The remaining one-third was to be held by the company until the customer had made final payment. The oral contract for the sale of the products of the

Vacuum Glass Company was indefinite as to the manner of payment of commissions, but throughout the entire transactions the plaintiff was led to believe that he was dealing with the corporation upon the same terms as those specified in the written contract. All correspondence and orders covering the products manufactured by either the Campbell Electric Company or the Vacuum Glass Company were sent by plaintiff to the Campbell Electric Corporation and the orders were filled without question.

The trial court found that the services had been rendered as alleged in the complaint, and that the commission due and unpaid thereon was \$2,294.15. It also found that there was no open and mutual book account existing between plaintiff and any of the defendants as alleged in the cross-complaint of the Campbell Electric Corporation, and that plaintiff was not indebted to any of the defendants as claimed in said cross-complaint.

[2, 3] It is strenuously argued that the complaint is insufficient, and that the demurrers thereto, which were both general and special, should have been sustained. The complaint is in the form of a common count for services rendered under an express promise to pay therefor. This form of pleading has been expressly approved in *Pike v. Zadig*, 171 Cal. 273, 278, 152 Pac. 923. The three defendants were properly joined in the action as joint debtors. *Pike v. Zadig*, supra; *Montgomery v. Dorn*, 25 Cal. App. 666, 670, 145 Pac. 148. The demurrers were properly overruled.

The findings are sufficient to support the judgment against the Campbell Electric Corporation, but in the absence of evidence showing that all three corporations were in fact one concern, the findings are insufficient to support the judgment against the Vacuum Glass Company and the Campbell Electric Company.

The judgment in so far as it denies recovery upon the cross-complaint or counterclaim, and in so far as it relates to the defendant Campbell Electric Corporation, is affirmed; in so far as it relates to the other defendants it is reversed.

The defendants Vacuum Glass Company and Campbell Electric Company shall be entitled to such portion of the costs of this appeal as upon the filing of the remittitur the trial court shall find they have expended.

We concur: STURTEVANT, J.;
NOURSE, J.

STOKES v. WATKINSON. (Civ. 3869.)

(District Court of Appeal, First District, Division 1, California. Aug. 8, 1921. Hearing Denied by Supreme Court Oct. 6, 1921.)

1. Pleading \S 121(4)—Denial of allegation of due recordation of assessment for want of information and belief insufficient.

In an action to foreclose street assessment liens, in which plaintiff alleged the proper recordation of the assessment, defendant's denial of proper recordation for want of information and belief held insufficient.

2. Municipal corporations \S 483(3)—Recordation of assessment in loose-leaf book by superintendent of streets held sufficient.

Superintendent of streets' recordation of assessment by inserting copies of the originals in loose-leaf book and keeping them so inserted subject to public inspection, held sufficient.

3. Evidence \S 344—Copies of assessments and warrants contained in certified records of superintendent of streets admissible in lien foreclosure action.

In an action to foreclose street assessment liens, copies of the assessments and warrants contained in the certified records of the superintendent of streets held admissible under Street Improvement Act 1911, \S 37, and Code Civ. Proc. $\S\S$ 1855 and 1893.

4. Evidence \S 344—Omission of seal from copy of affidavit of demand and nonpayment held immaterial.

In an action to foreclose street assessment lien, omission from copy of affidavit of demand and nonpayment offered by plaintiff of the copy of the notary's seal held immaterial, where pleadings admitted that a proper return of demand and nonpayment was made by plaintiff.

5. Municipal corporations \S 515(1)—Omission of seal from copy of affidavit of demand and nonpayment held not to affect right to foreclosure of lien.

In an action to foreclose street assessment lien, omission from certified copy of affidavit of demand and nonpayment offered by plaintiff of the copy of the notary's seal held immaterial; the omission being a mere irregularity which was cured by Street Improvement Act, 1911, \S 26.

6. Municipal corporations \S 572—Defendant's offer pending assessment foreclosure action to pay assessment without costs insufficient to deprive plaintiff of right to recover costs.

Defendant's offer, pending action to foreclose street assessment liens, to pay the assessments in full without the costs that had accrued, did not deprive the plaintiff of the right to prosecute the action and to recover costs under Street Improvement Act 1911, \S 27, and Code Civ. Proc. \S 1022, subd. 5.

7. Municipal corporations \S 474—Assessment lien will not be held void on the ground that property not within the district was benefited by the improvement.

Assessment liens will not be held void on the ground that all property benefited was not

embraced within the district; the limits of the district being a matter committed solely to the discretion of the municipal legislative body.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Consolidated actions by G. H. Stokes against Henrietta P. Watkinson, individually and as executrix of the last will of Joseph Henry Thomas Watkinson, deceased. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. T. Kearney, of Richmond, and Edward C. Harrison, of San Francisco, for appellant.

Faulkner & Faulkner, of San Francisco, for respondent.

RICHARDS, J. This is an appeal on the part of the defendant individually and as the executrix of the last will of her deceased husband, Joseph H. T. Watkinson, from a judgment of foreclosure of certain street assessment liens.

The property affected by the action consisted of a large number of lots situate along the northeasterly side of Pullman avenue in the city of Richmond, all of which lots belonged to the appellant's testator in his lifetime. The street improvement in question consisted of certain sewer construction work along the line of Pullman avenue, performed under and pursuant to the provisions of the Street Improvement Act (St. 1911, p. 730), approved April 7, 1911, and having its inception in the month of August, 1914, through the passage of a resolution of intention to make said improvement by the council of the city of Richmond on that date. The work proceeded thereafter under said act until its completion, approval, and acceptance by the street commissioner of said city in the month of March, 1915, whereupon the said superintendent of streets proceeded to make the assessments against the several lots owned by the defendant's testator, who was then still living, and also to make and record and deliver the warrants for each of said assessments to one Fred Meyers, the assignee of the original contractor, and who, as such, was authorized under said improvement act to demand and receive the amount due from the owner of the lots in question according to each of the assessments levied against each of them. The plaintiff alleges that such demand was personally made by said Meyers upon said Joseph H. T. Watkinson in his lifetime, and that he failed and refused to pay the several amounts so demanded. Thereafter said Meyers assigned to the plaintiff herein all of his right, title, and interest in and to the money due upon said warrants and assessments, and thereafter the said plaintiff commenced 43 separate actions to foreclose his assessment lien upon each sep-

arate parcel of land upon which such several assessments had been levied. In each of said actions the plaintiff prayed for an attorney's fee of \$15, to which he claimed to be entitled under the terms of said improvement act, together with costs in each case. Prior to the inception of these several actions Joseph H. T. Watkinson had died, and his widow, Henrietta P. Watkinson, had succeeded to his interest in said several tracts of land and had been duly appointed executrix of his will. She was therefore made individually and as such executrix the defendant in said several foreclosure suits, and upon her motion, after the institution thereof, the court in which said actions were pending ordered a consolidation of them, whereupon the plaintiff, while objecting to said order, complied with the same by filing a supplemental complaint in which all of said actions were consolidated, and in which, in asking for a foreclosure of said liens, the plaintiff prayed for a reasonable allowance of counsel fees and for his costs. Upon the trial of these actions, as thus consolidated, the court decreed a foreclosure of said liens, and in the matter of counsel fees allowed the plaintiff in each of said original actions an attorney's fee of 60 cents, together with the costs accrued in each action. From the judgment of foreclosure thus decreed the defendant has prosecuted this appeal.

There is also another appeal by plaintiff from that portion of said decree awarding counsel fees and which is dealt with in a separate opinion.

Upon the present appeal the appellant's first contention is that the assessment which forms the basis of each of these several liens was never properly recorded. In making this contention the appellant relied upon the case of *Federal Construction Co. v. Curd*, 179 Cal. 479, 177 Pac. 473, which case was decided by the Supreme Court some time after the date of the trial and judgment in the instant case. The respondent meets this contention with the showing that in the plaintiff's consolidated complaint it was alleged that the documents constituting those records of the superintendent of streets which were required by the terms of the improvement act in question to be recorded in his office were and each of them was duly recorded therein, that these allegations of matters of public record were denied by the defendant in her answer for want of information and belief, and that such denials were insufficient in point of law to put in issue the due recordation of these documents. The respondent further urges, and the record shows, that no objection was made by the defendant at the trial to the form or substance or physical character of the record book or books showing the recordation of these documents. The respondent further urges that the record does not affirmatively

show that the method of recordation of the documents in question which was condemned in the case of *Federal Construction Co. v. Curd*, supra, was the one adopted by the street superintendent in the proceedings involved in this case. We have carefully examined the record herein with a view to determining the merit of the objections urged by the respondent against the consideration of this point upon appeal.

[1] As to the pleadings of the parties, we find the plaintiff does allege the proper recordation of the documents which the superintendent of streets was required by law to record and to keep a record of. This averment would suffice to put the defendant upon notice and inquiry as to the existence and state of such record, and, this being so, the defendant is not permitted by a well-established rule of pleading to base her denial of the due and proper recordation of such documents upon a want of information and belief. Such denials have been uniformly held insufficient to put in issue the due recordation of documents required by law to be recorded and alleged to have been so recorded. *Mulcahy v. Buckley*, 100 Cal. 484, 35 Pac. 144; *Mendocino County v. Peters*, 2 Cal. App. 24, 82 Pac. 1122; *Rogers Bros. v. Beck*, 184 Pac. 515; *Brickley, etc., v. Silman*, 33 Cal. App. 648, 166 Pac. 371; *Wm. Wilson Co. v. Trainor*, 27 Cal. App. 43, 148 Pac. 954; *Art Metal Construction Co. v. Anderson Co.*, 182 Cal. 29, 186 Pac. 776.

This being the law, it becomes unnecessary to determine whether or not the objections which the defendant interposed to the introduction of the record book of the superintendent of streets in evidence were sufficient to predicate the attack which the appellant makes upon their sufficiency to comply with the statute upon this appeal; for, if the averments of the complaint with respect to the due recordation of the documents in question were admitted by the defective form of the defendant's denials, it follows that no evidence was required upon that subject, and hence no objections which were urged nor assignments of error which were made to the introduction of such evidence need be considered upon appeal. *Mendocino County v. Peters*, supra.

[2] But aside from the foregoing considerations, which we think disposes of the appellant's first contention herein, we may say that from our inspection of this record we are by no means satisfied that it affirmatively appears therefrom that the recordation of the documents above referred to was subject to the infirmities existing in the record before the Supreme Court in the case of *Federal Construction Co. v. Curd*, supra; for, while in both cases a so-called "loose-leaf book" was used by the superintendent of streets for purposes of recordation, the infirmity disclosed in the *Curd* Case was not

in the form or physical features of said book, but consisted rather in the fact that the originals of the documents required to be recorded by the terms of the act had been placed in the book and then at once withdrawn and handed to the contractor for the purpose of making his demand, and that during the period of their absence for that purpose there was no record whatever of these documents in the office of the superintendent of streets. It does not appear that such was the method or practice pursued by the superintendent of streets in the instant case, but, on the contrary, it does appear that the papers inserted and kept in the loose-leaf book of the superintendent of streets in this case were copies of the originals handed to the contractor for the purposes of his demands, and that such copies at all times after their insertion in said book were kept there subject to public inspection. We are of the opinion that the requirements of the statute would be satisfied and fully subserved by such a procedure.

[3] The next contention of the appellant is that the plaintiff's evidence as to the existence and substance of the assessments and warrants upon which he relies to support his alleged liens was insufficient for the reason that the plaintiff rested his proof of the existence and substance of these documents, not upon the production of the original documents, but upon the copies thereof contained in the certified records of the superintendent of streets. We see no merit in this contention nor in the refinement of argument with which appellant seeks to support it. The Street Improvement Act, under which the proceedings involved in this case were had, in section 37 thereof, and in respect to be records to be kept by the superintendent of streets, provides that—

"The records so kept and signed by him, shall have the same force and effect as other public records, and copies therefrom duly certified, may be used in evidence with the same effect as the originals."

Language could not be plainer than this in order to place the records of the superintendent of streets upon the same basis as to evidentiary value as other public records possess by virtue of sections 1855 and 1893 of the Code of Civil Procedure.

[4, 5] The appellant's next contention is that the affidavit of demand and nonpayment, a certified copy of which was offered by the plaintiff, was irregular and insufficient to prove the existence and substance of such original demand, for the reason that it appears that there was absent from the copy of this document so introduced in evidence the copy of the seal of the officer who attached his jurat to the original document. The respondent makes several answers to this contention, all of which appear to be

good. The first is that the pleadings admit that a proper return of his demand and of the fact of nonpayment was made by the assignee of the contractor. A second, and we think also sufficient, answer is that the absence of a notary's seal from the original or of a copy of the impression of such seal from the recorded copy of such original would constitute a mere irregularity which would be cured by the provisions of section 26 of the Improvement Act, under which these proceedings were taken, and which provides as follows:

"No assessment, warrant, diagram or affidavit of demand and nonpayment, after the issue of the same, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality, or other defect in the same, where the resolution of intention of the council to do the work, has been actually published as herein provided, and said notices of improvement have been posted along the line of the work, as provided in section 5 of this act, before the passage of the resolution ordering the work to be done."

See, also, *Blensfield v. Van Ness*, 176 Cal. 585, 169 Pac. 225; *McGinn v. Van Ness*, 40 Cal. App. 600, 181 Pac. 70, 183 Pac. 950.

[6] The appellant's next contention is that the trial court erred in its award of costs to the plaintiff in each of the cases which were consolidated into the single proceeding in which the plaintiff was allowed judgment. This objection is predicated upon the fact that many months after the institution of these several actions the defendant made and filed an offer to pay the several assessments in full, without costs. Such an offer, however, would be ineffectual to prevent the plaintiff from the recovery of costs already accrued, and would also be ineffectual under the Code section permitting such offers to allow judgment to be filed for the reason that it did not embrace an offer to pay the costs accrued to the date when it was made. The plaintiff, having the right to commence and prosecute these several actions, if he had a right to his judgment of foreclosure, had also the right under the provisions of section 27 of the Improvement Act, and also under the provisions of section 1022, subd. 5, of the Code of Civil Procedure, to recover his costs.

[7] The final contention of the appellant, to the effect that the proceedings which form the basis of these assessment liens were void because all of the property benefited by the improvement was not embraced within the district assessed for such work, is without merit, since the question as to the limits of assessment districts in the matter of making such improvements is one that is committed solely to the discretion of the municipal body determining upon such improvement under the district plan. *Larsen v. City and*

County of San Francisco, 182 Cal. 1, 186 Pac. 757.

Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

Opinion of Supreme Court, In Bank, Denying Hearing.

PER CURIAM. The application for a hearing in this court after decision by the district court of appeal of the first appellate district, division one, is denied.

In denying the application we withhold our approval from that portion of the opinion which holds that the denial for want of information and belief of the allegation that the assessment was duly recorded in the office of the superintendent of streets was not a sufficient denial. This portion of the opinion is not essential to the judgment of the district court of appeal in view of the further answer contained in the opinion to the claim of want of proper record.

All concur except SHAW, J., absent.

SCHUYLER v. PANTAGES et al. (Civ. 3860.)

(District Court of Appeal, First District, Division 1, California. Aug. 24, 1921. Hearing Denied by Supreme Court Oct. 20, 1921.)

1. Corporations \Leftrightarrow 452—Contract bearing only signature of president and manager held to bind corporation.

A contract on its face purporting to be a contract of a corporation, bearing only the signature of person expressly stated to be president and manager, and in whose name it was doing business, bound the corporation.

2. Contracts \Leftrightarrow 282—Theater company held to have right to terminate engagement.

A clause in an agreement under which plaintiff was to produce vaudeville upon defendant's circuit reciting that, if defendant determined the services to be unsatisfactory to it, defendant might thereupon cancel and terminate the agreement, gave defendant right to terminate the contract at the close of the first regular performance, in absence of bad faith, and a declaration of a local manager that plaintiff's performance was unsatisfactory was sufficient.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by Elise Schuyler against Alexander Pantages and others. Judgment for plaintiff, and defendants appeal. Reversed.

A. J. Treat and Wm. A. Kelly, both of San Francisco, for appellants.

R. H. Countryman and John T. Pidwell, both of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in favor of the plaintiff in an action for damages for the breach of a written contract alleged to have been entered into between herself and the defendants, by the terms of which the plaintiff was to produce upon the circuit of the defendants for a period of 14 weeks a vaudeville production which she had written and was, with the aid of another, to perform in the various playhouses of the defendants throughout said circuit, and for which she was to receive the sum of \$115 per week and her traveling expenses.

The plaintiff's complaint is in five counts; all, however, being based upon the same transaction. In the third of said counts the plaintiff includes in her averments and demands for damages the value of a drop curtain alleged to be the sum of \$500, ordered by her for the purposes of her production, and rendered valueless by the defendants' refusal to permit her to perform her said agreement; while in the last of said counts the plaintiff includes a demand for damages in the sum of \$25,000 for injuries to her reputation as a writer and producer of plays, and to her physical health, arising out of the defendants' refusal to permit the production in their playhouses of her performance.

The defendants in their answer deny entering into the agreement with the plaintiff which she pleads in substance in her complaint; but they allege that the plaintiff and Alexander Pantages did enter into a written agreement for the production of her play, a copy of which agreement they attach to their answer. They also deny the breach of said agreement, and that the plaintiff sustained any damages from any such breach. For a counterclaim they allege that the defendant Alexander Pantages loaned plaintiff the sum of \$200, for which he seeks the recovery.

The findings of the trial court were generally in favor of the plaintiff, the court fixing the plaintiff's damages at the sum of \$2,880, without differentiating how such sum was to be apportioned among the plaintiff's several demands for damages, except as the court allowed interest upon the sum of \$1,410, as indicating that to be the portion allowed as damages for the direct breach of a written contract. The defendants appeal from the judgment rendered and entered upon these findings.

The appellants' first contention is that in so far as said judgment is against the defendant Pantages Circuit of Vaudeville Theaters, Inc. (a corporation), it is not sustainable, since the contract upon which the plaintiff relies for a recovery does not purport to have been signed by said corporation, but only by the defendant Alexander Pantages in person.

[1] This contention we hold to be without

merit. The contract on its face purports to be the contract of the corporation of which Alexander Pantages is expressly stated to be the president and manager. It refers throughout to the circuit of theaters conducted by said corporation and to the production of the plaintiff's performance therein.

In addition to this, the complaint alleges, and the answer admits, that the defendant Alexander Pantages did business under the name and style of Pantages Circuit of Vaudeville Theaters. Such being the condition of the contract and the pleadings, we deem the signature of the contract by Alexander Pantages sufficient to bind the corporation of which he was the president and manager, and in the name of which he was engaged in the business with direct relation to which this contract was entered into.

[2] The next contention of the appellants, however, is more serious, and is to our minds determinative of this appeal.

The contract in question contains, among its several provisions, the following clause:

"VI. If before or during this engagement the first party determines that the second party has reduced or changed the personnel or number of performers, or changed or lowered the quality of act contemplated herein, or if it determines the services herein contemplated to be unsatisfactory to it, the first party may thereupon cancel and terminate this agreement."

It is the appellants' contention that under the foregoing clause of said contract the party of the first part thereto reserved the absolute right, in the absence of bad faith, to cancel and terminate the agreement at any time during the plaintiff's engagement "if it determines the services herein contemplated to be unsatisfactory to it," and that, having exercised this right at the beginning of the plaintiff's engagement, or, in other words, at the close of her first regular performance, and no bad faith in so doing being shown, there is an end to the plaintiff's case.

We are constrained to hold that this contention must be sustained. In the case of *Tiffany v. Pacific Sewer Pipe Co.*, 180 Cal. 700, 182 Pac. 428, 8 A. L. R. 1493, the Supreme Court (Mr Justice Shaw writing the opinion) discusses quite lucidly the two classes of contracts in which one party is required to do something which expressly is to be the satisfaction of the other party, namely:

"(1) Where fancy, taste, sensibility, or judgment are involved; and (2) where the question is merely one of operative fitness or mechanical utility."

In relation to the first of these two classes of agreements the opinion adopts the rule laid down in 13 *Corpus Juris*, p. 675, as follows:

"In contracts involving matters of fancy, taste, or judgment, when one party agrees to perform to the satisfaction of the other, he

renders the other party the sole judge of his satisfaction without regard to the justice or reasonableness of his decision; and a court or jury cannot say that such party should be satisfied where he asserts that he is not."

We are of the opinion that the agreement in the instant case comes clearly within the first class of agreements above referred to, and hence within the rule last above quoted. The cases cited in *Corpus Juris* as illustrating the rule deal with such agreements as those for the painting of a portrait (*Gibson v. Cranage*, 39 Mich. 49, 33 Am. Rep. 351); the writing of articles for a newspaper (*Crawford v. Mail, etc., Co.*, 163 N. Y. 405, 57 N. E. 616); the preparation of a literary or scientific article for an encyclopedia (*Walker v. E. D. W. Thompson Co.*, 37 App. Div. 536, 56 N. Y. Supp. 326); a play to be written by an author for an actor (*Haven v. Russell* [Sup.] 34 N. Y. Supp. 292); a design for a banknote (*Gray v. Alabama Nat. Bank* [City Ct.] 10 N. Y. Supp. 5); and the like. Being an agreement of the class illustrated in the foregoing citations, it follows that the act of the local manager of the corporation defendant in declaring the plaintiff's attempted performance of the same unsatisfactory, and in refusing to permit the further performance thereof, and the further act of Alexander Pantages himself in ratifying the local manager's said action, were within the rights of the defendants under said agreement, and hence were acts upon which the plaintiff had no right to any or all of her several alleged causes of action.

In so deciding we take note of the respondent's contentions that the terms of the contract required the exercise of the personal judgment of Alexander Pantages as to whether her performance was satisfactory; that this personal judgment on his part had not been exercised, since he was not personally present when the performance which was objected to was given; that this function of determining whether or not the plaintiff's performance was satisfactory could not be delegated to the person who essayed to exercise it, and hence that Pantages' attempted ratification of the local manager's action could avail the defendants nothing. We do not find that the contract is susceptible of the construction which the respondent seeks to give to it in this respect. The clause above quoted does not require that the plaintiff's performance shall be satisfactory to Alexander Pantages personally, but to the corporation itself, which must, of course, act through its officers and agents. There are other provisions of the contract which would seem to invest the local managers of the numerous theaters of the corporation upon its somewhat widespread vaudeville circuit with full discretion as to the performances to be given thereat, while the evidence in the case discloses without

contradiction that the local managers of vaudeville theaters are invested with the power of determining whether or not a certain performance is being satisfactorily given.

We are, therefore, of the opinion that the plaintiff's engagement under her said agreement was terminated by the declaration of the defendants' local manager that her performance was unsatisfactory and that it could not go on. The good faith of the defendants' local manager in so determining, while impugned by the respondent in her brief, is not seriously assailed either in her pleadings or the proofs in the case, nor is it questioned in the findings of the trial court. On the contrary, the evidence preponderates in negating such a conclusion.

It follows from the foregoing that, since the defendants were within their rights in declaring the plaintiff's performance unsatisfactory and in refusing to permit its further production, her whole case falls, and her several claims for damages, having thus no foundation, are insufficient to sustain any portion of the findings and judgment of the trial court in her favor.

This conclusion renders unnecessary a discussion of the further questions presented in the case. It follows that the judgment must be reversed; and it is so ordered.

We concur: WASTE, P. J.; KERRIGAN, J.

METZLER et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR HUMBOLDT COUNTY et al.

Ex parte METZLER et al.

(Civ. 2351; Cr. 573.)

(District Court of Appeal, Third District, California. Aug. 23, 1921. Hearing Denied by Supreme Court Oct. 20, 1921.)

1. Certiorari \S 29—**Habeas corpus** \S 30(1)
—If court had jurisdiction, writ must be discharged despite errors of law.

If a court, whose action or judgment is attacked by application for habeas corpus or writ of certiorari, had jurisdiction to hear and determine the matter, the writ must be discharged, though the court committed some errors of law.

2. Certiorari \S 50—Entire record of proceedings must be certified to appellate court.

On application for writ of certiorari, the entire record of the proceedings, eventuating in the judgment against petitioners, must be certified to the appellate court.

3. Contempt \S 54(1)—**Affidavit charging contempt out of presence of court is necessary.**
Under Code Civ. Proc. \S 1209, 1211, the court's jurisdiction to punish for contempt,

committed out of its immediate presence, cannot be put in motion, in the absence of the filing of an affidavit charging facts constituting such contempt.

4. Contempt \S 54(1)—Court informed by attorneys of contempt by them out of its presence exceeded jurisdiction in adjudging them guilty thereof.

Though attorneys for a minor in a proceeding to adjudge her a ward of the juvenile court admitted before the court that they caused witnesses to be subpoenaed after it had been stipulated by them that the court might make an order adjudging such minor a ward, and the witnesses appeared while the proceeding was being heard, the court, who did not know of such fact until informed by the attorneys, exceeded its jurisdiction in adjudging them guilty of contempt, in the absence of an affidavit charging the facts, as required by Code Civ. Proc. \S 1209, 1211, in case of contempts committed out of presence of the court.

Application by S. E. Metzler and Ernest S. Mitchell for certiorari and habeas corpus to review a judgment of contempt of the Superior Court of California in and for the County of Humboldt, Denver Sevier, Judge. Judgment annulled, and writ of habeas corpus discharged.

V. A. McGeorge, of Sacramento, and Metzler & Mitchell, of Eureka, for petitioners.

Arthur W. Hill, Dist. Atty., and J. J. Cairns, Deputy Dist. Atty., both of Eureka, for respondents.

HART, J. The petitioners were, on June 2, 1921, by the superior court of Humboldt county adjudged guilty of contempt of court and each sentenced to pay a fine of \$100, with the alternative of imprisonment in the county jail of said county, "until such fine be paid, at the rate of one day's imprisonment for every two dollars of said fine." They refused to pay the fines so imposed and were committed to the county jail, where they remained until the 4th day of June, 1921, at which time, upon the issuance by this court, upon their petition, of a writ of habeas corpus looking to their release from what they alleged to be the illegal restraint of their persons, they were set at liberty, having given the bail to which they were ordered to be admitted by this court upon the issuance of said writ.

[1] Subsequently to the issuance of said writ of habeas corpus, and prior to the hearing thereof, the petitioners filed in this court a petition praying for a writ of certiorari for the review of the proceedings culminating in the judgment of contempt against petitioners. Both proceedings pending before us, therefore, involve precisely the same judgment of contempt, and the office of each of the writs applied for here by the petitioners is to determine precisely the same ultimate

question, to wit: Whether the action of the court in adjudging petitioners guilty of contempt of court and punishing them therefor, upon the record upon which each of the applications is supported, remained within its jurisdiction. Abstractly speaking, it is well understood that the sole question which may be determined, either upon habeas corpus or upon a writ of review, is that of jurisdiction, and if it be found in either case that the court whose action or judgment is thus attacked had jurisdiction to hear and determine the matter, the writ must be discharged although it may appear upon the record that the court, in passing upon and deciding the matter, had committed some errors of law.

[2] In the proceeding before us upon the application for the writ of certiorari, as the very name of that writ implies shall be done, and in consonance to the remedial function peculiar thereto, the entire record of the proceeding bearing upon and eventuating in the judgment of contempt against each of the petitioners has been certified to this court, and although, in view of the conclusion at which we have arrived, the ultimate question of law submitted here could be determined upon the record supporting either application, we prefer to confine ourselves, in determining whether the judgment of contempt against the petitioners was beyond the jurisdiction of the court to a consideration of the petition for the writ of certiorari, for the reason that, as we feel constrained to hold that the court exceeded its jurisdiction in the matter, a petition for a hearing in the Supreme Court after the decision on certiorari here will lie, while a discharge on habeas corpus would wholly terminate the matter, so far as is concerned the particular proceeding to which both petitions here are addressed.

The record certified to this court in response to the writ of review issued by this court herein discloses that the proceeding out of which grew the judgment of contempt against both petitioners involved a matter pending and being heard by the respondent court, sitting in separate session in the exercise of its jurisdiction as a juvenile court. It is thus made to appear that, on the 10th day of May, 1921, the probation officer of the county of Humboldt filed in the superior court of said county, as in the exercise of its juvenile jurisdiction, a petition, alleging that a certain unmarried Indian female "comes within the provisions of subdivision 2, 4, and 11, of the Juvenile Court Law of the state of California, in this: That said — has no parent or guardian willing to exercise or capable of exercising proper parental control, and has no parent or guardian actually exercising such proper parental control, and that said — is in need of such control," and further alleged that said minor "has within three months last past given birth to an illegitimate child, which has since died; that

the father and mother of said minor are living separate and apart, that said minor has been living with her father, who is, by reason of his acts of cruelty and depravity, an unfit person to have the care, custody and control of said minor; that the home of the mother of said minor is not a fit and proper place for said minor to reside or to live in." It appears, at least inferentially, from the record, that the father of the said minor was accused of being responsible for the motherhood of the minor, although it does not so appear that the father was at the time of the proceeding before the superior court or under arrest.

Upon the filing of the petition above referred to a citation, directed to the father of said minor, was issued by the court, ordering his appearance with said minor before said court on the 16th day of May, 1921, and to show cause why said minor should not be adjudged a ward of the juvenile court. On the day named the matter came up for hearing, the minor being represented by the petitioners, who were law partners, and, after certain testimony had been received in support of the allegations of the petition, the minor was called to the stand, and before any attempt was made to question her the judge observed:

"Now it might be possible that this recital [doubtless referring to a statement by the minor] may be spared. Isn't it possible," the judge proceeded to inquire, "that this girl can be placed in some home?"

To this question the petitioner, Metzler, replied:

"That is all we ask, that this girl be placed in a home, a good home."

After the court had asked whether the father would bear the expense of the support of the minor and an affirmative reply to said question by Mr. Metzler, the court declared:

"Then it is a matter of selecting a party under whom we will place her, some good woman and some good family."

The court thereupon inquired:

"Is it satisfactory to both sides that Miss Beasley [executive secretary of the Welfare Department of the county of Humboldt] find parties that will be satisfactory to the court?"

To which petitioner, Metzler, answered:

"We will be satisfied with the family that Miss Beasley selects. We feel that Mr. — [naming the father of the girl] should be permitted to visit his daughter at the Detention Home [the minor being in the custody of said home pending the final disposition of the proceeding], or that she be released. I feel that he should be given that right as a father."

To this suggestion the district attorney declared that he would object, unless the

parties in charge of said home were present when the father visited and conversed with the minor.

The further hearing of the proceeding was then postponed until the 19th day of May, 1921, at which time, in objecting to the application of the district attorney for a further continuance of the matter until the following day, petitioner, Metzler, insisted that the minor, since she had not down to that time been adjudged a ward of the court, should be taken from the detention home and returned to the custody of her father, who, he declared was compelled to support the minor, "no matter whether she was born in or out of wedlock." The petitioner proceeded to say that he desired to interview the little girl in order to get at the facts relative to the charge that her father had been guilty of the acts towards her of which he had been accused, intimating that he could not secure a truthful statement from the child as to the charge against her father while she was in the presence of the managers of the detention home. This proposition was objected to by the district attorney. Metzler thereupon stated to the court that he desired to withdraw from the stipulation previously entered into respecting the disposition that should be made of the minor by the court, and the court in reply to that proposition stated that counsel could not withdraw from the stipulation without the consent of the court, nor could he do so without making a motion based upon a showing which would justify the court in permitting him to withdraw from the stipulation. The court also declared that he did not think that counsel (the petitioners) were acting in good faith in making their application to interview the little girl without the presence of her then custodians or in making their application to withdraw from the stipulation by which they agreed that the court could place the minor in the care and control of some good family pending her minority.

The matter then was continued until the following day, the 20th of May, 1921, and on said day Miss Beasley reported that she had up to that time been unable to secure a home or a proper person to whom the care and custody of the minor might be committed, and asked for further time within which to find such a home and person. Thereupon the district attorney moved for a further continuance of the matter "until Miss Beasley's report is prepared and then the court inform the attorneys." At this juncture the petitioner, Mitchell, addressed the court as follows: "The other day a stipulation was entered into for the purpose of avoiding going into the sordid details of a minor of that age. It becomes necessary to go into it, and we informed the court after the stipulation was entered into that we withdrew our stipulation. We have sub-

pœnaed our witnesses to-day." He proceeded to say that the witnesses were present in court at that time, "and if it is continued we would like to have it continued to a day certain in order to have our witnesses here, if necessary." To this the court replied:

"You entered into a stipulation in this court, and it went down in the record; there is just one way for you to get relief from that stipulation, you know that as well as I do, that you will have to make a motion and do it upon affidavits and serve it properly. You or no other attorney has a right to say this stipulation is off, and you are not bound by it. You know that as well as I do, and as to subpoenaing witnesses here at this time, I told your partner yesterday that he could not do that. When did you get the subpoenas out of this court?"

"Mr. Mitchell: The day we were in court.

"Court: Yesterday?"

"Mr. Mitchell: No, prior to that time.

"Court: What day?"

"Mr. Mitchell: It was delivered to the sheriff day before yesterday I believe.

"Court: Now you have no right to issue any subpoena when there is no hearing at this time. There was no hearing at this time.

"Mr. Mitchell: It was continued.

"Court: What for? Who gave that subpoena to the sheriff, you or Mr. Metzler?"

"Mr. Mitchell: I am not certain, I think Mr. Metzler gave it, but I am not certain.

"Court: Did you tell him to do it?"

"Mr. Mitchell: Yes, your honor.

"Court: And you knew there was no hearing here at that time. We will take this matter up next Thursday. Under section 1209 of the Code of Civil Procedure, disobediences are contempt of court, and various items are set forth. The fourth is 'abuse of the process or proceedings of the court.' Now the county is not going to pay the witnesses. You had no right to subpoena these witnesses here at this time, and you and your partner are cited to appear in court next Thursday to show cause why you should not be punished for contempt of court, and you shall pay those witnesses out of your own pocket—summoning people here to come at their own expense. (To Mr. Cairns, Asst. District Attorney:) I want you to look up this proposition, I don't know whether it is contempt of court or not, but it seems to me to verge very strongly on it.

"Mr. Cairns: Do you desire me to give any further notice?"

"Court: You may serve the regular notice on the firm because Mr. Metzler is not here. The motion of the attorneys Metzler & Mitchell for an order of this court to have control of this girl is denied.

"Mr. Mitchell: Is the hearing continued until next Thursday?"

"Court: No, sir. This contempt proceeding is a different proposition. The other will be when Miss Beasley has found a suitable home, when she reports she has found a home, suitable for this girl."

Immediately following the above proceedings a citation entitled, "In the Matter of S. E. Metzler and Ernest S. Mitchell, in Contempt," was issued and signed by the

judge of said court, and the same served upon the petitioners, reciting the history of the proceedings relating to the matter of the petition to have the said minor adjudged a ward of the court, and referring to the statement of petitioners that they desired to withdraw from the stipulation mentioned and had subpoenaed witnesses to appear in court for the purpose of contesting the petition to have the minor declared a ward of the juvenile court, and requiring the petitioners to appear in said court at 10 o'clock in the forenoon of the 26th day of May, 1921, "then and there to show cause, if any you have, why you, and each of you, should not be adjudged to be guilty of contempt of this court for misbehavior in office and a willful violation of duty as officers and attorneys of this court, and for an abuse of the process of this court, as hereinabove set forth, and why you, and each of you, should not be punished therefor as provided by law."

The citation above referred to was unverified, and was the only document or paper supporting the proceeding in contempt, there having been no affidavit or affidavits filed charging the petitioners with contempt of court or the abuse of the process thereof. On the 26th day of May the contempt matter was called, and the petitioners demurred to the citation upon numerous grounds, among which were the following:

(1) That the court has no jurisdiction of the subject-matter of the proceeding or of the persons of the petitioners, for the reason that no affidavits or complaint have or has been filed "in this cause charging respondents with the commission of the matters and things set forth in the said order to show cause; * * * (2) that the court has no jurisdiction to punish respondents for contempt for the reason that none of their acts, or acts set out or mentioned in said order to show cause, constitute a contempt of court."

Petitioners also filed a motion to quash the proceeding on the ground that the court had no jurisdiction to issue the said order to show cause, for the reason that "no affidavit, complaint, or other paper has ever been filed in said cause upon which to predicate said order to show cause," and "the acts, facts and things stated in said order to show cause do not constitute contempt of court."

From the demurrer and the motion to quash the proceeding, it is to be seen that the points upon which the petitioners claim the right to the nullification of the judgment of contempt pronounced against them are that the court was without jurisdiction to pronounce said judgment, and that the facts upon which the proceeding was founded do not constitute or show contempt of court or a contumacious or any abuse of the process thereof.

The power or jurisdiction to impose punishments as for contempt of court not only inheres in the courts, but, in this state, is

expressly conferred upon them by the law. Code Civ. Proc. §§ 1209, 1211. The latter section reads:

"When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as therein prescribed. When the contempt is not committed in the immediate view and presence of the court, or judge at chambers, an affidavit shall be presented to the court, or judge, of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officer."

It will be noted, on an examination of the foregoing section, that, while a contempt committed in the immediate view or presence of the court may be summarily punished—that is to say, that, in such case, no formal charge or proceeding is requisite to start in motion the court's jurisdiction or power to act in the premises—where the alleged contempt is constructive or committed out of the view or immediate presence of the court, the court's jurisdiction to punish for a contempt so committed cannot operate or be put in motion in the absence of the filing of a formal charge, duly verified, or, in other words, in the absence of the filing of an affidavit reciting the facts constituting the alleged contempt. Indeed, in a case of contempt not committed in the immediate view or presence of the court, the affidavit upon which the proceeding in contempt must be founded constitutes a complaint, and unless it, upon its face, charges facts constituting a contempt, the court is without jurisdiction to proceed. *Batchelder v. Moore*, 42 Cal. 415; *Hutton v. Superior Court*, 147 Cal. 159, 81 Pac. 409; *Overend v. Superior Court*, 131 Cal. 284, 68 Pac. 372; *Rogers v. Superior Court*, 145 Cal. 91, 78 Pac. 344; *Frowley v. Superior Court*, 158 Cal. 220, 110 Pac. 817; *Mitchell v. Superior Court*, 163 Cal. 423, 125 Pac. 1061; *In re Selowsky*, 38 Cal. App. 569, 577, 177 Pac. 301.

[4] We are not prepared to say that the facts upon which the court acted in adjudging the petitioners guilty of contempt are not sufficient to constitute that offense, nor is there any necessity for expressing herein an opinion upon that proposition, since we are of the opinion that the alleged contempt was one that was not committed in the immediate view or presence of the court, and that therefore the court did not acquire jurisdiction to punish the petitioners as for contempt. It will be observed that the sole ground upon which the adjudication of contempt is founded was in the act or acts of the petitioners in subpoenaing witnesses to be present in court in the proceeding initiated for the purpose of adjudging the minor re-

ferred to a ward of the juvenile court under certain provisions of the juvenile court law, after it had been stipulated by the petitioners, as counsel for said minor, that the court might make an order adjudging said minor a ward of said court. The mere fact that the witnesses for whom the subpoenas in question were issued responded to the process and appeared in court while the proceeding against the minor was being heard does not and could not itself constitute an act of contempt. Their presence in court was merely the effect of the alleged act of contempt on the part of petitioners.

There can be no possible doubt that the acts of the petitioners constituting the alleged contempt were committed outside the view and immediate presence of the court. A subpoena issued for the purpose of compelling the attendance of a witness in any proceeding in the superior court is issued by the clerks thereof, under the seal of the court, the act of issuing it is in its nature purely ministerial and with the physical act of issuing the subpoena neither the court nor the judge thereof has anything to do. It maybe, and generally is, issued without the judge or the court having any knowledge thereof until the witnesses appear in the proceeding in which their testimony is required, and then the court may only assume that such witnesses have been regularly subpoenaed. In this case, it is clear that the judge of the court had no knowledge whatever of the act of the petitioners in causing the witnesses to be subpoenaed until he was informed thereof by the petitioner Mitchell himself, during the course of the proceeding involving the question of the disposition to be made of said minor. Thus it is plainly manifest that, as stated, the act of the petitioners in causing the subpoenas to be issued was committed outside of the immediate view and presence of the court. It has, however, been suggested that the admission of the petitioners before the court that they caused the subpoenas to be issued was sufficient to give the court jurisdiction of the petitioners and the subject-matter of the alleged contempt. We do not assent to that proposition. As we have shown above, and as all the cases clearly and positively declare, to give the court jurisdiction to punish for contempt where the alleged contempt has been committed outside of its immediate view and presence, there must be an affidavit or affidavits or something in the nature of a complaint charging facts clearly disclosing that the contempt claimed has been committed. The situation is no different from that in which a person might appear before a court and openly confess in its presence that he had committed a crime. No one would for a moment undertake to maintain that in such case there being no complaint or indictment

or other accusatory pleading on file charging the person with the crime of which he thus admitted he was guilty, the court in whose presence such admission was made would have jurisdiction to punish the party for the offense. Indeed, if the court should undertake to impose a penalty upon a person admitting his guilt in its presence in the absence of any formal complaint or indictment charging him with the offense, the act of the court would be wholly nugatory or *coram non judge*.

In accordance with the foregoing views the judgment of contempt rendered and entered by the respondent court against each of the petitioners, S. E. Metzler and Ernest S. Mitchell, is hereby annulled, set aside, and vacated, and the petition for the writ of habeas corpus dismissed, and said writ discharged.

We concur: FINCH, P. J.; BURNETT, J.

MACCHI v. LA ROCCA (LA ROCCA, Intervenor). (Civ. 3957.)

(District Court of Appeal, First District, Division 2, California. Aug. 26, 1921. Hearing Denied by Supreme Court Oct. 21, 1921.)

1. Marriage §54—Woman's interest in property acquired during illegal marriage vests irrespective of amount contributed.

Since a legal wife's interest in community property vests without contribution of any part of the actual purchase price, it is immaterial how much money for the purchase of property acquired by a man and woman while cohabiting under an illegal marriage was actually contributed by the woman; the same rule, though strictly speaking there can be no community property, being applicable by analogy as would obtain under a valid marriage.

2. Trusts §81(4)—Minor son acquires no interest in property purchased with his earnings by father.

Since the earnings of a minor automatically become the earnings of his father (Civ. Code, § 197) who may use them as he sees fit, a minor son acquired no interest in property purchased in part with earnings contributed by him for the payment of household expenses, and no trust resulted in his favor.

Appeal from Superior Court, City and County of San Francisco; Edward P. Shortall, Judge.

Action by Maria Macchi against Augustino La Rocca, in which Francisco La Rocca intervened. Judgment for plaintiff, and defendant and intervener appeal. Affirmed.

Jos. L. Taaffe, of San Francisco, for defendant appellant.

Leon Samuels, of San Francisco, for intervenor appellant.

J. H. Morris, of San Francisco, for respondent.

NOURSE, J. Plaintiff commenced this action for an equal division of certain property acquired by defendant and herself during the period of an illegal marriage. Defendant answered, admitting the illegality of the marriage, the cohabitation of the parties during the period alleged, and the acquisition of the property, but denied that plaintiff contributed one-half of the purchase price thereof, and alleged that plaintiff contributed but one-third of said purchase price, and that the remaining two-thirds was contributed by defendant from his own earnings and from a portion of the earnings of his minor son which had been delivered to defendant during the period of cohabitation. The defendant then prayed judgment awarding plaintiff an undivided one-third interest in the property in suit and for a determination of the respective rights of himself and son in the remainder. This son filed a complaint in intervention, setting up practically the same set of facts, and prayed for an undivided one-third interest in the property. Upon plaintiff's motion for judgment upon the pleadings, judgment was entered in favor of plaintiff, awarding her an undivided one-half interest in the property against both defendant and the intervenor. From this judgment the defendant and intervenor appeal on the same record.

The facts admitted in the pleadings are that in November, 1906, plaintiff and defendant procured a marriage license from the county clerk in the county of Santa Clara and thereafter, without solemnization of any kind, lived together as husband and wife until about the 8th day of July, 1920, when plaintiff for the first time discovered that their cohabitation had been illegal. During this period the parties acquired a piece of property in San Francisco, which they occupied as their home, and it is this property, together with the household furniture and personal property located therein, which is the subject-matter of this litigation. During the period of cohabitation both plaintiff and defendant worked in various canneries and other establishments and contributed their earnings to the household expenses and the acquisition of this property. Plaintiff had a minor daughter by a former marriage, while the defendant had two minor sons by a former marriage, these children living for the greater part of the period with their parents. They also worked from time to time and contributed their earnings to their parents to help meet the household expenses. It is alleged in the complaint that

during this period the plaintiff earned and turned over to defendant the sum of \$8,500, and that her minor daughter during the last four years of the same period earned the sum of \$1,750, which was also turned over to the defendant, and that a portion of said sum so contributed to the defendant was used in the purchase of this property. On the other hand, the defendant denied that he had received these sums, but alleged that the earnings of plaintiff which were turned over to him did not exceed the sum of \$2,500, and that the earnings of plaintiff's minor daughter were received by her mother and at no time turned over to defendant. It is also alleged in the answer and in the complaint in intervention that plaintiff's minor son during this period earned approximately \$5,600, and the greater portion thereof was used by defendant in the purchase of this property. The value of the property in suit is admitted to be \$8,500 with an outstanding indebtedness of \$1,350.

The only issue raised by the answer is as to the amount of actual cash contributed by plaintiff and used by defendant in the purchase of the property. The only issue raised by the complaint in intervention is one of law purely, and that is the right of a father to use the earnings of his minor son without accounting therefor to the son.

[1] The issue of fact raised by the answer is wholly immaterial to the determination of the case. Where a man and woman have acquired property while cohabiting as husband and wife under an illegal marriage, though, strictly speaking, there can be no community property, the same rule will be applied by analogy as would obtain under a valid marriage. Under such rule it is immaterial how much money the wife has actually contributed to the purchase of the property involved, because, if a legal wife, her interest in the community property would vest by reason of her services as a wife and without contribution of any part of the actual purchase price of the property. Upon this point the case is controlled by *Coats v. Coats*, 160 Cal. 671, 675, 118 Pac. 441, 38 L. R. A. (N. S.) 844, and *Schneider v. Schneider*, 191 Pac. 533, 11 A. L. R. 1386.

[2] As to the rights of the intervenor, his earnings while a minor automatically became the earnings of his father. Section 197, Civ. Code. The father, being entitled to the earnings of his son, might use them as he saw fit, and whether they were used to meet the household expenses or in the purchase of property was no concern of the son. In the absence of an express agreement (and none is pleaded), the minor son acquired no interest in the property purchased in part with his earnings, and no trust resulted in his favor.

Neither the answer nor the complaint in intervention raised a material issue of fact

which would have required a trial, and judgment on the pleadings was therefore properly entered.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

DI FIORE et al. v. BOHNETT. (Civ. 3911.)

(District Court of Appeal, First District, Division 2. California. Aug. 25, 1921.)

Sales ¶411—Complaint held not good as one on contract.

A complaint alleging that defendant sold plaintiff an entire fruit crop, and plaintiff advanced a portion of the price, but that defendant failed and refused to deliver any more than a portion whereby plaintiff was damaged in a certain sum sued for, was in assumpsit for money had and received, and not upon the contract, since to sue for breach plaintiff should have alleged performance, offer to perform, or readiness and willingness to perform.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by S. Di Fiore and D. Di Fiore, a partnership doing business under the firm name of D. Di Fiore Canning Company, against F. O. Bohnett. From a judgment sustaining demurrer to complaint, plaintiffs appeal. Affirmed.

S. G. Tompkins, of San Jose, for appellants.

Bohnett & Hill, of San Jose, for respondent.

NOURSE, J. Plaintiffs sued defendant for \$417.95, the amended complaint alleging that on the 14th day of June, 1917, the defendant and S. Di Fiore, doing business under the name of D. Di Fiore Canning Company, entered into an agreement whereby the defendant sold and the canning company purchased the defendant's crop of fresh apricots grown during the season of 1917 at the price of \$75 per ton, the estimated quantity being 40 tons. The complaint also alleges that at the time of the execution of the contract S. Di Fiore paid and advanced to defendant on account of the purchase price of said fruit the sum of \$500, that but 2,188 pounds of said fruit was delivered, of the value of \$82.05, and that defendant has failed, neglected, and refused to deliver any more. It is then alleged that, by reason of defendant's failure to deliver the balance of the apricots, plaintiff has been damaged in the sum of \$417.95, the amount sued for. A demurrer was interposed, specifying as grounds thereof that the complaint did not state a cause of action, that the plaintiffs did not have legal capacity to sue, in that they had failed

to comply with the provisions of sections 2466 and 2468 of the Civil Code, and that the cause of action was barred by the provisions of subdivision 1, § 839, of the Code of Civil Procedure. This demurrer was sustained without leave to amend, and from the judgment following the plaintiff appeals.

It does not appear when the original complaint was filed, but appellant concedes that, if the action was in assumpsit, and not an action on the contract, it is barred by the statute of limitations. The "action upon the contract" to which appellant refers would be an action for damages for its breach. That the complaint does not contain the essential averments for such an action is apparent. It being evident that the contract called for the purchase of the entire crop grown by respondent during the 1917 season, appellant would not be permitted to take such portion of the crop as he chose and refuse to take the balance. In order to sue for breach of the contract, it was therefore necessary for appellant to allege his performance, offer to perform, or readiness and willingness to perform. *Barron v. Frink*, 30 Cal. 486, 488; *L. A. Gas. & Elec. Co. v. Amalgamated Oil Co.*, 156 Cal. 776, 778, 106 Pac. 55.

Here the complaint does not contain any of such averments, but it is apparent from the face of the complaint that the contract was abandoned, and that appellant did not seek its performance. His cause of action, then, was one in implied assumpsit for money had and received, and as such was concededly barred by the statute of limitations.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

PEOPLE v. ENGLISH. (Cr. 560.)

(District Court of Appeal, Third District, California. Aug. 26, 1921.)

Elections ¶329—Evidence that person personated in fraudulent voting was entitled to vote sufficient.

Evidence on prosecution under Pen. Code, § 46, for fraudulent voting, held, in view of Pol. Code, § 52, as to residence, and section 1239 as amended by St. 1917, p. 416, as to determining place of residence for voting purposes, sufficient to warrant finding that the person personated by defendant was legally entitled to vote at the time and place.

Appeal from Superior Court, Sacramento County; H. D. Burroughs, Judge.

John English was convicted of fraudulent voting, and appeals. Affirmed.

S. Luke Howe and Sheridan Downey, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant, himself a duly qualified elector and entitled to vote in precinct No. 83 of Sacramento county, was indicted by the grand jury of said county for the crime of voting at the general primary election held throughout the state on the 31st day of August, 1920, in said precinct No. 83 of said county, upon the false and fraudulent representation that he was one John Henry Miller, who, the indictment alleges, was "a duly qualified elector of the county of Sacramento" at the time of said election, "and then and there duly and legally qualified and entitled to vote as such elector at said election at August primary" in said precinct No. 83 of said county.

A trial of the accused resulted in his conviction by the jury of the offense so charged, and he prosecutes this appeal from the judgment and the order denying his motion for a new trial.

The indictment was based on section 46 of the Penal Code, which is as follows:

"Every person not entitled to vote, who fraudulently attempts to vote, or who, being entitled to vote, attempts to vote more than once at any election, or who personates, or attempts to personate, a person legally entitled to vote, is punishable by imprisonment in the state prison for not less than one nor more than two years."

It will be noted that by the foregoing section, three different offenses against the election franchise are described or defined, the indictment being founded upon the last part of the section, whereby it is made a crime for one, himself being entitled to vote at an election, who personates, or attempts to personate, a person legally entitled to vote. Under the indictment upon which the defendant was tried and convicted, it was, to justify a conviction, essential for the people to establish by the requisite degree of proof these facts or elements: (1) That the defendant himself was under the law entitled to vote at the primary election referred to in the indictment; (2) that the said John H. Miller was likewise entitled to vote at said election; (3) that the defendant voted at said primary election under the name of John Henry Miller, and upon the false representation that he was said person.

No question is raised here of the sufficiency of the proof to support the finding of the jury, as implied from the verdict, that the defendant himself was legally entitled to vote, and that he represented himself to be and did vote at said primary election as "John Henry Miller." Nor is it questioned that a person named John Henry Miller was registered as a voter in precinct No. 83 of Sacramento county, and that he did not him-

self vote at the primary election in question. It is contended, however, that the evidence is wholly insufficient to show that said John Henry Miller was legally entitled to vote in said precinct at the time of the holding of the primary election in said county of Sacramento on the 31st day of August, 1920, and this point constitutes the sole ground of complaint against the legal integrity of the verdict.

The rules of law in this state by which the question of residence is to be determined are set forth in sections 52 and 1239 of the Political Code. The section first named, among other things, declares:

"Every person has, in law, a residence. In determining the place of residence the following rules are to be observed:

"1. It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose;

"2. There can only be one residence;

"3. A residence cannot be lost until another is gained. * * *

Section 1239 of the same Code, which is under the title and chapter of said Code relating to "voting and challenges" at elections, provides, in part as follows:

"The board of election, in determining the place of residence of any person, must be governed by the following rules, as far as they are applicable:

"1. That place must be considered and held to be the residence of a person in which his habitation is fixed, and to which, whenever he is absent, he has the intention of returning; * * *

"3. A person must not be considered to have lost his residence who leaves his home to go into another state, or precinct in this state, for temporary purposes merely, with the intention of returning;

"4. A person must not be considered to have gained a residence in any precinct into which he comes for temporary purposes merely, without the intention of making such precinct his home. * * *

"10. The mere intention to acquire a new residence, without the fact of removal, avails nothing, neither does the fact of removal, without the intention."

See Stats. 1917, pp. 416, 417.

The question here is whether the record discloses evidence which, when tested by the rules above stated herein, is such as to preclude us from justly declaring that the fact that said Miller was a resident and entitled to vote in said precinct No. 83, at the time of the primary election mentioned, was sufficiently established, the existence of the other elements of the crime charged being, as seen, conceded.

It was shown that the John Henry Miller named in the indictment was a laboring man, and had lived at a hotel owned and conducted by a Mrs. Mary McIsaac, at 1401 Front street, in Sacramento city, for about 17

years down to the 15th day of June, 1921. Said Miller was a registered voter from said hotel, and had at a number of elections voted in the election precinct in which the hotel was situated. Miller would often, during the years he resided at said hotel, leave Sacramento to work for others, but upon finishing the work for the performance of which he had been employed, would return to Sacramento and to the said hotel, where he resided, and would remain until any work he might obtain would again require him to leave the city. For several months he was employed by Mrs. McIsaac about the hotel. He was thus employed down to the 15th day of June, 1920. Mrs. McIsaac, testifying for the people, stated that Miller was at times "nervous and unstrung," and when in that state would quit working for her. She said that, on the 15th day of June, 1920, Miller ceased working for her, and she paid him in full what she owed him; that Miller, having been at some time previously operated upon to correct some physical ailment, stated to her on the day just named that it was necessary for him to submit to another such operation, and that he was going to a hospital in Sacramento that day for that purpose; that she then said to Miller that she was tired of his presence at the hotel, that as both were of a nervous disposition and could not get along together, it was her desire that he would not return to her place, or words to that effect, and that Miller, replying to that suggestion, said that he intended, after he was operated upon and discharged from the hospital, to go to Oakland, where he would remain with his brother, who resided in that city, until his health was restored. Continuing, Mrs. McIsaac stated that she assisted in getting Miller to the hospital, but that he remained at the institution only a few hours, leaving for the purpose of taking work "up the river"; that she would say, so far as she was able to recollect, that Miller never stopped at or slept in her house after June 15, 1920, although she did say that, after that date, he left with her for safe-keeping some money he had earned in his more recent employment. On redirect examination the witness testified:

"Q. Isn't it a fact that the man, John Henry Miller, was in the habit of going out into the country and returning to your place, making that as his home? A. Well, I know he would work on the boats, then he would come back and ask me if I had any place for him, but he never asked me to keep a room for him. Q. Oh, I understand that, but it was his custom, during the 17 years, when he came to Sacramento, to make your place his residence; wasn't that it? A. Well, yes. Q. That is correct, isn't it? Mrs. McIsaac? A. Yes, sir. Q. And when he left, in June, and went to the hospital, and then he came back to your place didn't he? A. Yes. Q. Did he stay there, at all? A. No, he did not. He went to the country—no. Q. Well, you told Mr. Howe that he

left and went to the hospital and didn't stay there, and came back to your place. A. He went to the hospital, yes—oh, yes. My son-in-law took him out, made arrangements with the Sisters at the Sister's Hospital, and was going—now, whether he paid the bill or not I don't know; but he went and bought two night-shirts, and went out there and made arrangements, and when I came back in the morning, he was up there. Q. Up in your house? A. Yes. He came in, and I said: 'Miller, you can't stay here.'"

John H. Miller was called by the defendant and, testifying as to his residence at 1401 Front street, stated that he left the hotel of Mrs. McIsaac on the 15th day of June, 1920, for the purpose of going to the Sisters' hospital in Sacramento for an operation; that he remained there but a few hours, when he returned to Mrs. McIsaac's place; that Mrs. McIsaac said to him that he could not live at her hotel any longer, and he thereafter secured a position as a watchman on the steamer Flora, plying the Sacramento river and which was moored at a station known as Vernon, a number of miles north of Sacramento on the Sacramento river. He testified that upon taking the position as watchman on the steamer Flora, he considered that his residence was on the boat. When asked what he meant by residence, he replied that it was the place where he ate his meals and slept. He said that he left the McIsaac Hotel with the intention of not returning to the city of Sacramento and taking up his residence; that he intended to go to Oakland and reside. He testified on cross-examination that for the past 17 years he had frequently worked on the boats on the Sacramento river, and that "every time that I finished I would come back to 1401 Front street"; that he was registered as a voter from 1401 Front street (the McIsaac Hotel), and that he had on several occasions voted at elections from that place. He likewise testified that when he left the Sisters' hospital on the 15th day of June he returned to the McIsaac Hotel and remained there several days, or until he went to Vernon to take the position on the steamer Flora as a watchman; that after he ceased working on the steamer he went to the Holland land district, which is on an island south of the city of Sacramento; that he got sick while there, and was for that reason unable to work longer, and came back to Sacramento in the month of July, 1920; that he slept "up town, but I guess some nights I slept in the corner," referring, as he later explained, to the McIsaac place; that after he recovered from his illness he again went to Vernon and resumed work as a watchman on the steamer Flora and remained there until he came to Sacramento; that he shortly thereafter went over to the Yolo county side of the Sacramento river, where the boat was "tied up," and worked there as a watchman on the boat until the 17th of September. He further

stated that he had not gone to Oakland after the 15th of June, that he had no residence there and that he had no residence in Yolo county, other than living on the boat while engaged in his work as watchman. He testified that he had known the defendant about 35 years and knew him while he stopped at the McIsaac place.

The foregoing brief recapitulation of the evidence is sufficient to show that, tested by the rules of law (above stated herein) whereby the matter of residence is to be determined, the case as made by the proofs is such that the question whether the said Miller was, on the 31st day of August, 1920, the time of the holding of the primary election at which the defendant is charged with having voted upon the false representation that he was said Miller, entitled to vote as a registered voter of precinct No. 83 of said county, was one for decision by the jury; and, the jury having accepted the testimony as being sufficient to establish in their minds the truth of that element of the crime charged beyond a reasonable doubt, we are not prepared to say that the conclusion so arrived at was not justified. We can say, however, that, upon its face, the testimony is sufficient to support the verdict.

There is nothing in the evidence to show that the witness Miller ever changed or abandoned his residence at the McIsaac hotel or that he attempted to establish a residence at any other place or intended to do so. It is true that he stated that he left the McIsaac hotel with the intention of abandoning it as his place of residence, and it is also true that he stated that, after leaving said hotel on the 15th of June, 1920, to work on the steamer Flora at Vernon, his residence was on said steamer. The latter statement involved a legal conclusion, and as so made by the witness it was shown to be wholly without probative force upon that question by his explanation that he considered the place here he took his meals and slept sufficient to constitute a legal residence. As to his statement that he took his leave from said hotel with the intention of not returning thereto, it is clear that, under the law, such intention, even if it were in his mind, was not of itself sufficient to constitute an abandonment of said place as his residence or to effect any such result. As we have seen, under the law, every person has a residence (Pol. Code, § 52), and "that the mere intention to acquire a new residence, without the fact of removal," cannot have the effect of changing a person's residence from the place where he has established it to some other

place. Pol. Code, § 1239. There is no evidence that he registered at any other voting precinct, and such evidence would readily have been available in documentary form had it existed, because the records of the registration office would have shown that his registration as a voter in precinct No. 83 of Sacramento county had been canceled. Indeed, the affidavit of registration of Miller, which was introduced and received in evidence in this case, constituted some evidence of the fact that he was not registered as a voter in any other precinct or county, otherwise said affidavit would probably not have been in existence. It is clear that said precinct No. 83 at the time of the holding of said primary election was his residence, even though he had therein no room or house in which to dwell. In *Huston v. Anderson*, 145 Cal. 320, 328, 78 Pac. 626, 635, which involved an election contest and in which an objection was raised to the right of a certain person who had voted at the election to vote, said person having previously to the election moved to another precinct to undertake temporary employment only, the court said, referring to said objection:

"The evidence was sufficient to sustain a conclusion that he had no intention of making the precinct into which he moved his residence. * * * If the voter had no intention of making the precinct into which he moved his home, but went there for temporary purposes only, he did not gain a residence there, and consequently did not lose his legal residence in the precinct from which he moved, *notwithstanding that he may not have had any certain house, room, or place therein that he could call his home.* [Italics ours.] That precinct continued to be his legal residence until he gained a legal residence elsewhere. The evidence was such that it might have sustained a contrary finding, but not such as to warrant us in disturbing the findings of the court below. See, in this connection, *Smith v. Thomas*, 121 Cal. 533; *Stewart v. Kyser*, 105 Cal. 459."

See, also, *Sheehan v. Scott*, 145 Cal. 684, 79 Pac. 350.

What is said in the above case is cogently pertinent to the case here, although we are not prepared to say that the evidence, taking it at its face value, would have warranted the jury in reaching any other conclusion than that evidenced by their verdict. Our conclusion is that the verdict is amply supported by the evidence, and, accordingly, the judgment and the order appealed from are affirmed.

We concur: FINCH, P. J.; BURNETT, J.

QUINLAN v. ST. JOHN. (No. 958.)

(Supreme Court of Wyoming. Oct. 18, 1921.)

1. Escrows — Time held of essence of contract.

In an escrow agreement, providing that "in default of the payment to you of \$75 each month at the time and in the manner hereinbefore provided, then and in that event you are authorized to deliver said deed to E. [the grantor]," time must be considered of the essence of the contract in a purely law action.

2. Escrows — Demand for deed in escrow held not rescission, but a standing upon terms of contract.

Where escrow agreement provided that in default of payment of monthly installments, holder was authorized to deliver deed to grantor, a demand for the deed by the grantor on default of the vendee and surrender thereof to him did not constitute a rescission of the contract, but was a standing squarely upon the terms of the contract.

3. Vendor and purchaser — No recovery of installments paid where vendee defaults.

Where in an installment contract for purchase of realty, time is of the essence, and vendee defaults, he cannot recover purchase money paid, nor for improvements placed upon the property, without pleading facts to bring his case within recognized rules of equitable jurisprudence, even where the contract makes no provision for forfeiture.

4. Vendor and purchaser — Allegation as to wrongful conduct of vendor held not to entitle vendee to recover purchase money.

Allegation of plaintiff, vendee in escrow agreement, under which grantor had retaken deed on default of vendee in monthly installment, that wrongful act of defendant in interfering with tenants of vendee and thereby causing them to withhold from vendee money debts, "with other unavoidable hindrances," rendered plaintiff unable to meet the installments, was not sufficient upon which to base a recovery of installments of purchase money paid.

5. Vendor and purchaser — Vendee, seeking equitable relief, must show he is affirmatively entitled thereto.

A vendee, invoking the aid of a court of equity to relieve him against a forfeiture caused by failure to meet payments according to the terms of his contract, must show affirmatively in his complaint that he is entitled to equitable relief, and he must show a difference in his favor between the purchase money paid, plus the enhanced value of the premises caused by improvements made by him and properly chargeable against the defendant, and value of plaintiff's use of the property.

Error to District Court, Fremont County; Charles E. Winter, Judge.

Action by Bessie M. Quinlan against Edward T. St. John. Judgment for defendant, and plaintiff brings error. Affirmed.

John J. Spriggs, of Lander, for plaintiff in error.

V. H. Stone and John Dillon, both of Lander, for defendant in error.

TIDBALL, District Judge. This action is here upon proceedings in error instituted by plaintiff in error, who was plaintiff below, against defendant in error, who was defendant below.

The plaintiff's amended petition in the court below consisted of two alleged causes of action separately stated and numbered. The defendant demurred to the first cause of action set forth in said petition upon the ground that the first cause of action did not state facts sufficient to constitute a cause of action. This demurrer was sustained by the trial court. Thereupon plaintiff refused to further amend her petition, and elected to stand upon it, and the court accordingly rendered judgment, dismissing the first cause of action.

The only question before this court is whether the trial court erred in sustaining the demurrer and dismissing said first cause of action. The allegations of the first cause of action contained in plaintiff's amended petition are substantially as follows: That on December 20th, 1911, plaintiff and defendant entered into an escrow agreement for the purchase of certain lots in Lander, Wyo., said agreement reading as follows:

"Lander, Wyo., Dec. 20, 1911.

"To Ben Sheldon: This envelope contains a deed from Edward T. St. John to Beatrice Bright, which you are requested to hold in escrow upon and under the following conditions, viz: The said Beatrice Bright is to pay to you the sum of \$75 on the 9th day of each and every month until the full sum of \$3,900.00 shall be paid, said payment of \$75 to commence on the 9th day of January, 1912. When the full sum of \$3,900 is paid, you are authorized to deliver said deed to the said Beatrice Bright. In the default of the payment to you of \$75.00 each month at the time and in the manner hereinbefore provided, then and in that event you are authorized to deliver said deed to the said Edward T. St. John.

"In witness whereof we have hereunto subscribed our names.

"Edward T. St. John.

"Beatrice Bright."

That the envelope mentioned in the above agreement contained a warranty deed executed by defendant, conveying certain land to plaintiff, which is the deed referred to in the above writing.

That plaintiff met the payments regularly and on time until the sum of \$2,250 was paid, and that during said time she placed valuable improvements on the land to the value of approximately \$900.

That on July 9, 1914, an installment of \$75 became due under said escrow agreement, "but through the wrongful acts of

defendant in interfering with the tenants of plaintiff and thereby causing them to withhold from plaintiff money due her from said tenants, which with other unavoidable hindrances, plaintiff was unable to meet the installment due July 9, 1914, in the amount of \$75 on the exact day it became due, and further says that she pleaded with defendant for an extension of a few days' time in which to meet said installment," but that defendant refused to extend the time, and recalled said deed from escrow, and on July 25, 1914, sold the property in question to another person "and also taking possession of and appropriating to his own use the said improvements so placed on said property by the plaintiff."

The petition then alleges that by taking up the deed, defendant "rescinded said escrow agreement," but refused to and still refuses to return to plaintiff the \$2,250 paid on the contract, or to reimburse her for the improvements she placed on the land, as he is legally bound to do.

The prayer is for the recovery of the \$2,250 paid on the contract, with interest from the dates of the several payments, and for \$900, the value of the improvements, with interest from July 25, 1914.

There is no allegation in the petition that one Beatrice Bright, a party to the escrow contract, and Bessie M. Quinlan, the plaintiff, are the same person. However, the defendant makes no point of this in his brief, and virtually concedes the fact. There is also no direct allegation in the petition that plaintiff was in possession of the property during the life of the escrow agreement, the only allegations bearing upon the question being the allegations that plaintiff placed improvements on the property, and that defendant, when he recalled the deed from escrow, took possession of said improvements. However, both sides in presenting the case to this court have assumed that plaintiff was in possession during the life of the escrow agreement, and so we shall assume that to be the fact. The allegation that the failure of plaintiff to pay the \$75 installment falling due July 9, 1914, was caused by the act of defendant "in interfering with the tenants of plaintiff, and thereby causing them to withhold from plaintiff money due her from said tenants, which with other unavoidable hindrances plaintiff was unable to meet the installment," is likewise very indefinite. The court is not informed whether or not the tenants so interfered with were tenants occupying the premises in question, in what manner they were interfered with, or what the other unavoidable hindrances were. Nor is there an allegation that except for said interference plaintiff would have been able to meet the payment on time, nor are the facts pleaded showing this to be true. There is likewise nothing in the petition to show the court that the plaintiff has been dam-

aged, that is, it is not shown that the money paid and improvements made and taken by defendant were of greater value than the use of the property during the time it was occupied by plaintiff, nor that the improvements were of such a permanent nature as to add anything to the value of the property. Neither does the petition show whether and to what extent the value of the property was enhanced by the improvements placed thereon by plaintiff, nor whether they were made with the vendor's consent.

The petition alleges that defendant, when he took up the deed, after failure of plaintiff to meet the payment falling due on July 9, 1914, rescinded the escrow agreement. While this allegation is probably a legal conclusion on the part of the pleader (31 Cyc. 60), nevertheless the plaintiff's brief presents the case upon the theory that the facts alleged in the petition constituted a rescission, and that therefore the defendant is bound to place the plaintiff in statu quo.

There is no allegation in the petition that plaintiff ever tendered the installment due on July 9, 1914, or ever offered to pay said installment.

The plaintiff in error contends: (1) That time was not of the essence of the contract in question; (2) that defendant rescinded the contract, and therefore must place the parties in statu quo; (3) that defendant by his own wrongful acts, as alleged in plaintiff's petition, prevented plaintiff from meeting the installment falling due on July 9, 1914. We shall briefly discuss these several contentions, bearing in mind that this is purely a legal action in the nature of an action for money had and received, and that the petition is not sufficient, as we shall hereafter show, to invoke the equitable relief of the court.

[1] "When it is said that time is of the essence, the proper meaning of the phrase is that the performance by one party at the time specified in the contract or within the period specified in the contract is essential in order to enable him to require performance from the other party." 2 Williston on Contracts, 1621. "Although it seems now to be customary to insert that 'time shall be of the essence of the contract' if it is so intended, yet an examination of the cases will show that these words are not essential. Any words that show the intention of the parties to be that time shall be of the essence of the contract, or any clause which provides in unequivocal terms that if the fulfillment is not within a specified time the contract is to be void will have that effect." 6 R. C. L. 899. See, also, note in 104 Am. St. Rep. 268 et seq.; 39 Cyc. 1369. The escrow agreement in this case provides that—

"In default of the payment to you of 75.00 each month at the time and in the manner hereinbefore provided, then and in that event

you are authorized to deliver said deed to Edward T. St. John."

We think that in a purely law action, invoking no equitable grounds for relief, time must be considered as of the essence of the contract in question.

[2] Did defendant by recalling the deed from escrow after the default of plaintiff rescind the contract? We think not. He stood upon the terms of the contract. As was said in the case of *Hansbrough v. Peck*, 5 Wall. 497, 18 L. Ed. 520:

"The position [of the plaintiff] is that there is no longer a subsisting contract, as an end has been put to it by the vendor, and he has in consequence resumed the possession, and claims to hold the estate the same as if no contract had ever existed, and that in such case the purchaser, upon settled principles of law and equity, is at liberty to recover back the consideration paid and the value of the improvements. But the difficulty is that the vendor has only availed himself of a provision of the contract, which entitled him * * * to put an end to it and be restored to the possession. It is a proceeding in affirmance, not in rescission of it, by enforcing a remedy expressly reserved in it. Indeed, without such clause or reservation, the remedy would have been equally available to him."

Also, in the case of *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 Pac. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17, the court said:

"But the vendor, in refusing to accept the tender and to repay the money, is neither violating his contract nor rescinding it, nor treating it as at an end. He is standing squarely upon its terms."

In the case at bar, the defendant did exactly what the contract provided he might do, and nothing more nor different. He did not rescind the contract. It is true, the plaintiff pleads a rescission, and the defendant's demurrer admits all of the facts properly pleaded. But even if the pleading of a rescission by the plaintiff is the pleading of a fact, the other facts pleaded by plaintiff show there was no rescission.

[3] In an installment contract, such as the one at bar, for the purchase of realty, where time is of the essence, or when the prompt payment of the installments is made a condition precedent, as here, and the vendee defaults and without pleading sufficient facts to bring his case within recognized rules of equitable jurisprudence sues at law to recover payments made, the overwhelming weight of American decisions are to the effect that he cannot recover the purchase money paid, nor for improvements placed upon the property. *Hansbrough v. Peck*, supra; *Glock v. Howard & Wilson Colony Co.*, supra; *Sanders v. Brock*, 230 Pa. 609, 79 Atl. 772, 35 L. R. A. (N. S.) 532, and note; *L. R. A. 1918B*, note, page 540; 27 R. O. L. 625; 39 Cyc. 1639, 1401, 2025, 2075;

107 Am. St. Rep. (note), 730. See, also, "Forfeiture for Breach of Contract," by Prof. Ballantine, *Minnesota Law Review* for April, 1921. In the case of *Lytle v. Scottish American Mrtg. Co.*, 122 Ga. 458, 50 S. E. 402, which is often cited by text-writers as being opposed to the majority rule, the court says:

"Of course, where the vendee makes default, he cannot take advantage of his own wrong, so as to give himself a standing as plaintiff in an action to recover for improvements or purchase money paid in part performance of the contract of sale. Such claim can only be asserted defensively."

And this is generally held to be the rule even where the contract makes no provision for forfeiture of the money paid. *Glock v. Howard & Wilson Colony Co.*, supra; 39 Cyc. 2027; 2 Williston on Contracts, § 791, p. 1514; *Downey v. Riggs*, 102 Iowa, 88, 70 N. W. 1091. "It is difficult to see why such a provision should affect the question, since the buyer's right of return, if he ever has such a right, is given him by law necessarily in opposition to the terms of the contract." 2 Williston on Contracts, 1514. There are, however, some cases apparently to the contrary. 2 Williston on Contracts, 1514.

The case at bar is distinguishable from the case of *Johnson v. McMullin*, 3 Wyo. 237, 21 Pac. 701, 4 L. R. A. 670. In that case there was a contract of sale, the deed to be delivered when the notes given for the purchase price were fully paid, and there was no provision for redelivery of the deed to the vendor upon the failure of the vendee to make the payments on time, but even if time was originally of the essence of that contract, such provision was clearly waived, as shown by the opinion in the case, by the act of the vendor in failing to forfeit the contract upon breach by plaintiff. In that case also the contract was never terminated by the vendor when the notes were not paid at maturity, but he allowed the contract to continue in full force, retained the notes, and sold the property to a third person. The court said:

"If plaintiff failed to pay her notes at maturity, defendant had it in his power to tender the deed and recover the amount of the notes by suit; or, upon the other hand, it was his right to deliver to plaintiff her notes, and declare a forfeiture of the contract, provided the contract provided for a forfeiture. He did neither, but retained the notes and sold the property to a third party, leaving the contract in full force."

It is a case quite different from the one at bar.

This disposes of all the contentions of the plaintiff in error, except that allegation of the petitioner:

"That through the wrongful acts of defendant in interfering with the tenants of plaintiff and thereby causing them to withhold from

plaintiff money due her from said tenants, which with other unavoidable hindrances, plaintiff was unable to meet the installments on July 9, 1914, in the amount of \$75, on the exact day it became due."

[4] Assuming that where, in an action like the one at bar, the petition sufficiently alleges that the defendant by his own wrongful act prevented the plaintiff from meeting an installment when due, the plaintiff may recover back what he has paid in part performance of the contract, we do not think the allegation sufficient. It does not allege that defendant by his wrongful act prevented the payment. At most, it merely alleges that the act of defendant, coupled with other unavoidable hindrances, prevented the plaintiff from meeting the installment when due. To base a recovery upon such an allegation, it should at least state facts showing that except for the wrongful acts of defendant the plaintiff could have met the payment when due.

Our conclusion, then, is that under the facts in the case at bar, as set forth in the plaintiff's petition, she is not entitled to recover either the installments paid under the contract before its forfeiture by defendant, nor the money she expended by way of improvements.

Neither do we believe that the petition states facts sufficient to entitle plaintiff to equitable relief, even assuming, without deciding the point, that under a proper petition she would be entitled to relief.

In the case of *Wheeler v. Mather*, 56 Ill. 241, 8 Am. Rep. 683, which was an action in assumpsit for money had and received, involving the same questions as the case at bar, and which was decided upon a rehearing after the case had "received an extended and careful reconsideration," the court, after holding that plaintiff could not recover in such an action for purchase money and improvements placed on the property, uses this language:

"We do not, however, hold, or mean to be understood as holding, that these rules cover the entire subject-matter. There may be cases where a vendee, chargeable with a technical default under such a contract, might, under particular circumstances, be entitled to other relief, as in a case where he had paid a large portion of the purchase money, made valuable improvements upon the property, and his default was the result of fraud, accident or mistake; or the vendor should attempt to exercise the power of forfeiture in a case not fairly within its scope; or unfairly and oppressively, with a view of taking an undue advantage of the vendee by a forfeiture of payments and improvements; and in all other cases falling within the principles by which courts of equity are governed, the vendee may resort to such court to restrain the act of the vendor, if about to be done, or, if accomplished, to set it aside, and to have the equities of the parties arising from their relations ad-

justed according to the circumstances of each case."

But assuming that plaintiff might under a proper petition be entitled to relief at the hands of a court of equity, what facts must she set forth in her petition and to what relief would she be entitled?

[5] If entitled to recover at all, it must be upon the ground that equity will, under certain circumstances, relieve against a forfeiture, and the circumstances sufficient to invoke the aid of a court of equity must be shown by the petition. The rule is not that, upon the forfeiture of a contract by the vendor, the vendee may recover the purchase money paid and the value of all improvements placed on the property by the vendee, regardless of their nature or lasting qualities. In the case at bar, the act of defendant was caused by, and the result of, the failure of plaintiff to strictly fulfill the contract on her part by meeting the payments when due under the terms of the contract. In such a case, all that the vendor is bound to do when he forfeits the contract, and all that a court of equity will require him to do, is to place the vendee in statu quo. In some cases this might involve the return of all payments made and the payment for all improvements made by vendee. This would probably be true if the vendor had retained possession of the property during the life of the contract and if the improvements placed on the property were placed there with the vendor's consent, and actually enhanced the value of the property to the full extent of their cost. But in the case at bar, the vendee was in possession. She does not offer to account for the value of the use of the property during the time she held it. She does not show that the payments made by her were of a greater amount than the rental value of the property. She does not show the nature of the improvements, whether permanent or otherwise, nor how much they enhanced the value of the property nor whether placed there with the consent of the vendor. In other words, the plaintiff utterly fails to plead facts sufficient so that the court can say what the equity of the case is. We think this essential to the statement of a good cause of action. It may be said that the defendant could set these matters up in his answer, and, of course, he could; but the plaintiff is here invoking the aid of a court of equity to relieve her against a forfeiture caused by her failure to meet payments according to the terms of her contract, and in order to invoke that aid, she must show affirmatively that she is entitled to relief. The court cannot presume for her that, when equity is done between her and the defendant, she will be entitled to anything. The burden is on her to show this by her petition, or she fails to state a cause of action. For aught the court knows, with her petition in

its present form, the rental value of the property may have equalled or exceeded the monthly payments made; and the improvements may have been merely repairs or temporary improvements, and may not have enhanced the value of the property.

What the plaintiff is entitled to recover, if anything, is not the purchase money paid and cost of improvements, but the difference between the purchase money paid, plus the enhanced value of the premises caused by the improvements made by her and properly chargeable against the defendant, and the value of plaintiff's use of the property. This being true, it would seem to follow inevitably that in order to recover at all, she must show by her petition that there is a difference in her favor and of what it consists. This she has failed to do, so how can it be said that she has stated a cause of action?

We believe the above observations are fully sustained by the decisions and the rules of pleading as set forth in text-books, encyclopedias, and adjudicated cases. In the case of *Lytle v. Scottish-American Mrtg. Co.*, supra, the plaintiff pleaded the facts showing that he was entitled to relief and offering to do equity. In the course of its opinion the court says:

"When the vendee sets up any right (in his pleading), he is also bound to recognize that of the opposite party, and is equally bound to do equity before he can secure relief. He is not entitled to a return of his purchase money until he has allowed, as a deduction therefrom, all damages caused by his breach, one element of which will be the fair rental of the property during the time he occupied it, even up to verdict. * * * If the vendor elects to take back the land, he must return the purchase money, less damages and rent. If the land has been improved, he must allow the vendee for the enhancement in value occasioned thereby, before he can take the land thus improved. But the vendee cannot force the vendor to pay for the building or other meliorations. When the vendee asks compensation therefor, another factor is injected into the case, whereby he loses that absolute right to the purchase money and forces an account under which he can secure only what legally comes to him on a sale of the property."

"In the absence of some provision in the contract fixing a different measure of compensation, the amount recoverable for improvements is not what it cost to put them on the property, but the enhanced value of the property, not exceeding the amount expended for the improvements, and from this is to be deducted an amount equivalent to the fair rental value of the premises." 39 Cyc. 1402.

"Upon rescission by the vendor, the purchaser is to be charged with a fair rental value of the land from the time of his acquired possession." 39 Cyc. 1403.

"As a condition precedent to the action for the recovery back of purchase money paid to the vendor, the purchaser must put the vendor in statu quo. Thus where plaintiff seeks to recover the purchase money paid by him for land, treating the contract of sale as re-

scinded, he must account for the value of the use thereof while he was in possession." 39 Cyc. 2051.

"It [the stating part or premises of the bill in equity] must aver every fact necessary to show his [plaintiff's] title and right to relief, and such facts cannot be supplied by reference to other parts of the bill. The facts should be stated so distinctly and completely that the chancellor may, from the face of the bill, see that he has jurisdiction, and tell precisely what decree should be rendered, supposing the bill to be true." 21 C. J. 386.

In the case of *Gates v. McLean*, 70 Cal. 42, 11 Pac. 489, speaking of a vendee's right under rescission against a defaulting vendor. It is said that it is the vendee's duty "to restore the possession, in which case he may recover the purchase money advanced and the interest, together with the value of his improvements, deducting therefrom such sum as the use of the premises may reasonably have been worth." To the same effect is *Barrows v. Harter*, 165 Cal. 45, 130 Pac. 1050. Though this last case is decided under a statute, the court says the rule would be the same in equity without the statute.

In the case of *Cornely v. Campbell*, 95 Or. 345, 186 Pac. 563, 187 Pac. 1103, which was an action by vendee to recover the value of certain land transferred by him to the vendor in part payment of the purchase price of lands purchased by vendee from the vendor, the contract of purchase having been rescinded, while the question of a sufficient pleading on the part of the vendee was not involved in the case, it appears from the opinion of the court that the vendee, while not offering to account for rents while he occupied the land, showed that the value of such rents was more than compensated by the work expended and improvements made by him upon the land while he occupied it, and that therefore (quoting from the complaint):

"No accounting for the rents and profits from said lands would be necessary to place the defendant in statu quo."

This case and many others that we do not cite show that the counsel conducting the cases for plaintiff deemed it necessary to either account for the rents and profits or show a sufficient excuse for not doing so.

In the case of *Woodard v. Willamette Valley Irrigated Land Co.*, 89 Or. 10, 173 Pac. 262, the plaintiff vendee in suing for the return of the purchase money tendered possession and a quitclaim deed, and offered to account to the defendant vendor for the rents and profits during his occupancy, and asked for the difference found due. In its opinion the court says:

"Each party having consented to a rescission of the contract, neither can base a claim on such contract except in so far as is necessary to the restoration of the statu quo."

We are therefore of the opinion that plaintiff's petition fails to state a cause of action either as an action at law for money had and received or as an action in equity for an accounting and relief from a forfeiture, and it follows that the demurrer to the petition was properly sustained, and that the judgment should be affirmed. It is so ordered.

Affirmed.

POTTER, C. J., and BLUME, J., concur.

RICHEY v. STATE. (No. 1015.)

(Supreme Court of Wyoming. Oct. 18, 1921.)

1. Indictment and information \S 125(45)—Information held to charge that cattle of different owners were taken at same time and place.

An information for the larceny of neat cattle, charging that defendant stole various numbers of cattle from different owners held to charge that all the cattle mentioned were taken at the same time and place.

2. Indictment and information \S 125(45)—Information charging taking of cattle of different owners charged one offense.

An information charging that defendant took various numbers of neat cattle from various owners at the same time and place charged but one larceny.

3. Criminal law \S 143—Omissions in information waived by failure to move to quash.

The defect, if any, in an information in larceny case in failing to allege that owner of property was a copartnership or a corporation was in the manner of charging the crime, and was waived by failure to move to quash, under Comp. St. 1920, $\S\S$ 7462, 7483, 7487.

4. Larceny \S 40(9)—Variance as to name of owner held not material.

In a prosecution for larceny of neat cattle, there was no fatal variance between information charging ownership of cattle in Davison Bros., and evidence and verdict finding ownership in Davidson Bros., in view of Comp. St. 1920, \S 7463.

5. Criminal law \S 1169(3)—Admission of evidence of uncontradicted fact not prejudicial.

In a prosecution for larceny of neat cattle, where defendant admitted shipping 32 cattle to a certain destination, the admission in evidence of records showing such fact, if erroneous, was not harmful.

6. Criminal law \S 404(4)—Identify held sufficiently established to warrant admission of hides of stolen cattle in evidence.

In a prosecution for larceny of neat cattle, held that hides of cattle killed at a packing plant were sufficiently identified to warrant examination thereof by the jury.

7. Animals \S 10—Criminal law \S 306—Inference held not to rest on inference.

In prosecution for larceny of neat cattle, where fact that cattle discovered by inspector at South Omaha were the cattle which had been claimed and shipped by defendant, was inferred from proven facts, ownership in prosecuting witnesses could not be inferred from the fact previously inferred that the defendant had claimed, possessed, and owned them, but could be proved by any competent evidence tending to establish it, and was proved by evidence showing ownership of original brands on the animals, which was prima facie proof of the ownership of the animals themselves, and there was no question of one inference resting upon the other.

8. Criminal law \S 371(2)—Larceny \S 68(2)—Defendant's belief in ownership a jury question; evidence of rebranding of other cattle held admissible.

In a prosecution for larceny of neat cattle, where defendant admitted recent branding of cattle in question because the old brands could not be deciphered readily, the question was presented to the jury whether defendant may not honestly have believed that she owned the cattle, and evidence of similar misbranding of other cattle was properly admitted, even conceding that the misbranding of such other cattle did not make out a prima facie case of larceny of such cattle.

9. Larceny \S 55—Evidence sufficient to sustain conviction of larceny of neat cattle.

In a prosecution for larceny of neat cattle, evidence held sufficient to sustain a conviction.

10. Larceny \S 64(7)—Loss of cattle and incriminating circumstances sufficient to establish identity of guilty person and corpus delicti.

In a prosecution for larceny of neat cattle, loss of the cattle in question, and even imperfect identity of them in the possession of the accused, together with incriminating circumstances, may not only identify person guilty, but satisfactorily establish the corpus delicti.

11. Criminal law \S 1165(1)—Defendant held not prejudiced by theory of state that there was one larceny of cattle of different owners.

Defendant, in prosecution for larceny of neat cattle, held not prejudiced in making her defense by theory of state that, although there were cattle of different owners taken and rebranded and sold, only one larceny was committed.

12. Criminal law \S 1059(2)—Exception to group of instructions disregarded if one be correct.

An aggrieved party must point out definitely and particularly the ruling of which he complains, on writ of error, and an exception to the giving of a group of instructions will be disregarded if any one of the group be correct.

13. Criminal law \S 893—Verdict good if court can understand meaning.

A verdict must be construed with reference to the information and the trial, and if, when so construed, it be responsive to the is-

sues, and the court can understand the true intent and meaning of the jury, it is good.

14. Larceny —82—Verdict describing property held sufficient.

A verdict referring to crime as "stealing live stock" was good in a prosecution for stealing "neat cattle."

15. Larceny —82—Verdict held not too indefinite.

A verdict finding defendant guilty of stealing live stock, the property of, viz. "3 of Davidson Bros. and 1 of Lincoln Live Stock Company as charged in the information," held not too indefinite, evidently referring to neat cattle mentioned in the information and evidence.

16. Larceny —83—Finding of value in verdict sufficient.

Omission of the dollar sign and word "dollars" in a verdict in a prosecution for larceny, and the placing before the figures the sign signifying number, did not render verdict indefinite, under Comp. St. 1920, § 7549.

Error to District Court, Lincoln County; John R. Arnold, Judge.

Annie Richey was convicted of larceny of neat cattle, and brings error. Affirmed.

C. E. Melvin, of Soda Springs, Idaho, J. L. Mullings, of Kemmerer, and M. E. Wilson, of Salt Lake City, Utah, for plaintiff in error.

W. L. Walls, Atty. Gen., for the State.

KIMBALL, J. Annie Richey was convicted of larceny of neat cattle, and brings the case here in error. The information, with the formal parts omitted, charges that:

"Annie Richey and Charles King, late of the county aforesaid, on the 23d day of July, A. D. 1919, at and in the county aforesaid, then and there being, did then and there unlawfully and feloniously steal, of the personal property of Davision Bros., 17 head of neat cattle, then and there of the value of \$50 each; two head of neat cattle of the personal property of William Spencer, then and there of the value of \$50 each; four head of neat cattle of the personal property of Lincoln Live Stock Company, then and there of the value of \$50 each; and two head of neat cattle of the personal property of Ernest Corless, then and there of the value of \$50 each."

Defendant King was found not guilty, and when hereinafter we mention the defendant we refer to plaintiff in error only.

[1, 2] A motion to quash the information upon the ground that it charges in one count four separate and distinct offenses was denied by the court, and this ruling is assigned as error. We construe the information to charge that all the cattle mentioned in it were taken at the same time and place, and therefore it charges but one larceny. This conclusion is unaffected by the circumstance that it appears that the cattle stolen were not all owned by the same person or company. Ack-

erman v. State, 7 Wyo. 504, 54 Pac. 228; 17 R. C. L. 54; note to State v. Sampson, 42 L. R. A. (N. S.) 967. There is little, if any, authority to the contrary. The case of U. S. v. Beerman, 5 Cranch. O. C. 412 (Fed. Cas. No. 14650) was expressly disapproved in Ackerman v. State, supra. Counsel rely upon State v. Bliss, 27 Wash. 463, 68 Pac. 87, and Joslyn v. State, 128 Ind. 160, 27 N. E. 492, 25 Am. St. Rep. 425, but neither case can be accepted as authority in support of the motion.

It appears from State v. Makovsky, 67 Wash. 7, 120 Pac. 513, that the Bliss Case has been expressly overruled, and by Furnace v. State, 153 Ind. 93, 54 N. E. 441, the Joslyn Case, if not overruled, has been limited as an authority to those cases where the information does not charge that the different articles of property were stolen at the same time. The motion to quash was properly denied.

[3] It is argued that the information is insufficient because it fails to allege that Davision Bros. was a copartnership, and the Lincoln Livestock Company a corporation. The omission of those allegations was not made the ground of the motion to quash, nor of any other objection to the information in the trial court, is not assigned as error here, and we might well disregard the point. However, as it is claimed that the information for this reason is fatally defective (citing State v. Clark, 223 Mo. 48, 122 S. W. 665, 18 Ann. Cas. 1120), we shall not pass the question without consideration. In the case cited, where it was held that the information for larceny was fatally defective for failure to allege the incorporation of the owner of the stolen goods, the question was considered, in the absence of a statute, as one under the common law. But in this state the effect of defects and imperfections in informations is largely regulated by statute. Section 7462, Wyo. C. S. 1920, provides that "No indictment shall be deemed invalid * * * for any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits;" section 7483, that a motion to quash may be made when there is a defect "in form of the indictment, or in the manner in which the offense is charged;" and section 7487, that defects which may be excepted to by motion to quash shall be waived by demurring, or pleading in bar, or not guilty. Under such statutes, indefiniteness is a defect in the manner of charging the offense, and, unless raised by motion to quash, may be waived. Wilbur v. Territory, 3 Wyo. 268, 21 Pac. 698; Bryant v. State, 7 Wyo. 311, 51 Pac. 879, 58 Pac. 596; Koppala v. State, 15 Wyo. 398, 89 Pac. 576, 93 Pac. 662; White v. State, 23 Wyo. 130, 147 Pac. 171, 148 Pac. 342; State v. Messenger, 63 Ohio St. 398, 59 N. E. 105; Arnsman v. State, 11 Ohio Cir. Ct. (N. S.) 113. Without decid-

ing that the information is defective at all in failing to describe more fully Davison Bros. and Lincoln Livestock Company, we hold that the defect, if any, was in the manner of charging the crime, not sufficient to invalidate the information, and, not having been presented to the court by the motion to quash, was waived by the plea of not guilty.

[4] It is contended that there was a fatal variance because the evidence on the part of the state tended to prove, and the verdict of the jury found, that the cattle alleged in the information as the property of Davison Bros. were the property of Davidson Bros. We find nothing in the record to indicate that the defendant was in any way misled by such variance. Section 7463, Wyo. C. S. 1920, provides that a variance between the statement in the information and the evidence in the name or description of any matter or thing whatsoever shall not be deemed ground for an acquittal unless the trial court shall find that such variance is material to the merits of the case or prejudicial to the defendant. We think there is a clear inference from the evidence that the defendant knew that Davison Bros. mentioned in the information and Davidson Bros. referred to in the evidence and verdict were the same. We agree with the trial court in its refusal to find that the variance was material or prejudicial. *Eggart v. State*, 19 Wyo. 285, 116 Pac. 454; *Harris v. State*, 23 Wyo. 487, 153 Pac. 881, Ann. Cas. 1917A, 1201.

Some statement of facts which the jury may have found from the evidence is necessary to an understanding of some other questions. Shortly before July 23, 1919, neat cattle belonging to the various parties named as owners in the information were upon the open range near the defendant's ranch. July 25, defendant loaded at Fossil, Wyo., for shipment to a commission firm at South Omaha, Neb., 32 head of cattle, all of which had been branded recently by defendant with brands owned or used by her, placed over older brands. Upon the arrival of the cattle at their destination, and before they had left the pens of the consignee, they were examined by an inspector of live stock whose duty it was to inspect all cattle arriving at that market from Wyoming. It was discovered then, and by later investigations, that the older brands were different from the fresh brands, and that the former in most instances, belonged to persons other than the defendant. The recently seared ears of the cattle raised the inference that the earmarks had been obliterated. Seventeen head, according to the testimony of the inspector, originally bore the brand of Davidson Bros., with which he was familiar, and, discovering this, he notified the county attorney of Lincoln county of the result of his inspection, and ordered the cattle to be held for further investigation. In the meantime, on July 26, Wil-

liam Davidson, of Davidson Bros., riding near Fossil, found two of the partnership cattle on which it appeared that the defendant's brand had been placed over that of Davidson Bros., and, learning that defendant had shipped a car of cattle the day before, he followed the car to Omaha, where he arrived soon after the cattle were unloaded. He there examined some 26 head of them. Eight head were taken to a packing house, where they were killed and skinned in the presence of Davidson and the inspector, and when the inner sides of the hides, after removal from the animals, were examined, the old brands only could be discerned. There was evidence tending to prove that, of the 8 hides, 4 bore the brand of Davidson Bros., 2 of Corless, 1 of Spencer, and 1 of Lincoln Live Stock Company. These hides were inspected by the jury at the trial, and doubtless furnished convincing evidence of the brands which they bore. The verdict found the defendant guilty of stealing 3 head owned by Davidson Bros. and 1 head owned by Lincoln Live Stock Company.

The defendant admitted that the cattle shipped from Fossil had been recently re-branded by her, but claimed that the older brands on said animals were hers also. Her old brands, she says, were dim, and she re-branded upon the advice of her father, who had told her to ship no cattle except those upon which the brands were distinct. Other incriminating circumstances we deem it unnecessary to rehearse.

It is urged that there was error in admitting in evidence records kept by railroad and stockyard employees showing the movements of the car of cattle from Fossil to South Omaha. Stated briefly, the evidence in which there was reference to such records was as follows:

The railway agent at Fossil testified that the records of her office showed that the cattle loaded there July 25 were put into car 45782; the manager of the stockyards at Cheyenne testified that his records showed that car 45782 arrived there July 28, when the cattle therein were unloaded, and on July 27 reloaded into car 35677, and the superintendent of the stockyards at Valley, Neb., testified that car 35677 arrived there July 29, when the cattle were unloaded, and on July 30 reloaded into car 1367. This testimony of these three witnesses was elicited by questions to which no objection was made, nor was there any motion to strike out the answers.

Over objection, an employee of the stockyards company at South Omaha testified that his record showed that 32 head of cattle were unloaded there July 30 from car 1317. The record itself was not introduced in evidence, and probably was used by the witness as a memorandum from which to refresh his memory, though the facts warranting such use do

not clearly appear. There was received in evidence, also over objection, the waybill of the shipment.

[5] The defendant admitted the billing of 32 head of cattle to the commission company; their receipt by that company was proved by the unobjectionable and uncontradicted evidence of other witnesses, one a defendant's witness, an agent of the consignee, who identified tally sheets made by the inspector of live stock, stating that they had reference to the shipment of 32 head of cattle received July 30 by the consignee from defendant. Therefore, whatever may be said as to the right of the defendant to deny the inference that the cattle delivered were the same cattle that were billed, we are of opinion that there was no dispute of the bald fact that 32 head of cattle were shipped by her from Fossil and the same number received by her consignee at Omaha; and consequently the admission in evidence of the testimony of the employee of the stockyards company and the way bill, which tended to establish that fact, was not harmful.

[6, 7] It is contended that it was error to permit the jury to examine the hides which were taken from the eight head of cattle killed at South Omaha, for the reason that they were not sufficiently identified as having been taken from animals that had been shipped by defendant. We are of opinion that this inspection by the jury was properly permitted, and, after what has already appeared from the foregoing statement of the facts, we believe the question requires but little discussion. From the facts proved it was the almost irresistible inference that the cattle received at South Omaha and examined there by the inspector and Davidson were the same cattle shipped by defendant. There was positive testimony that the eight head which were killed were a part of the cattle so examined, and like testimony that the hides exhibited to the jury were the ones that had been taken from those eight animals, with no change in the meantime of the marks or brands. In this connection it is argued that finding the ownership of the cattle to be in the parties named as owners in the information was in disregard of the rule that one presumption or inference cannot rest upon another presumption or inference, citing *State v. Potello*, 40 Utah, 56, 119 Pac. 1023. Without questioning the rule, we think the case at bar furnishes no example of its violation. If we understand the argument of counsel, it is that the presumption of ownership arising from proof of ownership of the older brands found upon the animals at South Omaha rests upon the inference that those animals were the same as the ones shipped from Fossil by defendant. We cannot accept this reasoning. The fact that the cattle discovered by the inspector at South Omaha were the cattle which had been claimed, possessed, and

shipped by defendant was inferred from facts which were proved. It then became important to the state to prove the ownership of the property. This fact, of course, could not be inferred from the fact, previously inferred, that the defendant had claimed, possessed, and owned them, but could be proved by any competent evidence tending to establish it, and was proved by evidence showing the fact of ownership of the original brands on the animals, which under the statute was prima facie proof of the ownership of the animals themselves. We see here no question of one inference resting upon another, but each inference or presumption rests upon its own facts.

[8] The witness Davidson was permitted to testify that soon after the car of cattle was shipped by defendant he discovered on the range in the vicinity of Fossil four other cattle on which the Davidson Bros. brand had been altered as he found it altered on the cattle discovered at Omaha, and that the defendant afterwards claimed them as hers. Two of these cattle were those discovered July 26, to which we have already referred, and the others were discovered a few days later. It is contended that the reception of that evidence, tending to show that defendant had been guilty of other criminal acts, was error. It is true that evidence of crimes other than that charged in the information may not be received for the purpose of leading to the conclusion that the defendant is a person likely from his criminal conduct or character to have committed the offense for which he is being tried. On the other hand, the mere fact that the evidence aduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bear upon the question whether the acts alleged to constitute the crime charged in the information were designed or accidental, or to rebut a defense that would otherwise be open to the accused. 17 R. C. L. 75; 16 C. J. 588, 589; note 43 L. R. A. (N. S.) 776; note 3 A. L. R. 1213; *Smith v. State*, 17 Wyo. 481, 101 Pac. 847.

The defendant, admitting the recent branding, and claiming it was done because her older brands could not be deciphered readily, presented to the jury the question whether, even though she did not own the cattle, she may not honestly have believed she did; that is, whether the act of misbranding was by intention or mistake. Evidence of a similar misbranding of other cattle was proper, not for the purpose of proving other crimes, but as bearing upon this question, and thus tending to prove the crime charged in the information. *Terr. v. Caldwell*, 14 N. M. 535, 98 Pac. 167; *State v. Morris*, 90 Or. 60, 175 Pac. 668; *Cannon v. State*, 84 Tex. Cr. R. 504, 208 S. W. 339.

[9,10] In a larceny case, evidence of the possession by defendant of goods other than those mentioned in the information may not be relevant unless it be sufficient to prove *prima facie* that such goods were stolen. It was so held in *State v. Jones*, 191 Pac. 1075. It is argued that the evidence under discussion was subject to objection on this ground, but we must hold otherwise. Conceding for our present purpose that it did not make a *prima facie* case of larceny of the four head of cattle, it was sufficient to prove *prima facie* the relevant fact sought to be established; that is, similar, wrongful instances of misbranding by defendant at about the same time. In cases like *State v. Jones*, *supra*, the evidence is inadmissible unless it be sufficient to prove another larceny; in this case it was admissible if it were sufficient to prove another misbranding.

The next question is the alleged insufficiency of the evidence to support the verdict. What has been said in treating another assignment of error expresses our view that the ownership of the cattle was satisfactorily established. That it was not proved that the cattle were taken feloniously is another alleged defect in the evidence. It seems to be contended that, to warrant a conviction, there should have been some different or additional evidence to prove that the cattle were lost by a felonious taking from the owner; that is, of the *corpus delicti*. Such a taking must, of course, be proved, but, as said in *Dalzell v. State*, 7 Wyo. 450, 53 Pac. 297:

"The evidence relied upon to establish the *corpus delicti* in larceny is not necessarily, or indeed usually, distinct from that relied upon to identify the offender and prove the guilty intent."

Quoting further from the same decision:

"The loss of and subsequent finding of the property does not prove, or in many cases tend to prove, the *corpus delicti*; that it was lost by a larceny. But the loss, and even imperfect identification of it in the possession of the accused, together with incriminating circumstances of misstatement and concealment, may, as in this case, not only identify the guilty person, but satisfactorily establish the *corpus delicti*."

The case there considered presented no more pronounced instances of misstatement and concealment than the attempted obliteration by defendant in this case of the owners' brands, and her claim afterwards that the cattle had always belonged to her. But, it is argued, the cattle may have strayed into the fields of the defendant, and she, having thus innocently come into their possession, would not be guilty of larceny by reason of a subsequent appropriation of them, because in such case the intention to steal at the time of the taking, which is an essential element of that crime, would be lacking. That the straying of range cattle into the fields of

another works such a change in possession that the owner of the field, who appropriates them, may not be convicted of larceny, is a proposition which we are not willing now to concede, and upon which we need not pass in this case, as it is not presented by the evidence, nor consistent with any theory advanced at the trial. The defendant herself testified that she "gathered" the cattle, brought them home, and rebranded them. We are of the opinion that there was ample evidence to establish the fact that the cattle were taken from the open range, and were not in defendant's possession or custody until she took them with the intention of stealing them.

It is argued also that the defendant's possession was not recent within the meaning of the rule, often invoked in larceny cases, that certain inferences may be drawn from the recent, unexplained possession of stolen property. Such inferences, and the grounds upon which they may be based, are important in those cases where the possession of the stolen property by the defendant is relied upon to establish the fact that he was the person who took it. But we fail to see how this rule had any place in this case, and evidently the trial court was of the same opinion, as it refrained from giving any instruction upon the subject. The circumstances attending the taking or gathering by defendant of the cattle which were shipped from Fossil were not in dispute, and the only issues under the evidence were: (1) Did those cattle belong to defendant, or to the persons claimed by the state to be the owners; and, if that issue were decided in favor of the state, (2) did defendant take them by mistake, or feloniously? No inference that could aid the state upon those issues could be drawn from the fact of defendant's possession, whether recent or remote, as possession by her was perfectly consistent with her defense.

[11] It is also claimed that the evidence was insufficient to prove that the cattle found by the jury to have been stolen were all taken at the same time. It was the theory of the state that the defendant was engaged in one continuous transaction consisting of the gathering, branding, and shipping of cattle belonging to others; that all of her acts during that transaction were with the same intention, and set in motion by a single impulse, and that in the shipping of the cattle, which was the result of the transaction, there was but one "carrying away," and but one larceny. The facts in support of this theory were, we believe, satisfactorily established. We do not decide that such facts would, in cases where the property of different owners is taken, necessarily result in only one larceny. Let it be conceded in this case that the time of taking from the range must be the determining consideration upon

the question whether there was one or several larcenies, yet we think the evidence was sufficient to support the finding of the jury that the cattle mentioned in the verdict were taken at the same time and place. It was shown by the state that the defendant had stolen a number of cattle, all of which were taken probably within a certain brief period. The defendant alone had knowledge of the exact time when any particular animal was taken from the range; her evidence failed to disclose this knowledge, and she thus declined to present any issue which might thus have been raised. Nor did she, by objection, motion, or requested instruction at the trial, suggest to the court that the state should be required to elect to ask a conviction for the stealing of some particular part only of the property. See *West v. Com.*, 125 Va. 747, 99 S. E. 854. The trial upon the theory that there had been only one larceny did not, we think, prejudice the defendant in making her defense, and the nature of the crime was unaffected by the number of cattle found by the jury to have been stolen.

[12] The charge of the court was made up of 17 separate, numbered instructions, and there is nothing in the bill of exceptions to point out at whose request any of them were given. The only exception to the instructions was "to the giving of all instructions by the court on behalf of the prosecution on the ground that they do not give the law applicable to the case." In any view which we can take of this exception it is insufficient as the foundation of an assignment of errors here. It was evidently directed at some group of instructions; possibly, to the whole of the charge. An aggrieved party must point out definitely and particularly the ruling of which he complains, and an exception to the giving of a group of instructions will be disregarded if any one of the group be correct. We consider this general principle settled in this state by *Dickerson v. State*, 18 Wyo. 440, 473, 479, 111 Pac. 857, 116 Pac. 448. In that case the court considered the sufficiency of assignments of error in a motion for a new trial, but the reason for requiring particularity in objections and exceptions applies with perhaps greater force in the present case, where we have to consider the sufficiency of the exceptions at the time of the adverse ruling. 14 R. C. L. 809-811; 17 C. J. 86.

The rule requiring timely and definite exceptions to instructions has been relaxed in criminal cases in this state in some particulars. In cases where the punishment was capital, the court has considered the entire record, although it did not disclose objections and exceptions, and granted a new trial if, from such examination, it determined that there were such fundamental and prejudicial errors as had deprived the defendant of that fair and impartial trial guaranteed to

him by the Constitution, and amounting to a denial of justice. *Parker v. State*, 24 Wyo. 491, 161 Pac. 552; *Omaha v. State*, 24 Wyo. 513, 161 Pac. 558.

In cases where the punishment imposed is less than capital, the general rule requiring that there be proper exceptions has been adhered to (*Dickerson v. State*, supra; *Loy v. State*, 26 Wyo. 381, 185 Pac. 796), except that in *Palmer v. State*, 9 Wyo. 40, 59 Pac. 793, 87 Am. St. Rep. 910, it was held that, where the instructions as a whole present an erroneous view of the law as applicable to the facts of the case, a general exception to the charge is sufficient.

We have examined and considered the charge of the court for the purpose of determining the questions (1) whether as a whole it presented an erroneous view of the law as applied to the facts, and (2) whether it may be said that all of any group of instructions to which defendant's exception may reasonably be considered to have been directed were erroneous. We find that both questions must be answered in the negative and therefore there is no exception in the record which would justify the discussion of any specific instruction. We repeat, the issues in the case were simple, and they were no doubt well understood by the jury. And in view of that and the convincing character of the evidence pointing to defendant's guilt, we are satisfied that the verdict was not the result of any erroneous statements in the instructions now criticized by counsel.

There remain for consideration some questions in regard to the sufficiency of the verdict, which reads:

"We, the jury, duly impaneled and sworn in the above-entitled case, do find the defendant, Annie Richey, guilty of stealing live stock, the property of, viz. 3 of Davidson Bros. and 1 of Lincoln Live Stock Company, as charged in the information, and we further find the value of the property stolen to be a total of \$200.

"H. E. Robinson, Foreman."

Without undertaking to decide whether any, and, if any, how much, of the verdict might be regarded as surplusage, we shall consider it as a whole to determine its sufficiency.

[13] A verdict must be construed with reference to the information and the trial, and if, when so construed, it be responsive to the issues, and the court can understand the true intent and meaning of the jury, it is good. *Ackerman v. State*, supra; *Long v. State*, 15 Wyo. 262, 88 Pac. 617; *People v. Patrick*, 277 Ill. 210, 115 N. E. 390; *Kendall v. State*, 183 Ind. 162, 105 N. E. 899.

It is contended that the verdict is defective in three particulars:

[14] First. That it refers to the crime as "stealing live stock" instead of stealing neat cattle. As neat cattle are live stock, and the only live stock mentioned in the

information or the evidence, there is no doubt that the jury intended to find the defendant guilty of the crime charged.

[15] Second. That the language, "3 of Davidson Bros. and 1 of Lincoln Live Stock Company" is indefinite. We think it too clear to require discussion that the language means "3 head" of the kind of live stock mentioned in the information and the evidence.

[16] Third. That the finding of a value of \$200 is insufficient to comply with the statute (section 7549, Wyo. C. S. 1920) requiring that the jury find and declare the value of the property. The dollar is the unit of value in this country, and the omission of the dollar sign or word "dollars" in a verdict does not render it indefinite. *Ex parte McLean*, 84 Kan. 852, 115 Pac. 647, 35 L. R. A. (N. S.) 653, and note. Here the jury not only omitted the dollar sign, but placed before the figures another sign, which we understand, when so used, signifies "number." However, we think it clear that the jury did not intend that that sign should have such meaning in this instance. The only evidence in regard to value tended to support the allegations of value in the information; that is, that the cattle were worth \$50 each. The statement of value in the verdict, if construed to mean \$200, is consistent with the undisputed evidence, and to construe it otherwise would be contrary both to precedent and common sense.

As we find no error in the record, the judgment will be affirmed.

Affirmed.

POTTER, C. J., and BLUME, J., concur.

HALL OIL CO. et al. v. BARQUIN et al. (No. 1041.)

(Supreme Court of Wyoming. Oct. 25, 1921.)

1. Appeal and error \Leftrightarrow 361(3)—Paragraph insufficient as assignment of error may be retained to aid the petition in error as to description of the judgment.

A paragraph preceding the assignments of error contained in the petition in error, which alleged that the court erred in rendering judgment for defendants in error, describing the judgment, though insufficient as an assignment of error as stating no proposition or point, might properly be considered as continuation of the former part of the petition preceding the specific assignments and to assist the petition in complying with Supreme Court rule 10, requiring the judgment to be described with reasonable certainty.

2. Appeal and error \Leftrightarrow 653(2)—Court on appeal cannot after bill of exceptions.

A bill of exceptions, when properly allowed, signed, and filed, becomes a part of the rec-

ord, and it is not within the province of the court on appeal to amend, alter, or strike from it.

3. Appeal and error \Leftrightarrow 732—General assignment that court erred in overruling motion for new trial brings up all questions.

Under Supreme Court rule 13 (104 Pac. xiii), that each matter presented by motion for new trial shall be sufficiently questioned in the Supreme Court, on error, by an assignment that the court below erred in overruling such a motion, all the grounds presented by the motion may be insisted on and considered by the reviewing court in a proceeding in error.

4. Appeal and error \Leftrightarrow 801(4)—Review on merits not to be had on motion to dismiss.

A motion to strike from the petition in error the assignments of error and dismiss, and to strike motions and recitals of rulings and orders from the bill of exceptions and to amend the bill, cannot avail the movant to secure rulings disposing of the cause, or partially so, on the merits.

Error to District Court, Fremont County; Ralph Kimball, Judge.

Action by James Barquin and another against the Hall Oil Company and others. Judgment for plaintiffs, and defendants bring error. Motion to strike assignments of error from the petition in error and dismiss and to strike motions and rulings from the bill of exceptions and to correct the bill. Motion denied.

John D. Clark, of Denver, Colo., and Hagens & Murane, of Casper, for plaintiffs in error.

John J. Spriggs, of Lander, for defendants in error.

POTTER, C. J. This cause is here on error, and has been heard on a motion of defendants in error expressing several objects, which may be grouped and stated as follows: (1) To strike from the petition in error each assignment of error and dismiss the proceedings; (2) to strike from the bill of exceptions certain motions and the recital of the ruling and order upon each of them and the exception thereto; (3) to correct the bill in certain other particulars.

It appears from the record that the action was brought in the court below by the defendants in error, as plaintiffs, against the four parties named as plaintiffs in error, as defendants, for the recovery of money as damages for alleged trespasses upon land; that there was a jury trial in said court resulting in a verdict on December 1, 1920, against three of the defendants for a stated sum as compensatory damages, and against each of said three defendants separately a further stated sum as punitive damages; and that on December 11, 1920, judgment was rendered upon said verdict against each of the said

three defendants. It further appears: that on December 2, 1920, said defendants filed a motion to set aside said verdict, stating as grounds therefor: (1) That the verdict for punitive or exemplary damages is not supported by sufficient or any evidence; (2) that the verdict for such damages is excessive and not justified upon any theory of the case; (3) that the verdict for compensatory damages is not supported by the evidence and is excessive; (4) that the verdict was received in the absence of said defendants and their attorneys, and the jury was discharged without an opportunity for defendants to have the jury polled. And by said motion it was further moved that an order be entered reserving the case for further argument and consideration and that the entry of judgment be withheld for that purpose. That on said second day of December, upon the suggestion of defendants, it was ordered that judgment be not entered until the further order of the court. That on December 11, 1920, said motion to set aside the verdict was overruled, which ruling was excepted to by defendants; said motion being referred to in the order overruling it as a motion "to set aside the verdict and for judgment notwithstanding the verdict." That on the last-mentioned date, also, the said three defendants filed separate motions for a new trial, with affidavits in support of the fifth ground, each stating, in substance, as grounds therefor: (1) Excessive damages appearing to have been given under the influence of passion and prejudice; (2) error in amount of recovery, same being too large; (3) that the verdict and decision is not sustained by sufficient evidence and is contrary to law; (4) errors of law occurring upon the trial and excepted to at the time by said defendants (the said alleged errors being separately specified and relating to the admission and exclusion of evidence, and the giving and refusing of instructions); (5) misconduct of the jury and error of law materially affecting the substantial rights of defendants in this, that the jury did not base its verdict as to punitive damages upon evidence but assessed such damages erroneously upon the basis of the wealth of defendants and a misunderstanding of the court's instruction upon the matter. And that on December 31, 1920, each of said separate motions for new trial was overruled, to which ruling the said defendants and each of them excepted. The motions aforesaid are embraced in the bill of exceptions, together with the said rulings thereon respectively and the exceptions thereto.

The three defendants against whom the judgment was rendered have filed in this court, in the same proceeding for the review of said judgment, separate petitions in error, but they are alike in form and substance, and may be referred to in the singular for the purpose of this discussion; and they are

so referred to in the motion under consideration, for it mentions only "the petition in error," though no doubt intended to apply to each of the separate petitions in its attack upon the assignments of error.

[1] The petition in error contains, in effect, only two assignments of error; the first alleging as error the overruling of the motion for new trial filed on December 11, and the second the overruling of the motion to vacate the verdict filed on December 2. And said motions, with the recital of the rulings thereon and the exceptions to said rulings, respectively, constitute the matter which the defendants in error, by their motion, seek to have stricken from the bill of exceptions. Said assignments of error are numbered, respectively, 2 and 3, and they are preceded by a paragraph numbered 1, which alleges that the court erred in entering judgment for defendants in error and against the plaintiff in error, and describes the judgment by stating it was made and entered on the 11th day of December, 1920, and otherwise identifying it. The defendants in error have understood that paragraph as the first assignment of error, and it is included in the motion to strike, though not on different grounds but for the same reasons that are stated for striking the paragraph numbered 2 and referred to as the second assignment, and it is not challenged as indefinite or insufficient in form or substance.

If that paragraph was intended as an assignment of error, we think it insufficient as such, for it states no proposition or point to be considered in determining whether or not there was error in rendering or entering the judgment, and does not specify or refer to any particular ruling relied upon as error to reverse the judgment. The object of an assignment of errors "is to point out the specific errors claimed to have been committed by the court below, in order to enable the reviewing court and opposing counsel to see on what points appellant or plaintiff in error intends to ask a reversal of the judgment or decree, and to limit discussion to those points." 3 C. J. 1329, § 1461. And it should directly and clearly allege error or errors of the trial court, and point out definitely and specifically the particular error or errors relied upon. *Id.* 1357, § 1504. But we would not be inclined to strike the paragraph from the petition in error upon the ground of its insufficiency as an assignment of error, even if it might be proper, upon motion and on that ground, to strike from a petition in error one among several paragraphs or clauses assigning error—a point which we need not decide. For said first numbered paragraph in error may properly, in our opinion, be considered as a continuation of the formal part of the petition preceding the specific assignments of error, alleging error generally in the proceedings and describing the judgment to be reviewed. That judgment is not described else-

where in the petition, and without such a description the petition would fail to comply with our rules requiring that a petition in error shall set forth each of the errors complained of, describing with reasonable certainty the cause wherein the errors are alleged to have occurred and the judgment or final order to be reviewed. Rule 10 (104 Pac. xii); *Commissioners v. Shaffner*, 10 Wyo. 181, 68 Pac. 14; *Riordan v. Horton*, 16 Wyo. 363, 94 Pac. 448. And since the petition in error contains in succeeding paragraphs assignments of error sufficient in form and substance, to which, and to which only, the points in the brief of plaintiffs in error are referable, it does not seem unreasonable to consider the paragraph aforesaid as above stated, whether or not it was intended also as an assignment of error. The motion as to that paragraph need not, therefore, be further considered.

The motion to strike the two paragraphs of the petition clearly intended to assign error is not based, as to either, upon the ground that they are insufficient in form or substance, but upon the ground, to state it generally, that they present no question that can be considered by this court. And the argument in support thereof is, in substance, that the motion for new trial filed on December 11, the overruling of which is assigned as error in the second numbered paragraph of the petition, was improperly filed, for the reason that, although filed within ten days after the verdict and therefore within the period allowed for filing a motion for new trial, it was, in effect, a second motion for a new trial not authorized by the statute; it being contended in that connection that the previous motion filed on the 2d day of December to set aside the verdict constituted a motion for new trial preventing the filing of a second motion on grounds not stated in the first motion, and, further, that the error, if any, in overruling the first motion assigned as error in the third numbered paragraph of the petition in error is waived, for the reason that it is not relied on in the brief, and, if we correctly understand the argument in another particular as to that motion, that the grounds therein stated challenging the verdict for excessive damages are insufficient under the statute because failing to allege that such damages were given under the influence of passion or prejudice. It may be stated here also that the motion, so far as it seeks to strike said motions to vacate the verdict and for a new trial from the bill, is based upon the same grounds and supported by the same argument, upon the theory, apparently, that if either motion was properly overruled for the reason or reasons suggested, or any ground thereof waived, it should be stricken from the bill, together with the recital of the ruling thereon and the exception. Thus the motion to strike the motions, rulings,

and exceptions from the bill is not independent of the motion to strike the assignments of error from the petition, but seems to be intended in aid of the latter purpose by eliminating from the record the rulings upon which error is assigned. Of course that would not be necessary to accomplish the said primary purpose of the motion, even if it would be proper for this court to strike the matter mentioned from the bill.

[2] But that would not be proper, whatever be the merits of the motion of defendants in error in other respects. The regularity of the presentation, settlement, and allowance of the bill of exceptions is not challenged by the motion, and it appears to have been timely presented, duly and regularly allowed, and properly filed. It ought not to be necessary to cite authority to show that a bill of exceptions regularly allowed and filed in the trial court cannot be amended, corrected, or in any manner changed by this, the appellate court. But it was said in *Commissioners v. Shaffner*, 10 Wyo. 181, 68 Pac. 14, that an objection that the recitals of a bill of exceptions are not true is not maintainable in this court, since a bill is to be settled in the trial court and not here. And in *Callahan v. Houck*, 14 Wyo. 201, 83 Pac. 372:

"When the bill of exceptions is signed by the trial judge and filed, it then becomes a part of the record, and can only be amended or corrected in the manner provided by law for the amendment or correction of any other part of the record. * * * Since the bill of exceptions when signed and filed becomes a part of the record, it can only be corrected or amended by the court where such record was made. No such power is vested in the appellate court."

And in *Le Clair v. Hawley*, 17 Wyo. 222, 98 Pac. 120, we said:

"A bill of exceptions, like any other record, appearing to be regular on its face, imports absolute verity, and is not impeachable in the appellate court by any evidence outside the record itself. * * * This court has no control over the records of any inferior court except in the exercise of its appellate or supervisory jurisdiction. It cannot settle a bill of exceptions taken upon a trial or proceeding in a district court, nor amend or correct one allowed in such court."

The bill recites that the motions above referred to, set out in full therein, were each filed and overruled, and the ruling excepted to, and also the date of the filing of each motion and the ruling thereon. It thus constitutes a record of these facts, and that was its purpose. It is provided for by statute for that purpose; and this court has no power to strike any part of it, the effect of which would be to make a record different from that made in the trial court. Under our statute and rules of practice, neither of the motions aforesaid are part of the record unless em-

braced in a bill of exceptions, and nothing which could have been properly assigned as ground for a new trial will be considered in this court unless it appears that the same was properly presented to the court below by a motion for a new trial, that such motion was overruled, and exception at the time reserved to such ruling, all of which must be embraced in the bill of exceptions. If it be claimed that the motion appearing in a bill was not filed in time, or was insufficient for any reason to present any matter or ground for a new trial, and was, therefore, properly overruled, that can be insisted upon in this court at the proper time, but it constitutes no reason for striking the motion or the ruling and exception from the bill of exceptions embracing such matters.

[3] What has been said is sufficient also to dispose of other parts of the motion under consideration, not above referred to, asking this court to strike out certain paragraphs of the motion for new trial stating grounds therefor. As indicated by the above general statement of the grounds of the motion to strike the assignments of error, it is sought thereby to have matters considered and determined that might properly be considered in disposing of the cause upon its merits. The general question upon the merits must be, in view of the specific errors assigned, whether or not the trial court erred in overruling either or both of the motions above mentioned and referred to respectively in the second and third numbered paragraphs of the petition in error. It is provided by our rules (rule 13 [104 Pac. xiii]) that each matter presented by a motion for a new trial shall be sufficiently questioned in this court, on error, by an assignment that the court below erred in overruling such motion. As to such a motion, therefore, where the adverse ruling thereon is assigned as error, all the grounds presented by the motion may be insisted upon and considered by this court in a proceeding in error; and it may involve the question whether the motion was filed in time, or whether a particular ground of the motion is based upon a proper exception, or is sufficiently stated, or states a cause for which a new trial may be granted under the statute, if found to be supported by the facts, or, generally, whether for any reason the motion was properly overruled. And these are questions proper to be considered upon a submission of the cause upon its merits. And that the questions now presented by the motion to strike the assignments of error and dismiss the proceeding might be presented and considered for the disposition of this cause upon the merits seems to be conceded. For it was stated in argument by counsel for defendants in error that the purpose of the motion is to eliminate certain questions from further consideration by having them disposed of by a decision upon the motion. And

it was argued in opposition thereto that the motion was prematurely seeking a decision disposing in part, if not wholly, of the merits of the cause.

[4] Where the record of a cause has disclosed that there was no motion for a new trial, or that no such motion was shown by a proper bill of exceptions, and it appeared that the question or questions submitted for determination here could not be considered in the absence of a motion for a new trial, the overruling thereof, and an exception thereto, embraced in a proper bill of exceptions, it has been our practice to dismiss the cause upon motion. But we have not gone so far as suggested by the motion in this case, which, as it seems to us, would result in disposing of the cause partially, at least, upon the merits. Nor has such a practice found favor with the courts. 4 O. J. 602, sec. 2426.

In *Waldo v. Schmidt*, 198 N. Y. 193, 91 N. E. 521, the court said:

"It is not our practice to entertain motions to dismiss appeals in part or to determine the precise questions brought up for review in advance of the argument of the case."

A motion to dismiss on the ground, first, that the court has no jurisdiction, and, second that the record presents only questions of fact for the court's consideration, where it was assigned as error that there is no evidence to support the finding and judgment, and the record showed a motion for new trial made and overruled and an exception to the ruling, was disposed of in *Edwards v. Griffiths*, 48 Ohio St. 664, 31 N. E. 742, by the court saying that whether the evidence supported the finding and judgment is a question of law and not of fact, that jurisdiction in a proceeding in error does not depend upon the merits of the assignments, and:

"Whether the assignments are well taken or not in no way affects the jurisdiction of the court to hear and determine them; and hence their sufficiency cannot be raised by a motion to dismiss on the ground of a want of jurisdiction."

And in *Kershner v. Trinidad Mill & Min. Co.* (N. M.) 189 Pac. 658, the court denied a motion to strike assignments, saying:

"The attack upon the assignments is in the form of a motion to strike them from the files. We do not deem this motion sufficient to search the record and to present the proposition that the error complained of had not been saved in the lower court, or that the evidence was considered by the court, or that there was no other substantial evidence to support the findings. Whether a demurrer or an exception would be a proper method of reaching such a question it is not necessary for us to determine in this case. But we feel free to say that a more satisfactory method of procedure is to take up the assignments as they are presented in the briefs, and there point out the fact that the er-

ror complained of in the assignment has not been properly saved in the court below, or is otherwise not available."

In *Blaisdell v. Steinfeld*, 15 Ariz. 155, 187 Pac. 555, where the cause appears to have been heard on the merits and also upon a motion to dismiss, the court, referring to the fact that the motion was, in part, to strike certain of the assignments of error, said:

"The practice of striking assignments that fail to conform with the rules of the court or with law has never been recognized by this court. According to rule 8 of the rules of this court, * * * 'an objection to the ruling or action of the court below will be deemed waived in this court, unless it has been assigned as error, in the manner' provided by the rules. An assignment so defective as to raise no question for this court to decide is as if no assignment had been made or attempted to be made, and any objection to the ruling or action of the trial thus made 'will be deemed waived.' No motion to strike is necessary, but objection may be made by calling the attention of the court to the defective assignment."

In a recently reported California case (*Smith v. Borgh*, 199 Pac. 1108), a motion to dismiss on the ground that the record disclosed that neither of the two questions raised by the exceptions could be considered by the court was denied; the court holding that the points made by the motion were matters to be considered in disposing of the appeal upon its merits.

In support of the motion to strike the so-called second assignment of error, which complains of the ruling upon the motion for a new trial filed on December 11, counsel relies upon the statement in section 2727 of *Thompson on Trials* (2d Ed.), that "it has been held that, after an adverse decision of a motion for a new trial, the moving party has no right to file another motion, for the matters embraced in the motion have become res adjudicata," and decisions cited, which, it is claimed, establish a rule to that effect. But it is said in the same section that—

"While a second motion cannot be made on the same ground, it may be made on a different ground, not known or knowable until the original motion was ruled upon, or where good reasons are shown for not incorporating the ground in the first motion."

And it appears in this case that one of the grounds of the later motion not contained in the first is misconduct of the jury with respect to the assessment of punitive damages, in support of which affidavits were filed with the motion, for the purpose, apparently, of showing that the jury acted upon a misunderstanding of the court's instruction as to the rule or basis for assessing such damages. We are not disposed at this time to enter upon a consideration of that question, or the question as to the right to file the second motion on that or any other ground, but we refer

to it merely as suggesting a matter which might require consideration in determining whether all the grounds of the motion were known or knowable, so as to prevent their inclusion in a second motion, if the first motion should be held to have been in legal effect a motion for a new trial, as to which counsel disagree, and it should be held also that a second motion for a new trial is forbidden or not authorized by the statute, which we do not understand to be conceded.

Upon a consideration of the merits of the appeal, however, it may be found unnecessary to consider any of those questions, or even the point challenging the second motion as improperly filed; and therefore, so far as we can now say, it is possible that a consideration of the questions presented in support of the motion to strike and dismiss, without waiting for a hearing upon the merits, might involve a determination of matters not necessary to a final disposition of the cause upon this proceeding in error. And that may be said also with respect to the points made against the first motion filed on the 2nd day of December.

We think it incontestable that a consideration of the questions now presented as to the two motions aforesaid must involve a consideration of the merits of the cause upon the proceeding in error, for the motion to strike and dismiss does not attack the proceeding as insufficient to invoke the jurisdiction of this court to review the judgment upon the errors assigned, or that the record contains nothing upon which the alleged errors can be considered. But what the court is really asked to do by said motion is to consider the assigned errors and the rulings complained of, for the purpose of determining whether or not said rulings were proper and should be sustained upon the grounds suggested by and in support of the motion. And while those grounds relate to matters of procedure in the court below, they would, if now considered, require a decision either sustaining the rulings or declaring one or both of them not sustainable upon the suggested grounds alone; and in the latter contingency the cause would remain here for further consideration of the same assignments of error, or at least, of the one not finally disposed of by the decision. By the same course of procedure the court might be called upon in any case to grant several hearings upon the merits, the number of points to be considered at any one hearing to rest entirely within the desire and control of the moving party. We are not inclined to adopt any such practice.

A consideration of the questions now presented by the motion might require an examination of the brief of plaintiffs in error to ascertain whether or not any ground of their first or second motion had been waived, as well as a consideration of the several grounds of the first motion, if not the second, to deter-

mine whether any statutory ground for new trial was stated therein, or any ground relied on in the brief sufficient to require a setting aside of the verdict. Whatever the power of the court to determine any such question at this stage of the proceeding upon the motion to strike and dismiss, or however advantageous it might be to the moving party to have a partial decision of the cause at this time, we think it clear that the better practice is to require that the objections now urged against the assignments of error be presented at a hearing upon the merits, when all the pertinent questions can be considered. The points made in support of the motion are not strictly grounds for dismissal, but suggest matters for consideration in adjudging an affirmance or reversal of the judgment.

The concluding part of the motion above referred to as moving to correct the bill of exceptions in certain particulars is sufficiently answered by what has been said as to the absence of power in this court to correct or amend a bill.

For the reasons aforesaid the motion will be denied.

Motion denied.

BLUME, J., concurs.

KIMBALL, J., did not sit.

HINES, Director General of Railroads, v. SWEENEY. (No. 1007.)*

(Supreme Court of Wyoming. Oct. 3, 1921.)

1. Railroads §372(1)—Rate of speed constituting negligence.

In the absence of legislation to the contrary, no rate of speed, though great, is, in thinly populated districts, ordinarily negligence per se.

2. Master and servant §137(4)—Trackmen under primary duty to keep lookout.

Upon track workers rests the primary duty of self-preservation in line of their employment by keeping a lookout for and avoiding trains.

3. Master and servant §137(4)—Engineer may assume trackman will keep lookout.

An engineer is not bound generally to stop or check his train as a precaution against injury to trackmen, and has the right to act on the presumption they will look out for their own safety.

4. Master and servant §244(3)—Warned trackmen must act with reasonable promptness for their safety.

Trackmen are only entitled to sufficient warning of the approach of a train and an opportunity to get out of the way, and, if given such warning and opportunity, it is their duty to act with reasonable promptness for their own safety.

5. Master and servant §137(4)—Railroad's duty to trackmen stated.

Track workers are not trespassers, and it is the railroad's duty to use reasonable care in the operation of trains so as to protect them from injury, in such way as the conditions demand.

6. Master and servant §137(4)—Duty of engineer warned of trackmen's presence stated.

When an engineer is warned that trackmen are ahead and apt to be in danger, he must take notice thereof and exercise that reasonable care which the circumstances demand, and put his train under such control that he may stop it should necessity appear.

7. Master and servant §286(31)—Engineer's negligence in not anticipating collision with motorcar carrying trackmen held for jury.

Where an engineer was warned that a motorcar carrying trackmen was just ahead, the nature of the warning, speed and control of the train, engineer's knowledge of road, proximity to a cut where the train might meet up with the motorcar, are circumstances that warrant a finding by a jury that a collision whereby a trackman was killed should have reasonably been anticipated by the engineer, and an instruction that, if sufficient time was given deceased to get off the track in safety, then the engineer was not negligent as a matter of law, was too favorable to defendant.

8. Evidence §75—Unexplained nonproduction of speed recorder justifies conclusion that speed was greater than testimony shows.

Where a railroad might have produced its speed recorder and did not do so, a conclusion that the speed was greater than was shown by the testimony of witnesses on that point is justified.

9. Master and servant §286(31)—Engineer's negligence as to trackmen question for jury.

The care or negligence of an engineer depending upon the rate of speed of his train, after a warning of motorcar carrying trackmen just ahead, and the fact as to whether he could stop within a reasonable distance, are for the jury.

10. Negligence §101—Under federal act, contributory negligence, though great, is no defense.

Under federal Employers' Liability Act, § 8 (U. S. Comp. St. § 8659), providing that contributory negligence of an employé shall diminish the damages in proportion to the amount of the negligence attributable to him, a railroad company is liable for injury to its employé if its negligence contributes proximately to the injury, no matter how slightly and no matter how great the negligence of the employé, and is absolved from liability only when the employé's act is the sole cause of the injury.

11. Master and servant §228(1)—Federal act cannot be nullified by calling contributory negligence proximate cause.

Federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8685), providing that employé's negligence is not a defense, but only

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied 201 Pac. 1013.

mitigates the damages, cannot be nullified by calling the act of an employé the proximate cause of the injury instead of contributory negligence, if the injury was caused in whole or in part by employer's negligence.

12. Negligence ⚡62(1)—Intervening agency must be independent of original negligence.

An intervening agency, in order to supersede the original negligence of defendant as the sole legal cause, must be independent of the latter, and not set in motion thereby, and itself sufficient to produce the injury.

13. Master and servant ⚡285(11)—Proximate cause of injury to trackman under motorcar struck by train held for jury.

Where an engineer was warned that a motorcar carrying trackmen was just ahead, and in passing over a curve in a cut at a speed of about 20 miles an hour he discovered the car about 990 feet away, when he applied the brakes and stopped within about 1,000 feet, but struck the car and the motorman who had fallen under it in attempting to escape, *held* that it was a question for the jury as to whether the negligent speed of the train was the proximate cause or one of the proximate causes of the injury, the jury being warranted in finding the injury was within the field of reasonable anticipation.

14. Negligence ⚡72—Care required in emergency.

The rule that one who is required to act suddenly and in the face of imminent danger is not required to exercise the same degree of care as at other times has application where the person injured is placed in sudden peril without his fault.

15. Negligence ⚡141(7)—Instruction on care in emergency held incorrect.

An instruction that one who acts in a sudden emergency, not being held to the same degree of care for his own safety as at other times, was properly refused for not stating that the emergency arose without the fault of the plaintiff.

16. Master and servant ⚡289(26)—Contributory negligence of trackman on motorcar struck by train question for jury.

Negligence of trackman on motorcar in starting out ahead of a train after warning not to proceed is not eliminated from case by notice to engineer that the trackman was ahead, and is proper question for jury.

Error to District Court, Sheridan County; James H. Burgess, Judge.

Action by Lucy Sweeney, administratrix of the estate of John C. Sweeney, deceased, against Walker D. Hines, Director General of Railroads. Judgment for plaintiff, motions for new trial made by both parties denied, and defendant brings error, and plaintiff files cross-petition in error. Affirmed.

Goddard & Clark, of Billings, Mont., and Charles A. Kutcher, of Sheridan, for plaintiff in error.

Brome & Hyde, of Basin, and E. E. Enterline, of Denver, Colo., for defendant in error.

BLUME, J. This action was brought by the administratrix of the estate of John C. Sweeney, deceased, as plaintiff, on account of the death of said deceased by a train of plaintiff in error, defendant below, which was alleged to have been run at a dangerous and negligent rate of speed. For convenience the parties will be hereinafter referred to in the same order as in the court below. The evidence is nearly undisputed, and in giving the material facts we shall closely follow the lucid statement contained in the brief of counsel for defendant.

On May 15, 1918, and for some time prior thereto, the deceased, a man then 35 years of age, was engaged as section foreman on the railroad of defendant. The section upon which he was employed was situated in Campbell county, Wyo., and extended from a small station called Felix to Echeta, which was about 6 or 7 miles west of Felix. He resided at Echeta where he returned each day after his labors were finished. His duties required him to superintend a gang of section laborers engaged in the work of repairing track. For this purpose he had a gasoline motorcar, which carried him and his men to and from their work.

On the day in question, the deceased, with his four men, all of whom were Mexicans, after finishing the work on the track about 5 o'clock in the afternoon, and after adjusting or filling some switch lights, drove the motorcar to the station at Felix, and inquired of one Mooney, the station agent, concerning the passenger train coming from the east, and was informed by Mooney that the train was past due, and would arrive at any moment. Upon Sweeney intimating that he intended to start for Echeta ahead of this train, he was admonished by Mooney, as well as by Mooney's father, who was present, not to go. Notwithstanding this advice and warning, the deceased started with his men on the motorcar for Echeta.

To the east of Felix a train could be seen coming for a distance of 1½ miles. A fourth of a mile to the west of Felix was a cut, curving sharply to the right. The cut is nearly a fourth of a mile in length. The deceased was killed at a point about 1,350 feet from the east end or mouth of the cut, apparently only a short distance from the west end thereof. From this point to the place where the engineer, when in the cut could first see the motorcar on the track was about 900 to 990 feet.

After Sweeney started from Felix and had proceeded a short distance, but before he reached the cut, the agent, Mooney, observed the passenger train approaching from the east. He thereupon, in an effort to signal and stop Sweeney, went out on a knoll or

elevation near by, and tried to signal for Sweeney to stop, and continued to do so until Sweeney entered the cut to the west of Felix and went out of sight. He failed to attract Sweeney's attention, Sweeney and his men apparently never looking back after they started towards the cut. Thereupon Mooney went to the station, wrote upon a piece of paper the words "Motorcar just ahead," and, when the engineer of the passenger train passed the station (the train not stopping), handed this paper to the engineer. This warning, as the engineer testified, meant to him that he was to use extra precaution.

This passenger train was a mixed train, consisting of an engine, 8 box cars filled with household goods, 1 baggage coach, and 8 passenger coaches filled with passengers. The train approached Felix from the east at about 40 miles per hour, and the engineer checked the speed upon approaching Felix until the train was traveling at about 28 or 30 miles per hour in passing Felix. By the time the engineer had read the note he was past Felix and near the east end of the cut. He immediately, according to his testimony, which is corroborated by other witnesses, applied his brakes, reducing the speed to 18 or 20 miles per hour, sounded the whistle, and after entering the cut again sounded the whistle, keeping at all times a careful lookout ahead. He discovered the motorcar on the track when about 900 to 980 feet distant from it, but testified that he saw no men on or near the motorcar, or on the track, and that he did not know that Sweeney was pinned beneath the car. He saw, however, several men on the side of the track. Then he immediately put on the emergency brakes, applied sand to the track, blew the whistle, and did everything in his power to stop the train and to avoid a collision. Before the train could be stopped, however, it collided with the motorcar and threw it, together with Sweeney, who was found to have been caught beneath it, off the track. The engine ran about three car lengths past the point where the collision occurred before stopping.

Sweeney, in going toward Echeta, drove the motorcar himself. After he had gone some distance west of the cut, he discovered the approaching train in the cut back of him. It was a clear day, and still daylight. As soon as Sweeney discovered the passenger train approaching, he apparently became excited and failed to apply the brake, but opened the throttle, thus accelerating the speed of his engine. He went, it seems, about 66 feet further, then apparently jumped off in front of the car, was knocked down by it, and pinned beneath it on the track. He was unable to extricate himself, and called to the men to help him. These men had safely jumped off the car to one side immediately upon seeing the train. One of them went to the assistance of Sweeney, but

was unable alone to lift the car off the deceased, and he thereupon crossed the track to the north side in order to signal the engineer and gave the stop signal, but the train was then almost upon them, and immediately thereafter the deceased was run over by the train and so severely injured that he died within a few hours thereafter. A few other facts will be stated later in the opinion.

The defendant moved for a directed verdict both at the close of plaintiff's testimony as well as at the close of all the evidence, both of which motions were overruled. The jury returned a verdict for plaintiff in the sum of \$3,425.54, upon which judgment was entered. A motion for a new trial was filed by both parties; both motions were overruled, and the case is here on petition in error of defendant and upon cross-error of plaintiff. The only point raised by defendant is that under the evidence the lower court should have directed a verdict in its favor, and seeks to have judgment for it entered in this court under the provisions of section 5897 of the statutes of 1920.

[1, 2] 1. In the absence of legislation to the contrary, no rate of speed, though great, is, in thinly populated districts, ordinarily negligence per se. *Elliott on Railroads*, § 1180; *Railway Co. v. Carter*, 180 Ky. 765, 203 S. W. 740; *Warner v. Railroad Co.*, 44 N. Y. 465; *Dyson v. Railroad Co.*, 57 Conn. 9, 17 Atl. 137, 14 Am. St. Rep. 82; *Railroad Co. v. Kistler*, 66 Ohio St. 326, 64 N. E. 130. The main duty of an engineer in charge of a passenger train is to look after the safety of the passengers. The needs and conditions of the times and the people demand speedy conveyance, and in order to maintain that speed, and safely and properly operate the trains, the railroad company employs track workers and section men. These men are necessarily engaged in a hazardous occupation, and it is their duty to see that the purpose of their occupation is fulfilled. Hence, upon them rests the primary duty of self-preservation in the line of their employment, by keeping a lookout for, and avoiding, trains which pass along the tracks on which they are at work. *Tober v. Railroad Co.*, 210 Mich. 129, 177 N. W. 385; *Connelly v. Railroad Co.*, 201 Fed. 54, 119 C. C. A. 392, 47 L. R. A. (N. S.) 867; *Hoffard v. Railway*, 138 Iowa, 543, 110 N. W. 446, 16 L. R. A. (N. S.) 797. As to them the railroad company will generally not be negligent if the trains are operated in the ordinary way.

[3] An engineer is not bound, generally, to stop or even to check, his train as a precaution against injury to persons working on the track, and he has the right to act upon the presumption that they will look out for their own safety. *Hoffard v. Railway*, supra; *O'Brien v. Railroad*, 210 N. Y. 96, 103 N. E. 895; *Connelly v. Railroad Co.*, supra; *Ingham v. Railway Co.*, 182 App.

Div. 112, 169 N. Y. Supp. 846; *Sierzchula v. Railway Co.*, 209 Ill. App. 15. Many cases go even to the extent of holding that no duty to look out for them ordinarily devolves upon the railroad company. *O'Brien v. Railroad*, supra. And see cases collated in *L. R. A.* 1916F, 555, 564.

[4, 5] In any event, a man working or walking on the track is, ordinarily, only entitled to sufficient warning of the approach of trains and an opportunity to get out of the way before the train reaches him, and if he is given such warning, and an opportunity to escape, it becomes his duty to act with reasonable promptness for his own safety. *Olsen v. Railway Co.* (S. D.) 182 N. W. 454; *Vizacchero v. Rhode Island Co.*, 26 R. I. 392, 59 Atl. 105, 69 L. R. A. 188. The track workers and section men, however, are not trespassers. There is some duty that is owing them. The foregoing cases, therefore, but interpret and apply, and by no means abolish, the fundamental rule, never to be lost sight of, that upon the railroad company, as in like cases upon every master, devolves the duty to use reasonable care and precaution in the operation of its trains, so as to protect from injury in such way as the conditions demand the persons working upon and rightfully upon its tracks. This principle has been frequently, and we think uniformly, applied in cases where the presence of these men was known or was to be anticipated, the specific care in each case depending upon the circumstances. 33 Cyc. 809; *Railroad Co. v. McCaskell*, 118 Miss. 329, 79 South. 817; *Hunsaker v. Coal & Iron Co.*, 181 Ky. 598, 205 S. W. 612; *Brightwell v. Lusk*, 194 Mo. App. 643, 189 S. W. 413; *Hoffard v. Railway*, supra; *Bennett v. Railway Co. (Iowa)* 174 N. W. 798; *Grow v. Railroad Co.*, 44 Utah, 160, 138 Pac. 398, Ann. Cas. 1915B, 481; *Tober v. Railroad Co.*, supra. In *Railroad Co. v. McCaskell*, supra, the court said:

"But the plaintiff has room to contend that the railroad company owed him the same duty which it owed to every other person lawfully on the right of way, and as stated by the Supreme Court of Arkansas in *St. Louis, I. M. & S. R. Co. v. Neeley*, 63 Ark. 636, 40 S. W. 130, 37 L. R. A. 616, 'the railroad company owed him the duty to employ reasonable care to avoid injuring him.'"

In *Hunsaker v. Coal & Iron Co.*, supra, the court said:

"So, if the Ashland Coal & Iron train crew from the circumstances should have anticipated the presence of Hunsaker or other persons on or near the cars standing on track No. 5, then it was the duty of that crew to sound a warning or maintain a lookout ahead and to guard against injury to such persons."

In *Tober v. Railroad Co.*, supra, the court said:

"Although it was primarily plaintiff's duty when working upon the tracks to look out for his own safety and keep out of the way of passing engines or trains, and the duty imposed upon defendant in its switching operations with reference to yard employees or section hands working upon the track was much less in degree than as to others, there was yet a concurrent or secondary duty to carry on the yard work with reasonable speed, caution, and care for the safety of all employees at work in the yard, according to existing conditions."

In the case at bar the engineer received a note stating, "Motorcar just ahead," which the engineer testified signified to him that he was to use extra precaution. The question therefore arises as what particular care he should have used under such circumstances. The cases nearest in point which we have been able to find are *Railroad Co. v. Evans*, 170 Ky. 536, 186 S. W. 173, and *Railway Co. v. Jones' Adm'r*, 171 Ky. 11, 186 S. W. 897. In both of these cases a signal was given that repair men were ahead on the track. We do not think that, because the signals in these cases were apparently entirely ignored, and there are many facts in these cases differing from those in the case at bar, the general rule there laid down as to the duty of the engineer in case such signal is given is in any way affected thereby. That rule was stated in the *Evans Case*, supra, as follows:

"It was also the duty of the engineer in charge of the train, if he was warned some distance before reaching the hand car that it would likely be on the track, to keep a sharp lookout for its presence and to have the train under such control as that it could be stopped within a reasonable distance."

And in the second case above mentioned the court said:

"It does not appear that the engineer had any knowledge of the presence of the section hands upon the road at the point where they were, but he should have operated the train cautiously, kept a lookout, and the train under control, so as to have been able to have stopped it if the necessity appeared."

[6] Under the holding of these cases, whenever a warning is given to the engineer in charge of a train that trackmen are ahead, and apt to be in danger, he must take notice thereof, and must exercise that reasonable care which the circumstances in each case and the character of the warning demand. He must put his train under such control that he may stop it, should necessity appear. As to the exact extent of such control, and what may be the reasonable distance in which the train should be able to be stopped, will depend, of course, upon the particular circumstances of each case.

[7] If these principles are applicable in this case, as we believe they are, then in-

struction No. 14, given in this case by the court below, wherein the jury were instructed that, if sufficient time was given Sweeney to get off the track in safety, then that the engineer was not negligent as a matter of law, was an instruction more favorable to the defendant than that to which it was entitled. No greater requirement, as we stated before, could in the ordinary case be made of the engineer than indicated in that instruction, and often the court may so hold as a matter of law; but we cannot do so in this case any more than was done in the Kentucky cases, particularly in view of the peculiar warning given in this case. The facts in a particular case may require greater care. The warning given in the case at bar was more precise, more emphatic, than that given in the Kentucky cases cited above. "Motorcar just ahead" might well be held by the jury to have meant that it was immediately ahead, requiring instant, effective action to avoid injury. The note containing this warning was not official and out of the ordinary. When it was handed to the engineer, it must have conveyed to him knowledge that the station agent was greatly apprehensive of a collision, offsetting, as it might do, in the minds of the jury the presumptions in which the engineer was ordinarily entitled to indulge. The train was late, conveying to him the knowledge that the men on the car ahead might consider themselves safe, or at least that they might be oblivious to danger. He, as a man of experience, might well be held to know that the motorcar, in traveling, makes such noise as to make it difficult for those traveling thereon to hear the whistle of the engine. He knew the cut was just ahead of him; the track was curved; the men on the motorcar could not see the train; they did not have the same means of taking steps for their own protection as they would have in case of a straight track with an unobstructed view thereon. The person in control of the train did not know but what they might be but a short distance from him when he would arrive at the point where he could see them. Under these circumstances, we cannot say as a matter of law that the jury were unwarranted in finding that a collision should reasonably have been anticipated by the engineer. And if an injury of some character should have been reasonably anticipated by him, then that fact may be decisive of the question of negligence. *Christianson v. Railway Co.*, 67 Minn. 94, 69 N. W. 640; *Hill v. Winsor*, 118 Mass. 251; *Railway Co. v. Whitehurst*, 125 Va. 260, 99 S. E. 569; *Railway Co. v. Stepp*, 164 Fed. 785, 90 C. C. A. 431, 22 L. R. A. (N. S.) 350.

We shall consider the element of reasonable anticipation more in detail when we

come to the question of proximate cause. Though not necessary to be taken into consideration in our holding, we might call attention to the fact that the testimony showed that the engine on the day of the accident in question was equipped with a speed recorder, under the control of the railroad company. This recorder was not produced in court, and its nonproduction not explained. The testimony given by the railroad employees was to the effect that the speed of the engine in going through the cut was reduced to 18 or 20 miles an hour. The speed recorder, no doubt, would have shown beyond cavil what the speed actually was. The jury are the judges of the weight of the evidence. The rate of speed at the station of Felix, which at that place was about 30 miles an hour, was some evidence of what the rate of speed might have been in the cut. *Kirby v. Railroad Co.*, 63 S. C. 494, 41 S. E. 785. See, also, *Laufer v. Traction Co.*, 68 Conn. 475, 37 Atl. 379, 37 L. R. A. 533.

[8] It is not unlikely that, in view of the unexplained nonproduction of the speed recorder, the jury may have believed that the speed in the cut was, perhaps, greater than that shown by the testimony of the witnesses on that point, and there can be no question that they had the right to come to such conclusion under the circumstances. *Railway Co. v. Ellis*, 54 Fed. 481, 4 C. C. A. 454; *Studebaker Bros. Co. v. Witcher* (Nev.) 199 Pac. 477, 478.

[9] Practically the only protection in the power of the engineer in this case, after the motorcar passed into the cut, was to have his train under control. Upon the rate of speed largely depended his care or negligence, and the fact as to whether or not he could stop his train within what the jury would consider a reasonable distance. Shall this court say as a matter of law that 20 miles an hour was not, under the circumstances, negligent, and that the jury were bound to fix the reasonable stopping distance of the train by that rate of speed? If 20 miles, why not 25 or 30 miles? Where, in other words, would counsel have us fix the dividing line where the province of the jury ends and that of the court begins? The question itself suggests the difficulty, and we believe that we would invade the province of the jury if we should say that the rate of speed shown in this case was not negligent as a matter of law. In the case of *Railway Co. v. Ellis*, supra, the court said:

"The presumption is that jurors are reasonable men, and that the trial judge is a reasonable man, and when the judge and jury who tried the case concur in the view that the evidence established negligence, every presumption is in favor of the soundness of that conclusion. The whole fabric of our judicial system is grounded on the idea that jurors are better judges of the facts than the judges."

In *Kirby v. Railroad Co.*, supra, the court held that, whether any rate of speed shows negligence, is a question for the jury, and that the court should not instruct the jury that a given speed does or does not constitute negligence. Whether this is universally true need not be decided. It has, however, been often held that whether a rate of speed is negligent, and as to what constitutes reasonable care, is ordinarily a question for the jury. *Elliott*, supra, § 1100; 33 Cyc. 792, 902; 29 Cyc. 634-636. Even though the facts are undisputed, still, if more than one inference can be drawn therefrom, the question of negligence is for the jury. *Water Co. v. Towage Co.*, 99 Me. 473, 485, 59 Atl. 953. In the foregoing discussion we have not at all overlooked the contributory negligence, if any, of the deceased, but have mainly considered whether, in any view of the case, some negligence might be ascribed by the jury to the defendant. We think there was no error in submitting this question to them.

[10, 11] 2. Defendant further contends that its negligence, if any, is not the proximate cause of the injury, but that the accident of deceased in being pinned under the motorcar, brought about by his own negligence, was the proximate cause. We must, at the outset, bear in mind that this action comes within the federal Employers' Liability Act of April 22, 1908 (U. S. Comp. St. §§ 8657-8665) which in section 3 (section 8659) provides that contributory negligence of the employee is not a bar to recovery, but that his negligence shall diminish the damages in proportion to the amount of negligence attributable to him. Under this act the railroad company is liable, if its negligence contributes proximately to the injury, no matter how slightly, and no matter how great may be the negligence of the employee. It is only when the employee's act is the sole cause of the injury that the railroad company is absolved from liability. *Union Pac. R. R. Co. v. Hadley*, 246 U. S. 330, 38 Sup. Ct. 318, 62 L. Ed. 751; *Grand Trunk W. Ry. Co. v. Lindsay*, 233 U. S. 42, 34 Sup. Ct. 581, 58 L. Ed. 838, Ann. Cas. 1914C, 168; *Pennsylvania Co. v. Cole*, 214 Fed. 948, 131 C. C. A. 244; *Railroad Co. v. Niebel*, 214 Fed. 952, 131 C. C. A. 248. If the injury was caused in whole or in part from the company's negligence, the statute cannot be nullified and the recovery defeated by calling the act of the employee the proximate cause of the injury, instead of contributory negligence. *Railroad Co. v. Campbell*, 217 Fed. 518, 133 C. C. A. 370; *Railroad Co. v. Wene*, 202 Fed. 887, 121 C. C. A. 245; *Grand Trunk W. Ry. Co. v. Lindsay*, supra. There may be more than one proximate cause of an injury (*Hellan v. Laundry Co.*, 94 Wash. 683, 163 Pac. 9), and the negligence of the employee, even if one of the proximate causes, would no more defeat the action under this statute than would

an efficiently concurring negligence of a third person in the ordinary common-law action, in which case it is well settled that both parties may be held responsible, even though the negligence of one arises subsequent to that of another (29 Cyc. 497; *King v. Steel Co.*, 177 Ind. 201, 96 N. E. 337, 97 N. E. 529; *Carlock v. Railroad Co.*, 55 Colo. 146, 133 Pac. 1103; *Merrill v. Gas & Elec. Co.*, 158 Cal. 499, 111 Pac. 534, 31 L. R. A. [N. S.] 559, 139 Am. St. Rep. 134).

[12] In the case at bar, the negligent acts of the deceased, if any, at the time of stopping his motorcar, came subsequent to the commencement of the negligence of the defendant, and might be termed an intervening agency. But an intervening agency, in order to supersede the original negligence of the defendant as the sole efficient legal cause, must be independent of the latter, and not set in motion thereby, and must be in and of itself sufficient to produce the injury. *Lemos v. Madden et al.*, 200 Pac. 791, recently decided by this court. 22 R. C. L. 133, 134.

[13] We do not believe that it can be said that the accident of the decedent with the motorcar was entirely independent of the negligence of the defendant. The train was the immediate instrument of death; its rapid approach was bound, in the nature of things, to have more or less immediate, direct influence upon the deceased in his attempt to escape. And the situation here is somewhat akin to that found in *Union Pac. R. Co. v. Hadley*, supra, where it was claimed that the negligence of the plaintiff was the proximate cause of the injury, and where the court said:

"But if the railroad company was negligent it was negligent at the very moment of its final act. It ran one train into another when if it had done its duty neither train would have been at that place. Its conduct was as near to the result as that of CREDIT. We do not mean that the negligence of CREDIT was not contributory. We must look at the situation as a practical unit rather than inquire into a purely logical priority. But even if CREDIT's negligence should be deemed the logical test, it would be emptying the statute of its meaning to say that his death did not 'result in part from the negligence of any of the employees' of the road."

In the case at bar the motorcar under which the deceased was pinned was about 900 to 990 feet beyond the point where the engineer could see it. The train was stopped within about 1,000 feet after the engineer saw the car, and the jury could have found that, if the speed of the train had been such as, in their judgment, ordinary care under the circumstances required, the deceased might have escaped being killed. Under such circumstances, it is ordinarily, as we think it was in this case, for the jury to say as to whether the negligent speed of the train is

the proximate cause, or one of the proximate causes, of the injury. 33 Cyc. 902, 1312; Railroad Co. v. Mochell, 193 Ill. 208, 61 N. E. 1028, 86 Am. St. Rep. 318; Crowley v. Railway Co., 65 Iowa, 658, 20 N. W. 467, 22 N. W. 918; Pasternak v. Railway Co., 170 Mo. App. 663, 157 S. W. 109; Texas Elec. Ry. v. Whitmore (Tex. Civ. App.) 222 S. W. 644; Traction Co. v. Apple, 34 App. D. C. 559; Evans v. Railway Co., 92 S. C. 77, 75 S. E. 275; Butler v. Railway Co., 90 S. C. 273, 73 S. E. 185.

3. Counsel for defendant, however, contend that the accident to plaintiff in being pinned under the motorcar was so unusual and extraordinary that it could not have been reasonably anticipated, and they appeal to the oft-stated rule that an injury, in order to be attributable to an act of negligence as the proximate cause, must be the natural and probable result thereof, and such as to have been reasonably anticipated. Anticipation of some injury is a necessary element in establishing negligence (R. Co. v. Wright, 183 Ky. 634, 210 S. W. 184, 4 A. L. R. 478), and, according to the prevailing rule (though contested in some jurisdictions; e. g., Railway Co. v. Whitehurst, supra), it is also a necessary element in establishing the proximate cause of an injury (22 R. C. L. 120). But it is also, further, the universally accepted doctrine, from which no court has dissented, that it is not necessary that the precise injury, or the particular manner or conditions under which it occurred, should have been anticipated, and all that is necessary is that an injury of some character could have been reasonably anticipated. 29 Cyc. 495; 22 R. C. L. 125. In Railway Co. v. Carlin, 111 Fed. 777, 49 O. C. A. 605, 60 L. R. A. 462, the court said:

"It must be conceded that the injury for which the action is brought occurred in an extraordinary and unusual manner. Just such an occurrence was not to be anticipated. * * * The fact that it happened to cause the injury in a manner so unusual that it was not to be expected cannot prevent the act from being negligent when it was likely to cause injury in a way that might be foreseen."

In the case of Walmsley v. Telephone Ass'n, 102 Kan. 139, 169 Pac. 197, the injury occurred through an accidental discharge of a gun, under peculiar circumstances which could not have been anticipated. The court said:

"That somebody would be shot through defendant's negligence would not have been anticipated. But the law does not say that if the particular injury arising from the negligence cannot be anticipated a recovery cannot be had. That some damage, some injury, would probably arise from the existing negligence, and that it could reasonably have been expected, is all that the law requires to justify a recovery."

The numerous cases cited in the notes to 29 Cyc. 495, as brought down to date, illustrate in various ways the application of the principle there stated, and also show that the application thereof is not entirely uniform. See Lawrence v. Ice Co., 119 Mo. App. 316, 330, 93 S. W. 897. But it is unnecessary to say what this court would do in a case where consequences of an unusual character were involved, different from those existing in this case. While the particular injury occurring in this case might not have been reasonably anticipated, we think the jury were warranted in finding that it was not beyond the field of reasonable anticipation that injury might occur to the occupants of the motorcar. It would not, we think, make any difference in this case, in determining the proximate cause of the injury, whether the plaintiff was negligent in the management of the motorcar, whereby he was pinned beneath it, or whether it was a pure accident for which neither party was responsible; if he was guilty of negligence, that would in this case only reduce the amount of his damages.

Accidents of a similar nature have frequently been passed on by the courts. Christianson v. Railway Co., supra, Coel v. Traction Co., 147 Wis. 229, 133 N. W. 23, Pasternak v. Railway Co., supra, McDermott v. Railroad Co., 87 Mo. 285, Crowley v. Railway Co., supra, are railroad cases, the first two expressly holding that an accident such as happened in the case at bar is within the field of reasonable anticipation. In the Pasternak Case the brake on a motorcar failed to work. Other cases of accidents, where the plaintiff stumbled and fell, but not in railroad cases, are Winchel v. Good-year, 126 Wis. 271, 105 N. W. 824; Davis v. Lumber Co., 164 Ind. 413, 73 N. E. 899; Hartman v. Envelope Co., 71 Misc. Rep. 30, 127 N. Y. Supp. 187; Ziehr v. Paper Co., 28 Ohio Cir. Ct. R. 342; Harvell v. Lumber Co., 154 N. C. 254, 70 S. E. 389; Espenlaub v. Ellis, 34 Ind. App. 163, 72 N. E. 527; Musick v. Packing Co., 58 Mo. App. 322; Finkle v. Lumber Co., 148 App. Div. 500, 132 N. Y. Supp. 1038; Bales v. McConnell, 27 Okl. 407, 112 Pac. 978, 40 L. R. A. (N. S.) 940; Goe v. R. Co., 30 Wash. 654, 71 Pac. 182; McKean v. Chappell, 56 Wash. 690, 106 Pac. 184; Fegley v. Rubber Co., 231 Pa. 446, 80 Atl. 870. Many others might be cited. In the first three of these cases the court specifically discussed the element of reasonable anticipation; the others base the decision on the point that defendant's negligence was an efficiently concurring cause of the injury. In the case of Coel v. Traction Co., supra, the court said:

"The argument to support the alleged absence of the element of reasonable anticipation is based upon the erroneous assumption that it was necessary that defendant should anticipate that plaintiff would stumble and

come in contact with the car in that manner. Counsel say: 'To hold the motorman to the doctrine of reasonable anticipation under the facts of this case it must be said that he should reasonably anticipate the sudden stumbling of this plaintiff, resulting in the collision;' and again: 'Nor can it be said that an ordinarily prudent man should reasonably anticipate that another will stumble and so be injured.' These extracts are fair samples of the argument on this question. The element of reasonable anticipation is not limited to such a narrow field. It is not necessary that an ordinarily prudent man ought reasonably to have anticipated the particular injury to the plaintiff or to any particular person. It is sufficient that such a man ought reasonably to have anticipated that his conduct might probably cause some injury to another. * * * Hence it was within the field of reasonable anticipation that some one at some time might stumble or fall, or in some other natural manner suddenly come in front of a moving car as it passed a standing one discharging passengers."

In the case at bar, the field of reasonable anticipation should not, we think, have been confined to the exact spot where the injury occurred. Much of the argument used when we discussed the question of negligence is applicable here, but we shall not repeat it. The train, even traveling at the rate of 20 miles an hour, would, unless checked, go nearly 30 feet in a second, or 300 feet in 10 seconds, and 600 feet in 20 seconds. When the engineer knew that the motorcar was just ahead of him, it would be no unreasonable requirement for him to anticipate that it might be in the cut, and that it might be, when he would first see it, only 50 feet or 500 feet ahead of him; yet in each of these cases it cannot be said as a matter of law that death of the motorman would not have been within the field of reasonable anticipation, because it is doubtful in such case, even if decedent had not fallen, that sufficient time would have been given to get out of the way of the train with the motorcar. And when this is so, this court cannot be asked to hold that the jury were not justified in holding that the engineer should have anticipated injury when the car happened to be only 400 feet further away; that is to say, about 900 feet beyond the point where he could first see it. Suddenly coming upon the decedent might well cause the latter to become confused, and that an accident such as happened came to pass is not, under the circumstances, so surprising and extraordinary that we can say, as a matter of law, that the jury were unjustified in their holding that this, too, came within the reasonable field of anticipation of the engineer, notwithstanding the evidence as to the usual rate at which a motorcar travels; for they were the judges of the weight to be attached thereto. The engineer had within his control a moving force that must inevitably result

in death should it run over a living being; the care as well as reasonable foresight required of him should necessarily be commensurate with the knowledge thereof; and the jury, having the right to find, as stated before, that he should have reasonably anticipated that he might catch up with the motorcar, close to the point where he could first see it, had, we think, the further right to find that, with his death-dealing instrument, he should not have taken the chance of not meeting up with it until it had reached a point perhaps beyond the zone of danger. While this question on the element of reasonable anticipation is close, we think, after most painstaking consideration and mature deliberation, that it was properly submitted to the jury.

[14] 4. The plaintiff assigns as cross-error the refusal of the court to give the following instruction:

"You are instructed that one who acts in a sudden emergency is not held to the same degree of care for his own safety that would be required of him in the absence of such emergency, and in this case, in determining whether or not the deceased was guilty of negligence in not abandoning the gasoline motor and running away from the danger, you may take into consideration all of the facts and circumstances attending the transaction as shown by the evidence. Bearing in mind that the burden of proving contributory negligence is upon the defendant in this case, and that contributory negligence, if established, is not a defense, but simply operates to diminish the amount of plaintiff's recovery."

The court properly instructed the jury, in other instructions, on the burden of proving contributory negligence, and the effect of it in the action, so that no complaint is made as to that point. We are cited to the rule laid down in 29 Cyc. 521, wherein it is said that, when one is required to act suddenly and in the face of imminent danger, he is not required to exercise the same degree of care as at other times. But it is well-settled that this rule applies only where the person injured was placed in a position of sudden peril without his own fault. *Thompson on Neg.* § 194; *Noyes v. Railroad Co.*, 3 Cal. Unrep. Cas. 293, 24 Pac. 927, 928; 29 Cyc. 523; *Dobbins v. Railroad Co.*, 108 S. C. 254, 93 S. E. 932; *Birmingham Ry. & L. Co. v. Fox*, 174 Ala. 657, 56 South. 1013; *Atkins v. Transp. Co.*, 79 Ill. App. 19; *Railroad Co. v. Cooper*, 109 Tenn. 308, 70 S. W. 72; *Berg v. Milwaukee*, 88 Wis. 599, 53 N. W. 890; *Baltzer v. Railroad Co.*, 83 Wis. 459, 53 N. W. 885; cases collated in 37 L. R. A. (N. S.) 54.

[15] In *Railroad Co. v. Cooper*, supra, the court held that it was error to give an instruction relating to emergencies which did not embody the foregoing modification. The instruction asked in the case at bar clearly does not contain it. The last clause thereof

can only relate to the effect of contributory negligence on the action as a whole. The difficulty in this case is that the evidence shows that the deceased was warned not to travel ahead of the train, but that he did so nevertheless, and failed to watch for the train. This, if true, was clearly negligent, and such negligence pervaded the whole incident, and would be distinct and separate from the negligence, if any, in connection with the stopping of the motorcar. We cannot, therefore, say that the emergency, if any, was brought about without the fault of the deceased, and to have given the instruction as asked would, we think, under the circumstances have been clearly misleading.

[16] 5. Plaintiff also assigns as cross-error the giving of instructions 9 and 10, which state in substance that, if the deceased knew that the passenger train was due, and was warned not to travel ahead of it, and if he nevertheless did so, but failed to take due care for his own safety, then that he would be negligent. Counsel for plaintiff contend that, when the engineer was warned that the motorcar was ahead, such negligence of the deceased was eliminated from the case. They cite no cases in support of such contention. That it is unsound appears, we think, sufficiently from what has been previously said.

We find no error in the record, and the judgment herein is accordingly affirmed.

Affirmed.

POTTER, C. J., and KIMBALL, J., concur.

SPRING CANYON COAL CO. et al. v. INDUSTRIAL COMMISSION OF UTAH.
(No. 3693.)

(Supreme Court of Utah. Sept. 22, 1921.)

1. Master and servant \S 417(7)—Question of substantial evidence in compensation case reviewable.

Under Industrial Act, 1917, providing for review of the Industrial Commission's decisions, and Const. art. 1, §§ 7, 11, whether a finding on which an award of the Commission is based is supported by substantial evidence is reviewable as a question of law, and whether an inference may be deduced from a particular fact is also a question of law for the reviewing court.

2. Master and servant \S 405(1)—Inferences held no basis for compensation award.

If, from the facts before the Industrial Commission, two different inferences may be deduced, one of which authorizes the award and the other of which does not, both inferences are equally reasonable, and the Commission may not arbitrarily disregard one of the inferences and choose the other as supporting its award, for, in such circumstances, the inferences meet

and destroy each other and neither has any probative effect.

3. Master and servant \S 405(4)—Finding of compensable death because of employment held unwarranted.

The fact that an employee was killed by an insane fellow employee, without more appearing, held not to justify the inference, to support award under C. L. 1917, § 3113, for death, that the fellow employee's act was directed against deceased "because of his employment."

4. Master and servant \S 371 — Compensable injury.

An injury which is received in the course of the employment does not necessarily arise out of the employment.¹

5. Master and servant \S 398 — Limitations against compensation claim not subject of waiver.

The Industrial Commission cannot waive the statute of limitations as respects a claim against the State Insurance Fund.²

Proceeding under the Workmen's Compensation Act by Marie Como, to recover compensation for the death of her husband, Frank Como, employee, opposed by the Spring Canyon Coal Company, employer, and the State Insurance Fund. Compensation was awarded, and the employer and the State Insurance Fund bring a writ of review. Award set aside and annulled.

Bagley, Fabian, Clendenin, & Judd, of Salt Lake City, for plaintiffs.

Harey H. Cluff, Atty. Gen., and John R. Robinson, Asst. Atty. Gen., for respondent.

FRICK, J. On August 27, 1920, one Marie Como, hereinafter called applicant, made application to the Industrial Commission of Utah, hereinafter styled Commission, in which application she asked that the Spring Canyon Coal Company, as employer, or the State Insurance Fund, be required to pay compensation for the benefit of herself and her three minor children as the dependents of one Frank Como, her former husband, who, she alleged, suffered a personal injury from which he died on the 11th day of July, 1917, while he was in the employ of said company as a coal miner, and which injury and death she alleged arose out of and in the course of his employment. After a hearing two of the commissioners awarded the applicant compensation, which, including funeral expenses, amounted to \$2,168.24. One of the commissioners dissented, upon the ground that the evidence was insufficient to authorize the Commission to award compensation in this case. Both the company and the State Insurance Fund,

¹ Twin Peaks Canning Co. v. Industrial Commission, 196 Pac. 853.

² Interurban Const. Co. v. Industrial Commission, 199 Pac. 157.

hereinafter called plaintiffs, applied to the Commission for a rehearing, which was denied, and they join in this application which is in the usual form, and ask that this court review the proceedings of the Commission, and that upon such review the award be set aside and annulled as not being authorized by our Industrial Act. The Commission filed a demurrer to the writ of review, and the case was submitted upon the demurrer.

[1, 2] The facts concerning the injury and death of the deceased were stipulated into the record before the Commission, and are as follows:

"That Frank Como, deceased, was, on the 11th day of July, 1917, employed by the Spring Canyon Coal Company at Storrs, Utah, as a coal miner; that while employed decedent was attacked and killed by a fellow employee, John Augustino, at 9:45 a. m.; that the deceased was employed by the Spring Canyon Coal Company at the time of his death, an employer subject to the provisions of chapter 100, Laws Utah 1917."

In addition to the foregoing stipulated facts there appear in the record copies of statements as follows: A statement from W. L. Sutherland, who, it seems, was the attending physician, who states that the deceased was killed as stated in the stipulation of facts, and that "John Augustino was bound over to await the action of the grand jury, and we understand has since been committed to the State Mental Hospital at Provo, Utah." It further appears from the statement that Frank Como was injured on July 11, 1917; that he was "hit on head with coal shovel several times by partner in mine"; that the injuries consisted of "several deep gashes about head, skull fractured," and that "death was instantaneous." There is also a copy of an unidentified letter purporting to be from the superintendent of the State Mental Hospital at Provo, Utah, which is addressed to the "manager of the State Insurance Fund." In that letter it is stated that one John Arostino was received as a patient at the State Mental Hospital on "August 1, 1917 * * *; when received here he was in an extreme catatonic state, from which he has apparently recovered. He is, however, afflicted with dementia præcox from which we cannot expect recovery. There is no question in my mind that he had dementia præcox for considerable time before he committed crime." We assume the Arostino referred to in the letter to be the same individual who in the record is otherwise called Augustino.

In view of the foregoing state of the record there is a sharp conflict between the attorneys for plaintiffs and the Attorney General, who represents the Commission, and incidentally the applicant, with respect to what ultimate facts the evidence which was before the Commission established. The attorneys for plaintiffs contend that there was

no evidence before the Commission except what is contained in the stipulation of facts, while the Attorney General, stating it in his own language, insists that the probative facts before the Commission were the following:

"That Frank Como, deceased, was killed on the 11th day of July, 1917, by a fellow employee; that this fellow employee was on the 1st day of August, 1917, committed to the State Mental Hospital. It was admitted that the decedent at the time he met his death was an employee of Spring Canyon Coal Company, and that at the time of the accident was engaged in the actual performance of his employment as a miner."

In view of the facts stated by the Attorney General he states his legal conclusion thus:

"Under these circumstances the question is not, as the plaintiffs contend, whether the accident arose out of and in the course of the employment, but was the Commission, under the circumstances, justified in inferring that Frank Como was killed by accident arising out of and in the course of the employment—two very different questions."

In view of the conflicting views of counsel we have given all of the material facts appearing in the record although it may well be, as contended by them, that some of the statements appearing in the purported statements and in the letters, strictly speaking, may not be competent evidence. For the purposes of this decision we shall assume that the facts as stated by the Attorney General have been established.

In making the foregoing statement we have excluded other jurisdictional facts, such as the marriage of the decedent and the applicant and the birth of children, etc., none of which is questioned.

Counsel for plaintiffs insist that the foregoing facts, together with the inferences that may be legitimately deduced therefrom, are wholly insufficient to justify the award made by the majority of the Commission. At the time the deceased was killed, as hereinbefore stated, our statute (Comp. Laws Utah 1917, § 3113) provided that compensation shall be made to an employee who receives personal injury which is caused "by accident arising out of and in the course of his employment." The statute also provided:

"The words 'personal injury by accident arising out of and in the course of employment' shall include an injury caused by the willful act of a third person directed against an employé because of his employment." Section 3112.

Counsel for plaintiffs contend that the burden is upon the applicant to prove that the injury was caused by an accident arising out of and in the course of the employment, and, further, that where it is shown without dispute, as here, that the injury which caused death was inflicted by a third per-

son the burden is again upon the applicant to prove that the act of such third person was directed against the employee (the deceased in this case) because of his employment.

While the Attorney General concedes that the burden is upon the applicant to establish the facts as contended for by counsel for plaintiffs, he nevertheless insists that the ultimate facts may be inferred from the evidentiary facts and circumstances, and that the facts hereinbefore referred to were sufficient to authorize the Commission to make the award. He insists that inferences may be deduced from circumstantial evidence as well as from positive or direct statements. He further contends that, where two inferences may be deduced from the established or conceded facts and circumstances, one of which is favorable to the applicant and the other against him, and both of which inferences are equally reasonable, the Commission may elect which inference it will adopt, and that we are bound by the inference the Commission adopts. In referring to plaintiffs' contentions and to the "weakness of plaintiffs' position," the Attorney General's views are reflected in his printed brief in the following words:

"They say we can easily infer that the assault was provoked by some personal grievance against Como 'due to causes wholly disconnected from their employment.' Of course, this is true, but is it not just as easy to infer that Como's death arose from a dispute which arose out of the employment as it is to infer that the assault was due 'to some personal grievance against Como?' Surely it is. So it is clearly seen that the finding of the Commission that the accident arose out of and in the course of the employment is based wholly upon an inference, and must, of necessity, be based upon an inference. How are the plaintiffs going to show that this inference is wrong? How can the court set the finding of the Commission aside without substituting its inference as to what happened for the Commission's inference as to what happened?"

It is only fair to the Attorney General to add that at the hearing upon the demurrer he, in his oral argument, further elaborated his position by stating that, while plaintiffs' contention that where two inferences may be deduced from facts and circumstances, one of which would make the employer liable while the other would not, the ultimate fact fixing liability would not be considered as established in courts of justice, yet the same rule does not apply to the Commission in view that it may choose any inference which is reasonable although another inference from which an opposite conclusion might be deduced is equally reasonable. In other words, all that is necessary to sustain the finding of the Commission is that the inference it adopts, and upon which the finding is based, is as reasonable as the opposite inference. The Attorney General's conten-

tion, to our minds, is clearly fallacious and finds no support in law. The mere fact that the Commission arbitrarily chooses one inference rather than the opposite, where the probabilities are equal, still leaves the fact to be established without any substantial evidence. Again, he overlooks the fact that the statute contains both the source and the limit of the Commission's power and duty. He also ignores the further fact that the statute, in express terms, provides that—

"Any party affected thereby [by the Commission's decision] may apply to the Supreme Court of this state for a writ of certiorari or review * * * for the purpose of having the *lawfulness* of the original award or the award on rehearing inquired into and determined." (Italics ours.)

The statute further provides that in reviewing the Commission's decisions this court shall "determine whether or not: (1) The Commission acted without or in excess of its powers. (2) If findings of fact are made, whether or not such findings of fact support the award under review." The statute assumes that the findings of fact reflect the evidence, and hence, if there is no substantial evidence in support of any material fact found, the decision is not supported by the findings of fact. The Attorney General also overlooks the important fact that, in case the award for any reason is not supported by law, it is our duty to so declare. If, therefore, two different inferences may be deduced, one of which authorizes the award and the other not, and both inferences are equally reasonable, the Commission may not arbitrarily disregard one of the inferences and choose the other. In such circumstances the inferences meet and destroy each other, and neither has any probative force or effect. The ultimate fact, therefore, which the inference, if there were only one, would establish is without any support in the evidence, and, if the Commission, nevertheless, makes an award upon the strength of the inference, the award is lacking in two essentials: (1) That it is without support in the evidence; and (2) that it is unlawful, because to require one person to pay money or something of value to another arbitrarily and without any legal evidence to support the requirement is taking property from one person and giving it to another without sanction of the law, and is therefore unlawful.

There is, however, still another very important element to consider, which is that we are bound to construe and apply every law in the light of and in accordance with the fundamental law of the state. The people of this state in their sovereign power have said that "no person shall be deprived of life, liberty or property without due process of law," and that "all courts shall be open and every person, for an injury done to him in his person, property or reputation shall

have remedy by due course of law." Const. Utah, art. 1, §§ 7, 11. Those provisions are mandatory and must be obeyed. If the Commission, therefore, acts without any substantial evidence and by its acts deprives some person of property or property rights, its acts are void and it cannot be heard to say to this court "although our inferences are without probative force, as matter of law, yet you are bound by them." In order to justify such a conclusion we should not only be compelled to entirely abdicate the supervisory power the statute has given us, but we should have to violate the command of the people which they have given us in explicit terms in the fundamental law of the state.

Let us be misunderstood, we desire to add here that by anything we have said we do not claim that we can dictate to the Commission what probative force or effect they shall give to any inference that may be legitimately deduced from the facts and circumstances, direct or circumstantial, that are made to appear in any case. Nor can we interfere with the weight they shall give to the evidence or to the credibility of the witnesses, but what we mean is that when there is purely a question of law presented, and which is necessarily involved in the decision or the award, it becomes our duty to determine that question. Whether an inference may legitimately be deduced from a particular fact, or from a state of facts, or from circumstances, is purely a question of law; while the probative force or effect that shall be given to the inference, if, as a matter of law, it may legitimately be deduced from the given fact, or state of facts, or circumstances, is a question of fact. Whether the inference in question may be deduced as claimed is therefore a question of law which we must determine as such.

[3] If, therefore, all the facts and circumstances in this case are considered, may it legitimately be inferred therefrom that the deceased was injured by an accident arising out of his employment? And may it be further inferred that the act which caused his death was "directed against him because of his employment?" It frequently happens that an employee is found dead at or near his place of work. Usually there are some facts and circumstances from which it may be inferred that the death resulted from injuries inflicted by violence. There may also be and usually are, marks or bruises, or other indications, found upon the body of the deceased from which it may be inferred what caused them. If the deceased worked in a mine there may be evidence that a rock or other material fell upon him from the roof, or from some other part of the mine. Again, timbers, if there were such, may have given way and fallen upon him, or have otherwise injured him. If he was working in a factory at or near moving machinery or other objects there may be some fact or circumstance which

indicates that he was injured by the moving machinery or the other objects referred to. The reader may readily supply many other instances where injury may have been inflicted which resulted in death, and where the cause of death must be inferred from the facts and circumstances as they are made to appear. Where, however, as here, the facts are undisputed with respect to what agency caused death, and it is conceded that the injuries which resulted in death were inflicted by a third person, then the cause of death is clearly established, and there is nothing left to inference. Is there any fact or circumstances, therefore, from which it may legitimately be inferred that the injuries inflicted upon the deceased and from which he died arose out of his employment. After a most careful consideration of all the facts and circumstances in evidence in this case we can discover nothing from which such an inference may legitimately be deduced. No one knows what induced Augustino to assault and to kill the deceased. Moreover, the record is absolutely devoid of any fact or circumstances from which it may legitimately be inferred that Augustino's act was directed against the deceased "because of his employment." It is quite as reasonable to assume or to infer that the assault upon the deceased by Augustino was induced from other causes as it is to assume or infer that it was because of the employment, or that it arose out of the employment. There is, therefore, no legitimate basis upon which to rest such an inference, and, in view that the findings and award of the Commission are manifestly and entirely based upon such inference, the award is unlawful, and cannot stand.

Plaintiffs' counsel have cited a large number of cases which they insist support their contention that the award of the Commission in this case is contrary to law, and that its findings cannot be sustained. Among the numerous cases cited we refer to the following: *Allyn v. Fresno, etc., Co.*, 2 Cal. I. A. C. 782; *In re McNicol*, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306; *Hinchuk v. Swift & Co. (Minn.)* 182 N. W. 622; *Chicago v. Ind. Com.*, 292 Ill. 406, 127 N. E. 49; *Mountain Ice Co. v. McNeil*, 91 N. J. Law, 528, 103 Atl. 184, L. R. A. 1918E, 494; *De Filippis v. Falkenberg*, 170 App. Div. 153, 155 N. Y. Supp. 761, affirmed by the New York Court of Appeals in 219 N. Y. 581, 114 N. E. 1064; *Marion County Coal Co. v. Ind. Com.*, 292 Ill. 463, 127 N. E. 84; *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164; *Union S. Mfg. Co. v. Davis*, 64 Ind. App. 227, 115 N. E. 676; *Jacquemin v. Turner*, 92 Conn. 332, 103 Atl. 115, L. R. A. 1918E, 496; *State v. Dist. Court (Minn.)* 168 N. W. 555; *Schmoll v. Weisbrod*, 89 N. J. Law, 150, 97 Atl. 723; *Laurino v. Donovan*, 183 App. Div. 168, 170 N. Y. Supp. 340; *In re Boelema*, 4 N. C. C. A. 855, note; *In re Chaney*, 12 N. C. C. A. 901; *In re Krup-*

yak, 11 N. C. C. A. 237; Gregory v. Chapman, 38 N. J. Law, 363.

In *Marion County Coal Co. v. Ind. Com.*, in the headnote, the rule in respect to a quarrel between two employees which resulted in injury by violence is stated thus:

"The killing of a miner by a car driver, both employees in coal mine, was not the result of an accident 'arising in the course of the employment,' and there was no causal connection between the employment and the killing, so that employer was not liable under Workmen's Compensation Act, it resulting from a quarrel about a past event in which deceased was the aggressor, he having complained of nondelivery to him the night before of an empty car and of the presence of a chain for the machine runner in the empty car just delivered."

In *Chicago v. Ind. Com.*, supra, the court, in considering whether a felonious assault committed by a third person upon an employee arose out of the employment, states the law thus:

"The felonious assault which was made upon the deceased was without any excuse. It had no more connection with the work in which he was engaged than if Ramsey had been a loiterer on the street and had asked for a drink from Gallagher's can. There was no causal relation between the work and the assault. The affair was purely personal, with no reference to the employment. Ramsey and Gallagher happened to be at the same place because of their employment, but an injury done by one to the other on account of some purely personal grudge which this proximity gave an opportunity to inflict was not a result of the employment. There was no causal connection between the conditions under which the work was to be done and the injury. The injury was not incidental to the character of the business, but the deceased would have been equally exposed to it entirely apart from his employment."

In *Union S. Mfg. Co. v. Davis*, supra, the court, in the course of the opinion, uses the following language:

"It is not enough for the applicant to say, 'The accident would not have happened if I had not been engaged in that employment, and if I had not been in that particular place.' He must go further and must say, 'The accident arose because of something I was doing in the course of my employment, or because I was exposed by the nature of my employment to some peculiar danger.'"

[4] In this connection it should be remembered that an injury which is received in the course of the employment does not necessarily arise out of that employment. See *Twin Peaks Canning Co. v. Ind. Com.*, 196 Pac. 853. Nor, in the absence of facts and circumstances authorizing such an inference, can it be assumed that an injury which is inflicted upon an employee by a third person either arose out of the employment or that the violence was directed against the employee because of the employment.

The Attorney General insists, however,

that the following cases sustain his position, namely: *Proctor v. Serbino* (1915) 3 K. B. 344; *Sparks Milling Co. v. Ind. Com.*, 293 Ill. 350, 127 N. E. 737; *Saunders v. New England Collapsible Tube Co.*, 95 Conn. 40, 110 Atl. 538; *Papinaw v. Grand Trunk Ry. Co.*, 189 Mich. 441, 155 N. W. 545.

The *Proctor* Case is especially relied on. In the course of the opinion in that case, at page 346, it is said:

"I think it is settled law that if nothing more is known and you are driven to mere surmise or conjecture the dependents of the deceased cannot succeed in their claim for compensation. The burden is on them to prove that death occurred by reason of an accident arising out of and in the course of his employment."

The writer of the opinion then suggests that the ultimate fact may, however, be inferred from other facts, and that such inference may be deduced from circumstantial facts where there is no direct or positive evidence. In justice to the Attorney General we desire to add that in the course of the opinion there are some loose expressions from which it might be assumed that, in case two inferences equally reasonable may be deduced from the facts and circumstances, one of which is favorable to and the other against the claim of the dependents, the Commission may determine which one of the inferences it will adopt, and whatever inference it adopts will be binding upon the reviewing court. When everything that is said in the opinion is considered, however, the foregoing conclusion is hardly permissible. This is so for the reason that by what is said in that opinion the sense in which the term "burden of proof" is used is clearly that of establishing a controverted fact or issue; that is, the term is used in the sense that the party upon whom rests the burden of proof must produce evidence from which the probabilities in favor of the material fact or issue to be established preponderate as against the probabilities in opposition or against such fact or material issue. If the evidence is merely such that the probabilities are equal, then the fact is not established, and the party upon whom rests the burden of proof must fail. For these, and other reasons appearing in the opinion, the loose expressions found therein must be considered in the light of all that is said.

While the other cases cited by the Attorney General are peculiar in their facts and circumstances, yet none of them go any further than to lay down the rule that the ultimate fact as to whether the injury in question was caused by an accident which arose out of and in the course of the employment may be inferred from the facts and circumstances in each case. In all of them it is held, however, that the burden of proof is upon the applicant, and that there must be some substantial evidence in support of the findings

of the Commission. No other conclusion is permissible.

There is another feature of the case, which, in view of the fact that it involves public rights, we feel constrained to refer to before closing.

[5] In view of the recent decision of this court in *Interurban Const. Co. v. Ind. Com.*, 199 Pac. 157, with respect to the statute of limitations, the Commission inserted the following statement as a part of its findings: "That the State Insurance Fund does not hold the statute of limitations as a bar to compensation." We remark that in cases before the Commission pleadings are not necessary, and are not generally filed. All that usually appears is the application or petition of the applicant in which the necessary jurisdictional facts and other facts are stated. The hearing usually is based upon this application. In this case the record does not even contain such a petition or application. The date upon which the injury occurred is, however, made to appear. Under the practice prevailing in this jurisdiction a demurrer may be interposed where it appears upon the face of the petition or complaint that the action or proceeding is barred by the statute of limitations. All that appears in this case, however, is the statement of the Commission referred to. It is elementary that, in order to avail himself of the provisions of the statute of limitations, a party must in some form indicate that he relies on the defense, usually by pleading it. Where there are no pleadings required, the defense of the statute of limitations may, nevertheless, be invoked if done in proper time and by properly indicating that it is relied on. It is also elementary that, unless pleaded or relied on, the statute is waived. No doubt any person who has the right to interpose the statute of limitations may waive such right. To do that, however, ordinarily at least, implies that the right to waive is personal, and that in waiving it the person doing so acts in a personal capacity and in his own right. In this case, for example, the company, one of the plaintiffs, could waive the right to interpose the statute of limitations as a defense if it chose to do so. It could, however, only waive the right so far as it affected its own rights. Whether the State Insurance Fund could waive the benefit of the statute of limitations presents a different question. That fund is administered by the Industrial Commission as public officials, and hence is administered by them as trustees and not in their own right. The question therefore arises, May the statute of limitations be waived by those officials? It manifestly is their duty to administer the fund in accordance with law, and so as to treat all alike who have a right to participate in that fund. The people in their sovereign capacity have an interest in the State

Insurance Fund, and they are entitled to have the same distributed to those only who are legally entitled thereto. To permit the Commission, or any other person having control of that fund, to waive the statute of limitations at will must, in the long run, result in injustice and favoritism, since the statute can be enforced as against A., B., and C., and as easily waived in favor of D., E., and F. A person or corporation distributing his or its own money may elect to waive the benefit of the statute of limitations in favor of A. while he or it may insist upon it as against B. without abusing any trust or disregarding a public duty. A public official may, however, not indulge in such a practice without abusing a trust and without bestowing a favor on one which he denies to another. In our judgment, where, as here, a fund is to be administered and distributed by public officials, it should be administered and distributed strictly in accordance with law, and to those only who are legally entitled thereto without favor to anyone. Under such circumstances the language of the Supreme Court of Mississippi in the case of *Trowbridge v. Schmidt*, 82 Miss. 475, 34 South. 84, is applicable. In referring to the duty of a municipal board to interpose the plea of the statute of limitations, the court, in the course of the opinion, said:

"It is indisputable that a municipal board cannot lawfully give away public money."

In the course of the opinion it is further said:

"It is the plain duty of a county or municipal board to plead the statute of limitations when it can under the facts. Such boards are the people's trustees."

If it is the duty of municipal or county officers to interpose the defense of the statute of limitations where public funds are in question, it certainly is the duty of a state official who is entrusted with public funds to do likewise. If he falls in doing so he must either disregard the statute of limitations entirely, and thus ignore the law, or he must practice favoritism by enforcing it as against one claimant while he waives it in favor of another. It needs no argument to show that such a practice would be intolerable.

In view of what has been said, it follows that the award of the Commission cannot be sustained. It is therefore ordered and adjudged that the award in favor of the claimant be, and the same is hereby, set aside and annulled. Plaintiffs to recover costs of this proceeding.

CORFMAN, C. J., RITCHIE, District Judge, and GIDEON, and THURMAN, JJ., concur.

WEBER, J., being disqualified, did not participate.

CADY v. BAY CITY LAND CO. et al.

(Supreme Court of Oregon. Oct. 11, 1921. On Rehearing Oct. 28, 1921.)

1. Bills and notes \S 467(2)—Allegation that payee, by indorsement, "Notice of protest waived and payment guaranteed," transferred and assigned note to plaintiff, held sufficient to allow proof of payee's signature.

Under Or. L. \S 7810, 7822, 7823, 7855, relative to the sufficiency and effect of indorsements of negotiable instruments, an allegation, in an action on a promissory note, that defendant by indorsement, "Notice of protest waived and payment guaranteed," transferred and assigned the note to plaintiff, was sufficient to allow proof that defendant signed the indorsement.

2. Bills and notes \S 295—"Notice of protest waived and payment guaranteed" held to pass title, being equivalent to indorsement.

Since one who writes his name on the back of a negotiable instrument may enlarge or restrict his liability without destroying his character as an indorser, a writing by the payee on the back of a promissory note, "Notice of protest waived and payment guaranteed," passed title to his assignee; such guaranty of payment being equivalent to an indorsement, and the rights of the parties, in view of Or. L. \S 7910, requiring protest only in case of foreign bills of exchange, not being affected by such waiver of notice.

3. Guaranty \S 45, 46(1)—Payee, indorsing waiver and guaranteeing payment, held liable without demand or notice.

A payee, indorsing on the back of a note, "Notice of protest waived and payment guaranteed," undertakes absolutely to pay it when due, and no demand or notice of nonpayment is necessary, as in the case of a stranger to the instrument collaterally guaranteeing its payment.

4. Bills and notes \S 496(3)—Plaintiff must prove genuineness of indorsement, where execution denied.

In an action against an indorser on a promissory note, where the execution of the indorsement is denied, the burden is on plaintiff to offer evidence of the genuineness thereof.

On Rehearing.

5. Bills and notes \S 492—Defendant's admission of transfer of notes does not dispense with necessity of proving his indorsement thereof, when denied by him.

Where defendant's name appeared as indorser on the back of the notes sued on, but he denied indorsing the note, thereby denying genuineness of such signature, his admission that he transferred the note did not relieve plaintiff from the burden of proving the genuineness of defendant's signature as indorser, as transfer is possible without indorsement, and, although a transferee under Or. L. \S 7841, acquires a right to have the indorsement of the transferor, such right cannot be enforced in an action at law, but only by proceeding in equity.

In Banc.

Appeal from Circuit Court, Tillamook County; Geo. R. Bagley, Judge.

Action by R. H. Cady against the Bay City Land Company and Solon Schiffman. Judgment for plaintiff, and defendant Schiffman appeals. Reversed and remanded.

The plaintiff brought an action against the Bay City Land Company and the defendant Solon Schiffman as the indorser of two notes alleged to have been executed by that company to Schiffman as payee, one for \$1,000 and the other for \$1,800, both dated "Bay City, Oregon, October 18, 1916." The making and delivering of the notes to Schiffman are admitted. The allegations of the complaint as to the two notes are identical, but are set up in two separate causes of action. The averment upon which the contest between the plaintiff and Schiffman arises is as follows:

"That thereafter for a valuable consideration the said Solon Schiffman, by indorsement on said promissory note in the following language: 'Notice of protest waived and payment guaranteed'—transferred and assigned the same to the plaintiff, and at the same time, and as a part of the consideration for said transfer and assignment, said Solon Schiffman waived notice and protest and guaranteed the payment of the said note according to the terms and conditions thereof. That plaintiff is now the owner and holder of said note."

The answer of Schiffman "admits that this defendant transferred said note." That it is long past due and unpaid is also admitted, but the quoted averment set out above is denied. There was no appearance for the defendant company. After a trial without a jury, the court made findings of fact substantially in the words of the complaint, and as a conclusion of law found that the plaintiff was entitled to judgment against the defendants for the amount of the two notes, with interest as stated. Judgment was entered accordingly against the defendants, from which the defendant Schiffman appeals; he alone having filed an answer.

Botts & Winslow, of Tillamook, for appellant.

Johnson & Handley, of Portland, for respondent.

BURNETT, C. J. (after stating the facts as above). At the trial, the plaintiff was called as a witness in his own behalf and was handed two promissory notes, which he stated were the instruments described in the complaint. His counsel then offered them in evidence, and they were marked as Plaintiff's Exhibits A and B without any objection. These exhibits, however, are not in the record before us. His counsel then made this statement:

"I offer the whole instrument as it is, indorsement and everything else."

The bill of exceptions does not disclose any objection to this offer. After some immaterial offers of testimony about the availability of certain collateral mentioned in the notes, which is not important here, the plaintiff rested, and the defendant declined to offer any testimony. Schiffman then moved for a directed verdict in favor of himself, on the ground that the complaint does not state facts sufficient to constitute a cause of action against him; that he is sued as an indorser, and in order to recover against him the complaint should show presentment of the note for payment, demand, and notice of nonpayment; and, finally, that it does not show that the indorsement was signed by him. The court denied the motion and entered judgment as stated.

[1, 2] As to the form of the allegation, it is sufficient to allow the plaintiff to prove the fact of an indorsement and delivery. In *Frasier v. Williams*, 15 Minn. 288 (Gil. 219), the allegation was that—

"Said Aaron March [payee], for value received, transferred, indorsed and delivered it [the note] to the plaintiff."

This was held to be a sufficient averment.

In *Chester, etc., Coal Co. v. Lickiss*, 72 Ill. 521, it is said that a statement that the payee indorsed the note to the plaintiff is sufficient without averring a delivery. It imports delivery.

"An averment that the payee of a * * * note indorsed it imports that he put his name on it in writing and delivered it to the indorsee, as there can be no indorsement, except by the legal holder's name being on the instrument, and it cannot be complete without a delivery."

Section 7810, Or. L., says:

"No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided."

The exception relates to signatures by an agent, and the like.

"An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery." Section 7822, Or. L.

"The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement." Section 7823.

"A person placing his signature upon an instrument otherwise than as a maker, drawer, or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." Section 7855, Or. L.

The statutory word "indorse," employed in an allegation, is sufficient to let in proof of all the elements detailed in the statute and summed up in that expression. We hold, therefore, that the allegation that Schiffman indorsed, transferred, and assigned the note to plaintiff is sufficient to allow proof of his signature to the indorsement, unless the language, "Notice of protest waived and payment guaranteed," is not to be construed as an indorsement. This is the important question in the case. There is a contrariety of the precedents, not as to the passing of title by such a writing on the note, but as to the effect of it. The rule is thus laid down in 8 C. J. 354, § 533:

"There is considerable conflict in the decisions as to the effect of the payee's writing a guaranty on the back of a note, in regard to the nature of the liability of the signer, although it is almost universally held that the inclusion of a guaranty in the indorsement does not prevent it from operating as a transfer of the legal title to the instrument, and it is generally held that it is equivalent to an indorsement and hence that it cuts off equities."

The text-writer in that connection notes further discordance in the decisions in a few states. The very great majority of the precedents, however, is to the effect that a man who writes his name on the back of a negotiable instrument is an indorser, and that he may enlarge his liability or restrict it, without destroying his character as an indorser.

We note, in passing, that there is no effort made to set up any defense as against the original holder of the note. In another form the question for discussion is whether title passed to the plaintiff irrespective of whether or not the note would be subject to defenses as against the original holder. The leading case cited against the doctrine that a writing of this kind on the back of a note is a contract of indorsement is *Central Trust Co. v. Wyandotte First National Bank*, 101 U. S. 68, 25 L. Ed. 876. The bank, wishing to establish credit with the Cook County National Bank in Chicago, gave to the latter bank its note for \$5,000, with an agreement, not expressed in the note, that the Cook County Bank should retain possession of the note and not negotiate it, and that the Wyandotte Bank should receive on the note only \$1,000, leaving the balance of \$4,000 to its credit in the Cook County Bank. Afterwards, in some transaction the Wyandotte Bank placed an additional sum of \$868 to its credit with the Cook County Bank, making a total due to the Wyandotte Bank of \$4,868, in the hands of the Cook County Bank. Contrary to its agreement, the latter bank negotiated the \$5,000 note to a New York concern, and it finally came into the hands of the Central Trust Company as receiver of the New York institution. At this stage the Wyandotte Bank brought suit against the trust company

to compel it to surrender and cancel the \$5,000 note and return certain collateral pledged with it, upon payment by the Wyandotte Bank of \$132, being the difference between the amount to its credit with the Cook County Bank, the original payee, and the \$5,000 for which the note was given. The indorsement on the back of the note by the Cook County Bank was as follows:

"For value received, we hereby guarantee the payment of the within note at maturity or at any time thereafter, with interest at 10% per annum until paid, and agree to pay all costs and expenses incurred or paid in collecting the same. B. F. Allen, President."

The decree of the court was that, upon payment by the maker of the note, the Wyandotte Bank, of \$132 to the defendant receiver, the latter should surrender the note and collateral. The effect of this decree was that the title passed, but left the note subject to prior defenses against the original holder, on the ground that the writing on the back of the note was not an indorsement, and not intended as such. That case is not an authority against the passing of title by such an indorsement; it is only to the effect that such a guaranty does not cut off prior defenses.

A leading case on the other side of the question is *Hendrix v. Bauhard*, 138 Ga. 473, 75 S. E. 588, 43 L. R. A. (N. S.) 1023, Ann. Cas. 1913D, 688, which holds that a payee, indorsing a guaranty on the note for the purpose of negotiating the same, becomes an indorser with enlarged liability. In *Baldwin Fertilizer Co. v. Carmichael*, 116 Ga. 762, 46 S. E. 1002, it was held that, where a payee writes on the back of a note a transfer of the same to a specified indorsee, coupled with his guaranty of payment, he is to be held as an indorser. It is stated in *Voss v. Chamberlain*, 139 Iowa, 569, 117 N. W. 269, 19 L. R. A. (N. S.) 106, 130 Am. St. Rep. 331, that—

"The indorsement by the payee of a note, of his name under a guaranty of payment, combined with a waiver of demand, notice, and protest, constitutes a blank indorsement, so as to pass title to one who takes the paper in due course for value."

In *Kellogg v. Douglas County Bank*, 58 Kan. 48, 48 Pac. 587, 62 Am. St. Rep. 596, the holding was to the effect that such a writing on the back of the note is both an indorsement and a guaranty, and hence passes the title thereto. The court said:

"The guaranty itself would be senseless and wholly inoperative, unless the note was transferred by the payee to a third party."

In *First National Bank of Durand v. Shaw*, 157 Mich. 192, 121 N. W. 809, 133 Am. St. Rep. 342, the court said:

"A guaranty of payment indorsed upon a promissory note is equivalent to an indorsement within the meaning of the law merchant."

In *Dunham v. Peterson*, 5 N. D. 414, 87 N. W. 293, 36 L. R. A. 232, 57 Am. Dec. 556, the court, speaking by Mr. Justice Corliss, says:

"One who is payee or is the holder of negotiable paper, and writes above his indorsement the contract of guaranty of payment, is an indorser with enlarged liability. It is on this ground that the decisions rest which hold that such a transfer of a negotiable instrument is an indorsement of it, within the purview of the rule which shields a bona fide indorsee against defenses good between the original parties [citing many authorities]. * * * In our judgment, this mooted question, whether the fact that, in addition to indorsing the paper, the person who negotiates it writes above his indorsement a special contract, takes from the act of indorsing the legal character of an indorsement of the instrument, was intended to be put at rest in this state by section 4868, Rev. Codes. This section provides as follows: 'One who writes his name upon a negotiable instrument, otherwise than as a maker or acceptor, and delivers it with his name thereon to another person, is called an indorser, and his act is called indorsement.' It will not do to assert that this section was passed to settle the question whether one out of the chain of title who indorses negotiable paper before delivering it to the payee, to give it credit, is liable as indorser or guarantor or as joint maker. Section 4877, Id., specifically relates to the subject. It declares that 'one who indorses a negotiable instrument before it is delivered to the payee is liable to the payee thereon as an indorser.' The only other purpose it could be enacted for, unless we assume it to be a purposeless enactment, was to declare that the act of writing his name upon negotiable paper by the holder thereof, as part of the negotiation thereof to a third person, should be an indorsement, despite the fact that, in connection with the act of indorsement, the indorser has, by special contract, restricted or enlarged his liability as indorser. We think this section is limited to the indorsement by the holder of the paper as part of the act of negotiation thereof. When these facts exist, the mere writing of a special contract above his name will not affect the character of his act as an indorsement. It is an indorsement, nevertheless."

The opinion quotes with approval this excerpt from *Brown v. Curtiss*, 2 N. Y. 225:

"The direct engagement of the indorser of a negotiable note, and of the guarantor of the payment of a note, whether negotiable or not, is the same. Both undertake that the maker will pay the amount when it shall become due. If there is a failure in such payment, both contracts are broken. Ordinarily, upon the breach of a contract, the party bound for its performance immediately becomes liable for the consequent damages. In the case of the indorser of a negotiable promissory note, however, the liability does not become absolute, unless due notice of nonpayment is given to the party whom it is intended to charge. This is not because the indorser has thus stipulated in terms, but it is a condition annexed by the rules of the commercial law. In the case of a

guarantor there is nothing to exempt him from the ordinary liability of parties who have broken their contracts, which is direct, and not conditional. No condition requiring notice of nonpayment is inserted in the contract, nor is any inferred by any rule of law."

In *Elgin City Banking Co. v. Zelch*, 57 Minn. 487, 59 N. W. 544, there was written on the back of the note the following:

"Pay the Elgin City Banking Company. D. Dunham. Payment guaranteed. D. Dunham."

Dunham was the original payee of the note. The holding in that case was to the effect that, whether there was one contract or two written on the back of the note, an indorsement was the result. The fact that Dunham enlarged his liability beyond that of an indorser by guaranteeing payment did not affect the character of his indorsement. In *Mangold & Glandt Bank v. Utterback*, 54 Okl. 655, 160 Pac. 713, L. R. A. 1917B, 364, the indorsement signed by the payee was in this language: "Payment guaranteed. Protest waived." And the court held that the purchaser was an indorsee protected against prior defenses. This excerpt is taken from the body of the opinion:

"There is no contention but that in the case at bar the [defendant] is at least a guarantor. If he be a guarantor only, then he is not entitled to the legal rights of an indorser to be served with notice of nonpayment. Yet we find written upon the back of the instrument in controversy the very significant words, 'Protest waived.' Why waive a right that the party did not have? It must be presumed that the parties did not intend to do a useless and unnecessary act, when those words were written upon the back of the instrument, and the reasonable construction is that by the entire indorsement he became an indorser with the enlarged liability of being legally held to payment without notice of the dishonor of the note. Further, no one can fairly say that the intention of the [defendant] not to be bound is clearly indicated from the words written upon the back of the instrument in controversy; in fact, the indication points the other way."

See, also, *Mullen v. Jones*, 102 Minn. 72, 112 N. W. 1048; *Pollard v. Hoff*, 44 Neb. 892, 63 N. W. 58; *Buck v. Davenport Savings Bank*, 29 Neb. 407, 45 N. W. 776, 28 Am. St. Rep. 392; *McNary v. Farmers' National Bank*, 33 Okl. 1, 124 Pac. 286, 41 L. R. A. (N. S.) 1009, Ann. Cas. 1914B, 248; *Partridge v. Davis*, 20 Vt. 499; *Donnerberg v. Oppenheimer*, 15 Wash. 290, 46 Pac. 254; *National Exchange Bank v. McElfish Clay Mfg. Co.*, 48 W. Va. 406, 37 S. E. 541; *Robinson v. Lair*, 31 Iowa, 9; *Baskin v. Crews*, 66 Mo. App. 22; *First National Bank v. Cummings*, 171 Pac. 862, L. R. A. 1918D, 1099.

It would seem that the part of the indorsement, "Notice of protest waived," is negligible, because in section 7910, Or. L., it is said that protest is not required, except in

case of foreign bills of exchange. In view of this enactment it is not apparent how the rights of a party can be affected favorably or adversely, or at all, by the waiver of notice of something which is not required. Really, it appears that the only effectual part of the writing is couched in the words, "Payment guaranteed." It is clear from the pleadings that the payee intended to effect a negotiation of the instrument; that is, to pass the title from himself to a new holder. Indeed, he admits that he transferred the note. To whom he does not say, but the averment of the complaint is that he transferred it to the plaintiff. In brief, in our judgment, the complaint is sufficient to allow the plaintiff to prove that the defendant signed the indorsement. The language thereof does not limit, but, on the contrary, expands, his liability into a condition where he is not entitled to notice of nonpayment or of demand on the maker for payment.

[3] If the plaintiff can prove, as we think he has a right to under the pleadings, that the defendant Schiffman signed the quoted indorsement on the back of the notes, we have a situation where he assumed to pay the notes as an indorser who has waived demand and notice of nonpayment. Granting that he guarantees payment of the notes, in the language of *Delsman v. Friedlander*, 40 Or. 33, 35, 66 Pac. 297:

"Primarily, it may be stated as a legal proposition, sustained and established by the very great weight of judicial opinion, that a guaranty of the payment of a note or other obligation is an absolute undertaking to pay it when due, and that no demand or notice of nonpayment is necessary or requisite to fix the liability of the guarantor"—citing numerous authorities.

It is not an instance where a stranger to the instrument guarantees its payment, which would be a collateral undertaking. It is a case of a payee, an actual party to the note, assuming a position in negotiating the same whereby he waives all further action on the part of the holder in fixing the liability of him who includes a guaranty in his indorsement.

[4] The plaintiff has stated a case, which, if he proves, he is entitled to recover from Schiffman the amount due on the notes. The execution of the indorsement is denied. Signatures do not prove themselves, and it is incumbent upon the plaintiff, in the face of the traverse of his complaint, to offer evidence of the genuineness of Schiffman's indorsement, if in fact the latter signed the same. Of course, we have considered the pleadings as they now stand. The complaint does not state whether the transfer of the notes was effected before or after maturity, or whether the present plaintiff took them without notice of defenses against them, so as to exclude such defenses. Neither does the

answer pretend to set up any defense, except denial of the negotiation of the note in a manner to make the answering defendant liable. In brief, with the pleadings in their present state, the plaintiff is entitled to prove that Schiffman signed the writing alleged to be on the back of the note.

The judgment of the circuit court is reversed, and the cause remanded for further proceedings not inconsistent herewith.

On Rehearing.

[5] As grounds for rehearing, the plaintiff urges that, because the notes sued upon and the indorsements thereon were not before us, as stated in the former opinion, we could not review the ruling on the motion for nonsuit. Appended to the bill of exceptions is the following certificate, signed by the trial judge and dated September 20, 1920:

"The foregoing bill of exceptions, including the attached transcript of testimony taken in the trial of the above cause, having been tendered by the defendant Schiffman, the same is hereby settled and allowed as a full and complete transcript of the proceedings had on the trial of said cause, and of all the testimony taken with the objections and exceptions taken and allowed by the court at that time."

According to the body of the bill, the only testimony was that of the plaintiff himself and the notes sued upon, which with the indorsements thereon were offered in evidence by the plaintiff. For the purposes of this opinion it may be conceded, as plaintiff's counsel intimates in argument, that on the back of each of the notes was the name "Solon Schiffman," and the words "Notice of protest waived and payment guaranteed." The record, however, is utterly devoid of any testimony about whether the name was signed by or on behalf of Schiffman.

In his brief on petition for rehearing the contention of the plaintiff is thus stated:

"These two notes in evidence, together with the indorsements thereon, would at least tend to establish the genuineness of the Schiffman signature. This is especially true in view of the fact that Schiffman admits in his answer the 'transfer' of the notes and this indorsement of Schiffman on the back of the notes shows that this transfer was made by such indorsement, and not otherwise, and that such indorsement and transfer is followed by Schiffman's signature."

As shown by the bill of exceptions, the objection urged by counsel for the defendant Schiffman, upon which his motion for nonsuit was based, concluded with this language, speaking of the amended complaint:

"It does not show that the indorsement was signed by Mr. Schiffman or any one. The indorsement is set out, and it does not include the signature of the defendant Schiffman."

All that the answering defendant admitted was that he transferred the note. The mere

transfer may be accomplished without indorsement. In such case the transferee takes the title of the transferor, and in addition thereto acquires a right to have the indorsement of the transferor. Section 7841, 'Or. L. It is quite consistent with the pleadings in the present instance that the transfer was made without indorsement; that is, without the signature of Schiffman. That is all that is admitted by the answer. It is true, the indorsee has a right to the indorsement of the transferor. This, however, cannot be enforced in an action at law. It is only by a proceeding in equity that the actual indorsement of the transferor can be secured. *Simpson v. First National Bank*, 94 Or. 147, 185 Pac. 913. On the face of the pleadings, therefore, we have the dilemma: If Schiffman did not sign the indorsement, he is not liable, because his name is not upon the note. Section 7810, Or. L. On the other hand, if he merely indorsed it in blank without the words quoted in the amended complaint, "Payment guaranteed," which is all the indorsement that could be compelled in the absence of additional agreement, he would not be liable under the complaint, because there is no allegation of presentment and notice of nonpayment. If the plaintiff relies on the mere transfer of the note without indorsement, which is all the answer admits, he must fail in this action, because only in equity can he compel the transferor to make the indorsement.

What we endeavored to point out in the former opinion was, that the plaintiff is entitled to prove that Schiffman actually signed the indorsement, and that, if that could be proved, the complaint contained enough to hold him without any allegation or proof of presentment and notice of nonpayment of the note. But these averments of the complaint are traversed by the answer. In other words, while admitting transfer of the note, which is possible without indorsement, Schiffman denies indorsing the note. This puts the plaintiff on proof of his allegation, and he must establish by the testimony, not only that Schiffman's name is on the note, but that it is genuine signature as an indorser in the enlarged form indicated.

In *Sears v. Daly*, 43 Or. 346, 73 Pac. 5, the name of the defendant Phya Daly appeared appended to the note sued upon, in form as a signature. It was contended there, as here, that the fact that the name appeared there gave color to the presumption that it was rightfully there, and as her signature; but the court held to the contrary, and concluded that such a presumption did not attach, and that there must be some proof that the defendant signed the note. This doctrine was also followed in *Long v. Hoedle*, 60 Or. 377, 119 Pac. 484.

The deduction is that, even if the notes set out in the complaint had been appended to the bill of exceptions and the name of

Schiffman had appeared on the back of them, the testimony would not have been sufficient to prove his signature. This contention was directly raised at the trial, according to the bill of exceptions, and its solution cannot be avoided. As pointed out in the former opinion, if Schiffman really signed the indorsement, "Payment guaranteed," thus enlarging the liability of an indorser in blank, the plaintiff would be entitled to recover from him without alleging or proving presentment and notice of nonpayment. But the mere fact that his name appears written on the back of the notes is not proof that he wrote it there. The petition for rehearing is denied.

ROSTAD v. PORTLAND RY., LIGHT & POWER CO.

(Supreme Court of Oregon. Oct. 11, 1921.)

1. Carriers \S 314(2)—A complaint for injuries to passenger boarding street car held sufficient.

In an action for injury to a passenger sustained while boarding a street car, the complaint alleging that "while plaintiff was boarding one of said cars defendant carelessly and negligently started the same, and as a direct and proximate result of said negligent act of defendant plaintiff was thrown under the wheels of said car," sustaining specified injuries, held sufficient on motion for nonsuit to charge negligence, as against objection that it does not show facts sufficient to charge defendant, and that it was a mere conclusion to say that the car was started negligently.

2. Carriers \S 320(9)—Fact of accident to passenger boarding car claimed to have been prematurely started held sufficient to take case to jury.

In an action for injury to passenger sustained while boarding a street car, claimed to have been prematurely started, the fact of the accident held sufficient, on motion for nonsuit, to take the case to the jury on the question of whether the car employees were at fault.

3. Carriers \S 245—Complaint held to show relationship of passenger and carrier.

Complaint alleging that plaintiff was injured while boarding one of defendant's street cars which had stopped to take on passengers, as a result of defendant's negligence in starting the car, without directly alleging plaintiff was a passenger and defendant a common carrier, held sufficient on motion for nonsuit to show the relationship of passenger and carrier.

4. Appeal and error \S 237(1)—Misconduct of counsel in argument to jury held not ground for reversal in absence of request for further action by court.

In action against street railway for injuries to passenger, misconduct of plaintiff's counsel in stating, during argument to jury without evidence thereof, that the railway company's surgeons had neglected the passenger and had

improperly cut off her leg and arm, held not ground for reversal, where court sustained objection thereto and directed jury not to consider statement, in absence of request for additional relief.

5. Trial \S 217—Instruction directing jurors to consider their experience as men of affairs held proper.

In an action in which jurors had been carefully instructed as to the preponderance of the evidence, contradictory evidence, presumption as to witness speaking the truth, and as to the jurors being exclusive judges of the credibility of witnesses, instruction directing jury to "bring to your assistance your experience as men of affairs" held proper, since such experience may be considered in passing on credibility of witnesses.

6. Trial \S 311—Jurors' personal knowledge of probative fact not considered in deciding case.

Under Or. L. \S 868, subd. 1, jurors must act with legal discretion and in subordination to the rules of evidence, and must not consider their personal knowledge of probative facts in deciding the case.

7. Damages \S 49—Not recoverable for mental anguish alone.

Mere mental anguish, unaccompanied by physical injuries, is not ground for damages.

8. Damages \S 50—Recoverable for mental anguish directly caused by injury.

Physically injured person may recover for mental anguish which is the direct, natural, and proximate result of the injury.

9. Damages \S 216(10)—Instruction as to mental anguish approved.

Instruction allowing recovery for physical pain and mental anguish which plaintiff "has endured, or will in the future be obliged to endure, all as a direct natural and proximate result of the injury," held proper, as against the objection that it allowed recovery for future mental anguish; collateral distress not being included.

Department 1.

Appeal from Circuit Court, Multnomah County; Robert Tucker, Judge.

Action by Florence Rostad, a minor, by Celia Rostad, her guardian ad litem, against the Portland Railway, Light & Power Company, a corporation. Judgment for plaintiff, and defendant appeals. Affirmed.

The defendant admittedly operates a street railway system in the city of Portland, part of which is located on East Fifth street at its intersection with Twenty-Ninth avenue. The plaintiff sues for damages for injuries which she claims to have sustained while boarding defendant's cars at that place when and where they had been stopped for the reception of passengers.

The charging part of the complaint is as follows:

"That on or about the 30th day of March, 1920, defendant had a train of cars stationed

at said Twenty-Ninth avenue and East Fiftieth street, and was taking on a number of passengers, and while plaintiff was boarding one of said cars, defendant carelessly and negligently started the same, and as a direct and proximate result of said negligent act of defendant, plaintiff was thrown under the wheels of said car, injuring and bruising her body and injuring and bruising the ligaments and tendons of her right ankle and causing the loss of her left leg and left arm, and fracturing her skull; that the shock and jar incident to, and in connection with, said injuries, has rendered plaintiff extremely nervous; that all of said injuries have, and will continue for all time to come, caused plaintiff to suffer great physical pain and mental anguish, and that said injuries are permanent and to plaintiff's damage in the sum of \$100,000."

This allegation is traversed by the answer, with the exception that the defendant admits the plaintiff met with an accident on the day named.

The new matter in the answer charges contributory negligence on the part of the plaintiff in that she attempted to board a moving train after passengers had been taken on the same and the train had resumed its journey. This is traversed by the reply.

The plaintiff had judgment, and the defendant appeals.

C. R. Peck, of Portland (Griffith, Leiter & Allen and F. J. Lonergan, all of Portland, on the brief), for appellant.

Henry E. McGinn and W. E. Farrell, both of Portland (Henry E. McGinn and Davis & Farrell, all of Portland, on the brief), for respondent.

BURNETT, C. J. (after stating the facts as above). The errors assigned which have been submitted in argument are: First, that the court overruled the defendant's motion for nonsuit, which was based upon the proposition that the complaint fails to state a cause of action and that there was no evidence offered disclosing any actionable negligence on the part of the defendant proximately causing the accident complained of. The second contention of the defendant is based on misconduct of counsel for the plaintiff in arguing the case to the jury, and the ruling of the court thereupon. A third complaint about the rulings of the trial court is predicated upon the following instruction given to the jury:

"Now, gentlemen of the jury, you have heard all the evidence, and, as stated to you, you will analyze the evidence, you will bring to your assistance your experience as men of affairs, and endeavor to ascertain where the truth is in this controversy. In case you should arrive at a verdict or find in favor of the plaintiff, it will then be your duty to approach the question of damages."

Finally, it is claimed that the court was wrong in giving the following instruction:

"If you find for the plaintiff in this case, you will assess an award to her by your verdict such sum of money as will fairly, justly, and fully compensate her for the injury which you will find from the evidence she has sustained, for the physical pain and mental anguish, if any, she has endured, or will in the future be obliged to endure, all as a direct, natural, and proximate result of the injury, not exceeding the amount demanded in the complaint."

[1, 2] As to the sufficiency of the complaint, the contention is that merely starting the car, although it is said to have been done carelessly and negligently, does not show facts sufficient to charge the defendant. The argument is that starting a car is one of the commonest acts in the management of a street railway system, innocent in itself, and that it is a mere conclusion to say that it was done negligently. Taking the whole language of the allegation together, however, we learn that this happened while the plaintiff was boarding one of the cars, and further that—

"As a direct and proximate result of said negligent act of defendant, plaintiff was thrown under the wheels of said car."

This allegation was not attacked by demurrer, nor even yet by a motion for a new trial. It is held in *Bobbitt v. St. Louis United Rys. Co.*, 169 Mo. App. 424, 153 S. W. 70, that an allegation was sufficient which stated that—

The defendant "negligently, suddenly and violently started said car, * * * thereby causing plaintiff to be jerked, jarred and thrown from said car to the street."

And in *Galveston, etc., R. R. Co. v. Thornsberry (Tex.)* 17 S. W. 521, it was held not necessary to allege a danger to the plaintiff and the defendant's knowledge thereof, if facts are stated from which that conclusion may be drawn. Also, in *Chicago City Ry. Co. v. Morse*, 98 Ill. App. 662, the principle was enunciated that the happening of an accident on account of the management of a car under the control of the defendant raised a presumption of negligence. In other words, a case is here presented in which an appliance under the control and management of the defendant inflicts an injury upon the plaintiff. Where the appliance is properly operated, the ordinary result is the safety of the passenger, and hence when an accident occurs, it is sufficient to go to the jury as tending to show the fault of the one in charge of the appliance.

[3] But it is contended that there is nothing to show that the plaintiff was a passenger. Indeed, it is not so directly said in the complaint, but after verdict we may deduce from the facts stated the conclusion that the plaintiff was a passenger. Confessedly the defendant was operating a street railway. The allegation was that it had a

train of cars stationed at a certain point and was taking on passengers. This constitutes an offer, deducible from circumstances, of course, that the defendant would take as passengers all those who accepted the invitation. And it was also said that the plaintiff was "boarding one of said street cars." This is a statement of an act on the part of the plaintiff from which may be drawn the conclusion that she had accepted the offer of the defendant, raising the contractual relation of carrier and passenger. The testimony presented on behalf of the plaintiff was that she ran down the street and grasped the handhold at the entrance of the car. Some witnesses say she was in the act of putting her foot on the step, while others say that she actually did so. In *Duchemin v. Boston Elevated Ry. Co.*, 186 Mass. 353, 71 N. E. 780, 66 L. R. A. 980, 104 Am. St. Rep. 580, 1 Ann. Cas. 603, it was held that going towards a car, intending to board the same, does not make one a passenger, but when the car is stopped to receive passengers "any person actually taking hold of the car and beginning to enter it is a passenger." This is the doctrine taught by such authorities, as *Indianapolis, etc., Rapid Transit Co. v. Walsh*, 45 Ind. App. 42, 90 N. E. 138.

The question as to the sufficiency of the complaint is very close. For instance, it is not directly stated that the defendant was a common carrier or engaged in the transportation of passengers, or that the plaintiff was a passenger. Indeed, it is said in *Ramling v. Metropolitan Street Ry. Co.*, 157 Mo. 477, 57 S. W. 268, that an allegation that the plaintiff boarded a car with the intention of becoming a passenger is not equivalent to the statement that he was a passenger. And again, it was said in *Birmingham Ry. & Electric Co. v. Mason*, 137 Ala. 342, 34 South. 207, that an allegation to the effect that "while plaintiff was engaged in or about becoming a passenger on said car" did not show that the plaintiff was a passenger. After verdict, however, the case may be set down as a defective statement of a good cause of action.

[4] In his argument to the jury, one of plaintiff's counsel charged that the surgeons employed by the defendant had neglected the plaintiff and that they had cut off her leg and her arm and did not do it properly. At this juncture, counsel for the defendant objected to the remarks of counsel, on the ground that there was no issue on that point, and that there was no charge against the company holding it responsible for the malpractice of its surgeons. The court sustained the objection and directed the jury not to consider the statement, whereupon the defendant saved an exception to the ruling of the court. No motion was made to set aside the verdict or to withdraw the case from the jury and award a new trial. The

court made an appropriate ruling on the defendant's objection. If the defendant would seek a more drastic remedy than the mere withdrawal of the remarks from the jury with an instruction to disregard them, he should have moved the court for additional relief, such as dismissing the jury and ordering a retrial. The court correctly disposed of the objection, and if anything more was requisite or proper to be done, the court of original jurisdiction should have had an opportunity of doing it. In other words, as an appellate tribunal we cannot award any relief which was not asked for in the circuit court, and which was within its power to grant on timely application.

The next assignment presented for consideration is that involved in the instruction of the court directing the jury to "bring to your assistance your experience as men of affairs." In *Northern Supply Co. v. Wangard*, 123 Wis. 1, 17, 100 N. W. 1066, 1072, 107 Am. St. Rep. 984, 993, the court had instructed the jury thus:

"You are to bring your own knowledge and experience in determining what the evidence and all the evidence and circumstances submitted for your consideration applicable to this question really establishes and means."

This instruction was condemned in the following language:

"Moreover the instruction, so far as it permitted the jury to apply to the matter any special knowledge of their own, was erroneous. That is according to elementary principles."

In *Burrows v. Delta Transportation Co.*, 106 Mich. 582, 64 N. W. 501, 29 L. R. A. 468, the question involved concerned damages from a fire ascribed to sparks coming from the smoke stack of a steamer which had in it a screen. The court charged the jury as follows:

"Now, if from your judgment and experience and knowledge, or better understanding of the testimony, you can say that there were large sparks that ought to have been arrested by the spark catcher, you can find a verdict for the plaintiff; otherwise, you will find that there is no cause of action. The whole right to recover depends on this fire happening, being occasioned by sparks that would have been checked by this spark arrester."

The appellate court held this was error, saying:

"This charge is a direction to the jury that they may determine the question of fact involved as to whether the employment of a screen upon the smoke stack would have prevented the fire, by acting on their own judgment and experience and knowledge. They should have been directed that they were to determine the facts in the case, not from their judgment or experience or knowledge, but from the testimony given by the witnesses on the trial of the case."

[5, 6] These precedents fairly illustrate the argument of the defendant against the correctness of the instruction. The great weight of authority, however, in our judgment, is to the contrary. Of course, jurors must act with legal discretion and in subordination to the rules of evidence. Section 868, subdiv. 1, Or. L. The personal knowledge of any juror concerning any probative fact involved in the case under consideration is not to be used in deciding the case. Such a juror should communicate his information to the court, and if he is not excused from service and it is deemed proper to use his cognizance of such a fact in the trial, he must be sworn as a witness and examined, subject to cross-examination by the adverse party, the same as any other witness. But any juror must consider the testimony in the light of that knowledge and experience which is common to all men. For instance, it is a matter of common knowledge that a bullet piercing the brain of a human being will in all likelihood prove fatal. It is common knowledge, also, that a forest tree cut nearly in two at the butt will fall, if a high wind blows against it. If a witness should testify to the contrary to these ordinary phenomena, the common knowledge of the juror derived from his experience in such matters would naturally compel him to discredit that witness. Many illustrations might be given where men are normally and legitimately influenced in considering testimony by their general knowledge and experience. Probably as clear a statement of the true doctrine as can be found is that contained in the language of Mr. Justice Hackney in *Jenney Electric Co. v. Branham*, 145 Ind. 314, 41 N. E. 448, 33 L. R. A. 205. The court there had instructed the jury that—

"You may also, in considering whom you will or will not believe, take into account your experience and relations among men."

Treating of this instruction, the court said:

"By this it is claimed the jurors were advised that it was proper for them to employ any of their particular experiences and relations among men out of court, in determining the rights of the parties. It is argued that such a rule would permit the disposition of a cause upon the whims of jurors, rather than upon the law and the evidence as they were learned in the trial. Jurors should be, and as a rule are, selected because of their extensive experiences among men. The school of experience which men attend, in their varied relations among men, imparts a keenness of mental vision which enables them the more readily to see the motives and to judge of the selfish or unselfish interests of men. This education, be it much or little, is a part of the juror, and should not, if possible, be laid aside in passing upon the inducements which may surround a witness to speak falsely. It is this education which, to a great

extent, enables a juror to discover in the faltering manner or the downcast eye whether the statement of the witness is made in modesty or in the guilt of falsehood. The value of experience is not to be given up when the man becomes a juror and is required to apply the tests of credit to the heart and mind of the witness; but whatever qualifications that experience gives should be employed to the end that the whole truth may be known and acted upon."

In a note to *Solberg v. Robbins Lumber Co.*, 147 Wis. 259, 133 N. W. 28, 37 L. R. A. (N. S.) 790, 793, the last-named publication has this language, supported by a long list of authorities:

"Jurors are not restricted to a consideration of facts directly proved, nor are they expected to lay aside matters of common knowledge, or their own observation and experience of the affairs of life, but, on the contrary, may give effect to such inferences as common knowledge or their personal observation and experience may reasonably draw from the facts directly proved."

The distinction between the use of the juror's judgment and experience in the analysis of the testimony and his knowledge of some probative fact is pointed out in *Ottawa Gas Light, etc., Co. v. Graham*, 28 Ill. 73, 81 Am. Dec. 263. See, also, *Graysonia-Nashville Lumber Co. v. Carroll*, 102 Ark. 460, 144 S. W. 519; *Sanford v. Gates*, 38 Kan. 405, 16 Pac. 807; *Morrison v. State*, 42 Fla. 149, 28 South. 97; *Lafayette Bridge Co. v. Olsen*, 108 Fed. 335, 47 C. C. A. 367, 54 L. R. A. 33; *Marshall v. State*, 54 Fla. 66, 44 South. 742; *Onkovch v. Success Mining Co.*, 30 Idaho, 623, 166 Pac. 567; *Falls City v. Sperry*, 68 Neb. 420, 94 N. W. 529, 4 Ann. Cas. 272; *People v. Turner*, 265 Ill. 594, 107 N. E. 162, Ann. Cas. 1916A, 1062; *Neenow v. Uttech*, 46 Wis. 581, 1 N. W. 221; *Springfield, etc., R. R. Co. v. Hoeffner*, 175 Ill. 634, 51 N. E. 884; *Jacksonville, etc., Ry. Co. v. Hooper*, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515; *Dunlop v. U. S.*, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799; *Fisher v. O'Brien*, 99 Kan. 621, 162 Pac. 317, L. R. A. 1917F, 610.

The jurors in the present instance were carefully instructed as to the preponderance of the evidence, as to contradictory evidence, as to their being the exclusive judges of the credibility of the witnesses, as to the presumption that every witness speaks the truth, and the like. The controverted instruction was but an amplification of the statutory rule that the jurors are the exclusive judges of the credibility of the witnesses, but that they must act with legal discretion and in subordination to the rules of evidence. By the process indicated, in the charge, they were directed to analyze

the evidence and to determine the truth of the matter in dispute. It is utterly impracticable in the administration of courts of justice to secure a juror whose mind is totally blank as to questions involved in the ordinary transactions of life. Triers of fact cannot, in the nature of things, be divested of general knowledge of practical affairs. The court cannot do otherwise than to direct them to use such experiences as are common to all men in the decision of questions of fact. It is part of the jury system which cannot be dispensed with. There was no error in this instruction.

[7-9] The remaining error presented in argument is to the effect that the court was wrong in allowing the jury to award damages to the plaintiff for mental anguish which she might experience in the future. It is true, as taught in *Adams v. Brosius*, 69 Or. 513, 139 Pac. 729, 51 L. R. A. (N. S.) 36, that mere mental anguish, unaccompanied by physical injury, is not a ground for damages. But on the other hand, we learn in *Maynard v. Oregon R. R. Co.*, 46 Or. 15, 78 Pac. 933, 68 L. R. A. 477, that—

"It is undoubtedly true that one suffering from injuries to his person, due to the negligence of another, may recover for mental distress and anguish resulting from the same cause."

The subject is exhaustively discussed in *Indianapolis Street Ry. Co. v. Ray*, 167 Ind. 236, 78 N. E. 978, and the conclusion reached that although damages are not recoverable for mental anguish flowing remotely from a physical impact caused by negligence, or from brooding over the plaintiff's physical condition, yet "an instruction in a personal injury case that plaintiff should recover for medical expenses past and future, loss of earnings past and future and bodily pain and mental suffering past and future, is correct." So intimately connected are the mind and body that no severe physical injury can occur without involving mental distress; and for that which directly flows from the physical injury as a natural consequence, whether present or fairly and reasonably to be apprehended, the injured party is entitled to recover such damages as will justly compensate him for the sequelæ of the physical injury, whether the same be mental or physical. It will be noted that the challenged instruction in the instant case limits the physical pain and mental anguish to that which is "a direct, natural, and proximate result of the injury." Collateral distress is not included.

The judgment is affirmed.

McBRIDE, BROWN, and HARRIS, JJ., concur.

BOTTIG v. POLSKY.

(Supreme Court of Oregon. Oct. 4, 1921.)

1. New trial \S 26—Trial court may grant in case of mistake preventing proper presentation of a cause, although no exception was taken.

A trial judge has power, when, by reason of some misapplication of the principles of law, or in consequence of some inadvertence to which attention has not been called, if satisfied that a party has not had his cause properly presented, to set aside a judgment rendered upon a verdict and grant a new trial when such action does not violate Const. Amend. art. 7, § 3 (see Laws 1911, p. 7), providing that no fact tried by jury shall be otherwise re-examined unless the court can affirmatively say that no evidence supports the verdict. (Per Harris, McBride, and Brown, JJ.)

2. Trial \S 252(11)—Instruction based on no evidence held erroneous.

Where there was no evidence that an employer failed to provide sufficient number of men to pile barrels in a box car, an instruction that plaintiff was entitled to a verdict if the employment involved a risk or danger, and if defendant failed to provide a sufficient number of men to do the work, is erroneous. (Per Harris, McBride, and Brown, JJ.)

3. Statutes \S 194—General words following enumeration of persons and things not to be construed in their widest sense, but as applying to persons or things specifically mentioned.

General words following an enumeration of persons or things, or by words of a particular and specific meaning, are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned, unless the legislative intent clearly appears to the contrary. (Per Harris, McBride, and Brown, JJ.)

4. Master and servant \S 107(8)—Dangerous employment within Employers' Liability Act defined.

Employers' Liability Act (Or. L. §§ 6785-6791), requiring persons having charge of work involving a risk or danger to employees to use every practicable safety device, does not apply to every employment in which an injury occurs, but applies only when the employment, considered as a class, is inherently dangerous, or if conditions are such as to render inherently dangerous a work which ordinarily is not dangerous; and the prescribed duty rests upon the employer if the work involves a risk or danger, whether caused by machinery or otherwise. (Per Harris, McBride, and Brown, JJ.)

5. Master and servant \S 286(5)—Dangerous employment within statute held question for jury.

In an action based on Employers' Liability Act (Or. L. §§ 6785-6791), requiring persons in charge of work involving a risk or danger to employees to use every safety device, held, on

the evidence as to plaintiff's injury by a barrel, which fell on his hand while piling barrels in a box car, that the question whether the manner of doing the work involved risk or danger, so as to render the employment inherently dangerous within the statute, was a question for the jury. (Per Harris, McBride, and Brown, JJ.)

6. Pleading \S 34(1) — Complaint should be construed most strongly in favor of pleader where defendant answered after overruling of demurrer to complaint.

Where defendant answers after his demurrer to complaint is overruled, complaint is to be construed most strongly in favor of the pleader, and will be sustained where the complaint contains a defective statement of the cause of action, but not where it fails to state a cause of action. (Per Bean, J.)

7. Pleading \S 212 — Demurrer to complaint waived by filing answer.

A defendant, by filing an answer and denying the gist of the allegations of the complaint, and affirmatively alleging contributory negligence and assumption of risk, waives his demurrer to the complaint. (Per Bean, J.)

8. Pleading \S 406(5), 433(3)—In action for negligence, failure to allege a specific act of negligence or duty omitted is waived by answer over and cured by verdict.

In action for negligence, failure to allege any specific negligent act done or duty omitted is a mere defective statement of the cause of action, and is waived by answering and cured by verdict. (Per Bean, J.)

9. Master and servant \S 258(10)—Allegation held to imply negligence of employer piling barrels in box car.

In an action based on Employers' Liability Act for negligent injury in loading a box car with barrels, an averment that defendant was negligent in not using every device, care, and precaution which it was practicable to use for the safety and protection of life and limb, clearly implies that it was practicable to pile the barrels, so that the upper one would not fall down. (Per Bean, J.)

10. Master and servant \S 265(4)—Burden on employee to show practicability of safety device.

In an action under the Employers' Liability Act (Or. L. \S 6785), providing that persons having charge of work involving a risk or danger to employees or the public shall use every device, care, and precaution which it is practicable to use for the protection and safety of life and limb, the burden is on plaintiff to show the practicability of using such a device. (Per Bean, J.)

11. Master and servant \S 204(1) — Assumption of risk no defense under statute.

Where plaintiff performed work in conformity to orders of defendant's foreman, who had charge of the work, defendant is responsible for the manner in which the work was done, and is not entitled to the defense of assumption of risk under Employers' Liability Act (Or. L. \S 6789). (Per Bean, J.)

12. New trial \S 39—Setting aside verdict and judgment held error.

Where the complaint stated a cause of action for injuries to servant, which was substantiated by evidence, and defendant understood cause of action, and was not surprised during trial, and the jury was correctly charged concerning the issues, it was error for the trial court to set aside verdict and judgment on ground that instructions should not have been given under the Employers' Liability Act. (Per Bean, J.)

13. Pleading \S 8(17)—Allegation of negligent injury held conclusion.

In an action for negligent injury, an allegation that the injury was caused by negligence of defendant in requiring plaintiff to place barrels in a box car, one barrel upon another, and to stack the barrels up as high as the roof of the car would permit, and in not using every device, care, and precaution which is practicable for the protection of employees as required by law, in that defendant did not have sufficient employees engaged in the work, and directed that the work be done in such a manner that it was possible for barrels to roll down from the top of the pile and fall upon the person engaged in the work, is defective in that it does not show by any statement of fact, or otherwise than as embodied in the pleader's averment of a legal conclusion, what it was practicable to do and was not done. (Per Burnett, C. J.)

14. Master and servant \S 107(8)—Piling barrels in box car not employment within Employers' Liability Act; "risk" or "danger."

Loading a box car with empty barrels in the usual and ordinary manner does not involve a "risk" or "danger" within the meaning of the Employers' Liability Act (Or. L. \S 6785-6791). (Per Johns, J.)

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Danger; Risk.]

In banc.

Appeal from Circuit Court, Multnomah County; J. P. Kavanaugh, Judge.

Action by Joe Bottig against Fred Polsky. From an order setting aside verdict and judgment for plaintiff, and granting a new trial, plaintiff appeals. Affirmed.

Joe Bottig, an employee of Fred Polsky, was injured while loading empty barrels in a box car. Bottig sued Polsky and recovered a verdict and judgment for \$1,000. On motion of the defendant the trial court set aside the verdict and judgment, and granted a new trial. The plaintiff appealed.

Fred Polsky was a dealer in new and secondhand barrels and kegs, and did business under the assumed business name of Panama Cooperage Company. His place of business was on Front street, in Portland. From time to time Polsky shipped barrels by railway. On March 5, 1919, a railway box car

was placed at the corner of Salmon and Front streets in order that Polsky might load it with barrels. The car could not be placed for loading prior to 8 p. m., because to have placed the car there before that hour would have interfered with trains; and hence it was necessary that the loading be done after 8 p. m., and in the nighttime. The work of loading was begun soon after 8 p. m., and completed about midnight. Bottig was injured about 11:30 p. m.

Lanterns were used to light the inside of the car. According to evidence offered in behalf of defendant, three good lanterns were used; but according to the testimony of plaintiff "it was awful dark," for he explained "sometimes we had one or two lamps in there, coal oil lamps, and the glass was black and dirty like a coal sack." The plaintiff testified that "they was always in a hurry;" and in explanation of this testimony it is claimed that the evidence supports the statement that the plaintiff and the other three men who were helping to load the car had other employment in the daytime, and on that account were anxious to expedite the work of loading; and, furthermore, it is said that it was necessary to complete the work before a certain time, so that there would be no interference with traffic on the railroad. Most, if not all, of the barrels had once contained oil, and consequently many of them were greasy on the outside. Although all the barrels were not the same in height and circumference, some being longer than others, and varying in circumference, most, if not all, of them were 50-gallon barrels. The car when loaded contained about 300 barrels.

The barrels were hauled on a truck from the defendant's place of business to the car, and there loaded through a door located at the middle of the car and in the side of it. The car was loaded in the manner generally followed when loading barrels into a car. One end of the car was filled "up to" the door, and then the other end was loaded "up to the door"; and finally the middle was filled. The barrels were placed in tiers. Each tier, when completed, contained four rows. The barrels in the first three rows were placed upright or end on end; but the proximity of the roof of the car made it necessary to lay the barrels in the fourth row on their sides.

At the time when plaintiff was hurt both ends of the car had been filled, and the plaintiff and those working with him were engaged in filling the middle of the car. A tier of four rows had been piled "up to the door"; next to this tier was one containing two rows; and next to the latter was one or more tiers, each of which at that time contained but one row. E. J. Bundy, the truck driver, delivered the barrels from the truck

into the car. John P. Schuster, who was in charge of the work, was inside the car. Nicholas Skow worked inside of the car part of the time, and during the remainder of the time he helped Bundy.

Bottig was piling barrels on the tier which contained two rows. According to the testimony of Bottig, both Schuster and Skow were inside of the car receiving barrels from Bundy and delivering them to Bottig; but there is also evidence to the effect that at the time of the injury Skow was on the truck. At any rate, Bottig had received a barrel from Skow or Schuster and had placed it on the tier containing two rows, and, with one hand resting on the barrel which he "put on last," was waiting to receive the next barrel to be delivered to him, when a barrel fell from the fourth row of the adjoining tier, which had been piled "up to the door," striking his hand and severely injuring it.

The plaintiff claims that the falling of the barrel was caused by the fault of the defendant. Polsky says that the plaintiff himself negligently caused the barrel to fall. The complaint consists of four paragraphs and the prayer. The first paragraph merely tells who the defendant is, what his business is, and where he does business. The second paragraph informs us that the plaintiff was employed by the defendant and directed to assist in loading empty barrels in a box car, and that while so engaged the plaintiff was injured by a barrel which fell upon his hand. The third paragraph is as follows:

"That said injury to plaintiff was caused by the carelessness, recklessness and/or negligence of defendant in requiring plaintiff to place said barrels in said box car, one barrel upon another, and to stack said barrels up as high as the roof of said car would permit, and in not using every device, care, and precaution which it is practicable to use for the safety and protection of life and limb of defendant's employees, as required by law, in that defendant did not have sufficient employees engaged in said work, and directed that said work be done in such manner that it was possible for barrels to roll down from the top of the pile and to fall upon the persons engaged in said work, and directed said work to be done in such manner as to be dangerous to those employed therein; that defendant well knew of the danger involved in loading said barrels in said car at that time in the manner in which he required said work to be done, and failed to take proper and necessary precautions to prevent such accidents."

The fourth paragraph declares that plaintiff expended \$20 for medical services, and that he will be compelled to spend more money for a surgical operation; that he was unable to work for several weeks, and on that account lost wages; and that he has been permanently damaged in a specified sum.

The defendant filed a motion to require the

plaintiff to set out in paragraph 3 of his complaint—

"wherein the defendant did not use 'every device, care, and precaution which it is practicable to use for the safety and protection of defendant's employees as required by law,' and further set out in said paragraph 3 wherein the defendant 'failed to take proper and necessary precautions to prevent such accidents.'"

The court denied the motion, and also overruled a demurrer which the defendant subsequently filed.

After the demurrer was overruled, the defendant filed an answer denying paragraphs 3 and 4 and a portion of paragraph 2 of the complaint. For a first further and separate defense the defendant alleged that the plaintiff was guilty of contributory negligence; and for a second further and separate defense the defendant pleaded assumption of risk. The plaintiff replied by denying each of the two separate defenses pleaded by the defendant.

The trial judge instructed the jury concerning the Employers' Liability Act (Or. L. §§ 6785-6791), and also concerning the rules of common-law negligence. Under the charge given by the court the jurors were permitted to return a verdict for the plaintiff if they found sufficient facts to bring the transaction within the Employers' Liability Act, or, if the Employers' Liability Act did not apply, to return a verdict on the theory of common-law negligence in the event sufficient facts existed to create a common-law liability.

The court in its charge pointed out the specifications of negligence appearing in the complaint and instructed the jury:

"So you have three charges of negligence, and these only: That there were not sufficient employees there; second, that he directed the work to be done in a manner that it was possible for the barrels to roll down from the top of the pile and fall upon the employees engaged in said work; and, third, that he directed the work to be done in such manner as to be dangerous to the employees."

The court further instructed the jury:

"If you find, I say, by a preponderance of the evidence that he was guilty of negligence in either of those particulars (the three particulars specified), and further find by a preponderance of the evidence that such negligence, if any, was the proximate cause of the injury to this plaintiff, and if you further find that these provisions, if corrected—that is to say, if he employed more men or if he piled the barrels differently or in some other way—if that would not have interfered with the efficiency of the work, then your finding upon that charge of negligence should be in favor of the plaintiff."

After a verdict was returned in favor of the plaintiff, the defendant moved for a new trial, and assigned as grounds: (1) Refusal

of the court to grant a judgment of nonsuit; (2) refusal to direct a verdict for the defendant; (3) refusal to instruct the jury that the Employers' Liability Act did not apply; (4) a refusal to give four requested instructions.

The trial court allowed the motion for a new trial, and signed and filed a writing which reads thus:

"A careful review of the allegations of the complaint convinces me that these allegations are insufficient to justify the court to submit the controversy to the jury under the Employers' Liability Act; that the instructions relating to the Employers' Liability Act were erroneous; and that a new trial should be granted."

According to the testimony of Bottig, the barrel which fell upon his hand was placed in the tier from which it fell by Schuster and Bottig, acting together and under specific instructions given by Schuster. There was evidence offered in behalf of plaintiff to the effect that the offending barrel, when placed in position, could have been made safe if one employee had held it there until the adjoining tier had been built up three rows high; or that it would have been safe and practicable if the defendant had built each of the two tiers three rows high before placing the barrel in position, for by so doing the barrel would have been supported by two tiers instead of one. Schuster says that before the barrel fell he called the attention of Bottig to it, and directed Bottig to take the barrel down from the tier, and that thereupon Bottig, who was very strong, jammed the barrel under the roof of the car so that when Schuster tested it he found the barrel to be lodged tightly and "sound." Schuster further says that, soon after testing the barrel, and finding it to be "sound," Bottig received a barrel to be placed upon the tier containing two rows, and that in attempting to pile this barrel in the last-mentioned tier Bottig got the chime of the barrel wedged between the two tiers, and then attempted to extricate it by using it as a pry on the tier containing the four rows; that he (Schuster) directed Bottig to desist from prying, but notwithstanding his directions Bottig continued to use the wedged barrel as a pry, with the result that the barrel which had previously been tested and found to be lodged "sound" was displaced, and fell upon the plaintiff's hand.

Henry L. Lyons, of Portland, for appellant.
Alex Bernstein, of Portland (Bernstein & Cohen, of Portland, on the brief), for respondent.

HARRIS, J. (after stating the facts as above). [1] After the adoption of the constitutional amendment known as article 7, § 3 (see Laws 1911, p. 7), it was held that the

granting of a new trial was not a matter of discretion and "that an order for the rehearing of a cause could not be sanctioned except when the court had committed some error, which if properly excepted to or seasonably called to the attention of the court and the motion denied, would have been sufficient cause for a reversal of the judgment if it had been brought up for review; and that under such circumstances the trial court upon motion or sua sponte possessed adequate power and was authorized" to correct the error which it had committed by granting a new trial. In 1918 this rule was broadened in *Archambeau v. Edmunson*, 87 Or. 476, 487, 171 Pac. 186, 189, where it was said:

"The rule thus established ought in our opinion to be enlarged so that, when by reason of some misapplication of the principles of law to which no exception has been taken, or in consequence of some inadvertence to which attention has not been called, if the court is satisfied that a party has not had his cause properly presented, justice which should be dispensed in all cases sanctions the setting aside of a judgment rendered upon a verdict and the granting of a new trial, when such action of the lower court does not violate article 7, § 3, of the Constitution of Oregon respecting the quantum of evidence."

In that precedent there was a general verdict and a judgment for the plaintiff. The defendant moved to set aside the judgment rendered for the plaintiff and for the entry of a judgment for the defendant on the ground that the general verdict was inconsistent with the special findings. The trial court granted the defendant's motion; but subsequently the trial court concluded that its charge to the jury was not sufficiently specific, and, although the charge to the jury was not challenged in any manner, the court upon its own motion set aside the second judgment and ordered a new trial. Although, if the question were *res integra*, it might be difficult to reach the conclusion adopted in *Archambeau v. Edmunson*, the rule of stare decisis is now applicable; for the doctrine announced through Mr. Justice Moore in *Archambeau v. Edmunson* was followed in an opinion by Mr. Justice Johns speaking for this court in *Cathcart v. Marshfield*, 89 Or. 401, 174 Pac. 138, and was approved in *Dunlway v. Hadley*, 91 Or. 343, 346, 173 Pac. 942, in an opinion written by Mr. Justice Bean, and therefore may now be regarded as the settled law of this jurisdiction. See, also, *State v. Evans*, 98 Or. 214, 221, 192 Pac. 1062, 193 Pac. 927. In actual practice, the rule promulgated in *Archambeau v. Edmunson* will be an aid, rather than a hindrance, in the administration of real justice; and on that account the doctrine of stare decisis is especially applicable.

[2] As previously explained, the court instructed the jury that the plaintiff was entitled to a verdict if the defendant was guilty

of negligence in any one of the three particulars mentioned in the complaint. The jurors were informed not once, but several times, that the plaintiff was entitled to a verdict if the employment involved a risk or danger, and if the defendant failed to provide a sufficient number of men to do the work. This instruction, when viewed in the light of the evidence, was clearly erroneous, for the reason that there was not a word of testimony to sustain the allegation that the defendant did not employ a sufficient number of men; but upon the contrary, every witness who testified upon the subject, including the plaintiff himself, affirmatively declared that there was a sufficient number of men. It had been the practice of the defendant to have three or four, but never more than four, men to do the work. The plaintiff had between November, 1918, and March 5, 1919, helped to load cars with barrels on as many as ten different occasions and on none of those occasions were there more than four men. Neither the plaintiff nor any other witness gave any evidence containing even the slightest suggestion that more than four men ought to have been employed; but upon the contrary the record informs us that the plaintiff, as well as other witnesses, unequivocally declared that there was a sufficient number of employees present; for the following question was asked and answer given on the direct examination of Bottig:

"Q. I will ask you, then, Mr. Bottig, how many men should they have had there to do the work so that the work would be safe and the barrels would not fall down? A. He could do that with the men he got there; he got plenty of men to pile them in a safe condition, not take chances on it."

The witness then explained that one of the men ought to have been directed to hold the barrel in place until the adjoining tier was piled three rows high.

In the memorandum filed by the trial judge he explained that a new trial should be granted because, among other reasons, "the instructions relating to the Employers' Liability Act were erroneous." It may be assumed for the purposes of this discussion that most of the instructions relating to the Employers' Liability Act were correct; but it is clear that the instructions concerning the number of employees were erroneous and prejudicial to the defendant. Manifestly the case was not properly presented when the jurors were told that they could return a verdict based upon a specification of negligence which was not only without the support of a scintilla of evidence, but was expressly disaffirmed by the plaintiff himself, as well as every other witness who testified upon the subject. If the defendant had requested and the trial court had refused to charge the jury that there was no evidence to support the allegation that an insufficient

number of men was employed, and if the defendant had excepted to such refusal, or, if the defendant had excepted to the instructions actually given concerning this specification of negligence, then, in either situation, every judicial opinion written by this court having any application whatever to the subject would without a single exception require upon an appeal a reversal of the judgment obtained by the plaintiff, for the plain reason that the instruction was extremely prejudicial to the rights of the defendant. We cannot possibly know whether the verdict was or was not based on the allegation concerning the number of men. If the verdict was in part based upon that allegation, then to that extent the verdict was without support. If the verdict was based solely upon that allegation, then the verdict was wholly without support. Under the rule expressed in *Archambeau v. Edmunson*, the trial court properly allowed a new trial.

It is argued that the instructions requested by the defendant included a requested instruction which proceeded upon the theory that the jury could return a verdict based upon the allegation concerning an insufficient number of men; and that therefore the defendant invited the court to tell the jury that the Employers' Liability Act applied, and that a verdict could be based upon the allegation relating to the number of employees. The defendant moved for a judgment of nonsuit, contending that the cause did not come within the embrace of the Employers' Liability Act; and he consistently maintained this contention throughout the trial. The defendant requested an instruction that the Employers' Liability Act did not apply. The defendant contended that there was no liability whatever; but he also argued that, if there was any liability at all, it was only because of common law negligence. It is true that the defendant requested an instruction that the only specifications of negligence were the three already pointed out, and it is also true that the defendant requested the court to charge the jury that "these are the only grounds of negligence that you are to take into consideration;" but it is likewise true that the instructions requested by the defendant and refused by the court were so worded as to require a finding that all the specifications had been sustained by the evidence before a verdict could be returned for the plaintiff. The instructions requested by the defendant were in the conjunctive, and not in the disjunctive. The defendant did not ask the court to give any instruction which would have permitted a verdict based solely upon the allegation concerning the number of employees. It is true that the attention of the court was not directed to the fact that there was no evidence to sustain the allegation relating to the number of men; but it is also true that the situation was one which

came clearly within the doctrine of *Archambeau v. Edmunson*, and hence the trial court was entirely warranted in granting a new trial.

[3, 4] In the circuit court, and also in this, the appellate court, the defendant insisted that the Employers' Liability Act (sections 6785 and 6791, Or. L.) does not apply. If the defendant is liable at all under the statute, it is only because of the following omnibus clause with which section 6785, Or. L., is concluded:

"And generally, all owners, contractors or subcontractors and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

This clause, which is sometimes referred to as the "and generally clause," has been construed by this court, speaking through Mr. Justice Bean, in *O'Neill v. Odd Fellows' Home*, 89 Or. 382, 389, 174 Pac. 148, 150, to apply only to employments which are inherently dangerous; and, since we deem it peculiarly appropriate here, we now quote at length from that opinion:

"It is manifest that this general clause, providing for care and precaution to be used in work involving a risk or danger, refers to employments additional to those mentioned in the first part of the section, which are similar in kind as to having danger inherent therein, or involved in the same, or combined inextricably, or nearly so, therewith. The act, as its title indicates, embraces within its scope what is usually termed dangerous or hazardous employment. It is a general rule of statutory construction that, where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned, unless the legislative intent clearly appears to the contrary. Black on Interpretation of Laws, p. 141; 2 Lewis' Sutherland Statutory Construction, § 360. In a certain sense, there is a risk or danger in a person going up or down an ordinary flight of stairs in a home, but this is not the kind of risk or danger embraced within the meaning of the statute. It would hardly be said that a person's work which required him to go up and down ordinary stairs, or hang clothing on a line using a common stepladder two or three feet in height, not inherently defective, and with no particular danger involved therein, would be likely to harm, or would be perilous, hazardous, or unsafe. The whole language of the act denotes that the kind of employment thereby protected is that which is beset with

danger, the hazardous, dangerous employments similar to those enumerated in the act, or which under the circumstances or manner in which it is being executed is rendered dangerous, within the meaning of the act. See *Olds v. Olds*, 88 Or. 209, 171 Pac. 1046, 1048."

The "and generally clause" may present itself for consideration in two aspects. There are some employments which, because of their very nature, as for example working on a line carrying a high voltage of electricity, are as a class regarded as inherently dangerous; the employment, when considered in the abstract, and spoken of as one of different kinds of employment, without regard to any unusual conditions attending some individual case, is by most, if not all, persons unhesitatingly classed as a dangerous employment, because it is a kind of employment in which danger inheres; the work involves, has wrapped up in it, embraces, danger. See *Century Dictionary* for a definition of the word "involve." See, also, *Fernald on English Synonyms, Antonyms, and Prepositions*, pp. 301 and 307. On the other hand, there are employments which, when considered in the abstract, are never spoken of as dangerous employments; and yet an employment which ordinarily and generally is a nondangerous one may nevertheless, because of the presence of extraordinary and unusual conditions, be converted in some individual case into an employment inherently dangerous.

It is suggested that whenever an injury occurs it speaks for itself, and declares itself to be the accomplished result of a risk evolved from the employment; and that, since a risk cannot be evolved from an employment unless that employment involves that risk, it necessarily follows that such risk was involved in the employment, and that therefore the employment is within the embrace of the *Employers' Liability Act*. Under this view, a servant who stubs his toe when ascending an ordinary flight of stairs in the master's residence, and is hurt, is engaged in an employment involving a risk or danger, because, forsooth, he was hurt. This interpretation is equivalent to saying that, regardless of the class of employment and regardless of the conditions attending an employment, the mere occurrence of an injury is irrefutable and conclusive evidence of danger, and that the employer is necessarily liable unless it appears that he has performed his duty by using every practicable care, device, and precaution. Such an interpretation of the *Employers' Liability Act* takes notice of nothing except the single word "involving," and gives to that word a meaning which its etymology does not compel, even though the word is viewed alone, and without regard to the words accompanying it; and, moreover, such an interpretation gives no heed to the purpose of the statute, which is made plain by the title of the act, by the ballot title,

by the argument printed in the *Voters' Pamphlet*, and by the context of the statute. See *Turnidge v. Thompson*, 89 Or. 637, 175 Pac. 281, where the *Employers' Liability Act* is given in full, together with the title of the act, the ballot title which appeared upon the ballots used by the voters, an excerpt from the argument printed in the *Voters' Pamphlet*, and a narrative of some additional facts shown by the official records.

When the body of the act is read in connection with its title, and is considered in the light of the language of the ballot title placed before the eyes of every voter in Oregon who went to the polls, and is viewed in the light of the argument appearing in the *Voters' Pamphlet* which was sent to every registered voter in Oregon, then, in the view of the writer it will be impossible to expand the meaning of the statute beyond the boundaries marked out in *O'Neill v. Odd Fellows' Home*, 89 Or. 382, 174 Pac. 148. It is now too late to enter into any debate as to whether or not the act applies to an employment which, although ordinarily non-hazardous, is in a given instance made dangerous by unusual and peculiar conditions; for that question is foreclosed by numerous precedents, and the rule of *stare decisis* applies with full force. If, therefore, an employment considered as a class is inherently dangerous, as explained in *O'Neill v. Odd Fellows' Home*, 89 Or. 382, 174 Pac. 148, or, if the conditions in an individual case are such as to render inherently dangerous a work which ordinarily is not dangerous, then in either event the *Employers' Liability Act* applies.

The defendant argues that there was no machinery used and that there was no need for any device, and that therefore the statute does not apply. The language of the statute is: "And generally" an employer having charge of "any work" involving risk or danger shall use "every device, care and precaution." The inquiry to be made is: Does the work in truth involve a risk or danger? If the work does involve a risk or danger, whether caused by machinery or otherwise, then the statute imposes a prescribed duty upon the employer, and it then becomes pertinent to inquire whether that duty has been performed. The element of danger may be present because of the presence of machinery; or, although there may be a total absence of machinery, the work may nevertheless be such as to involve danger in its highest form. If the employment as a class is inherently dangerous, or if, because of the presence of certain conditions, an otherwise nondangerous employment is rendered inherently dangerous then the *Employers' Liability Act* applies, and it becomes the duty of the employer to use the care prescribed by the statute.

[5] The question as to whether or not a work involves a risk or danger is generally

a question of fact to be decided by a jury (*Mackay v. Commission of the Port of Toledo*, 77 Or. 611, 616, 152 Pac. 250); and hence, unless, as in *O'Neill v. Odd Fellows' Home*, 89 Or. 382, 174 Pac. 148, the court can say as a matter of law that the work does not involve a risk or danger, the question of danger should be submitted to the jury.

When measured by the record presented here, the work of piling empty barrels in a box car, considered as a class of work, is not in general an inherently dangerous work. If the testimony of Schuster is entirely true, then the barrel which fell upon the plaintiff's hand was, after being jammed under the roof, safe, and carried with it no danger whatever until the plaintiff continued to use the wedged barrel as a pry in disobedience to the instructions of Schuster, and by his own negligence the plaintiff himself caused the barrel to fall. If, however, Bottig's version is correct, then it is a question of fact for the jury to decide whether the work was rendered inherently dangerous because of the insecure position of the offending barrel, together with other attending circumstances, such as the greasy condition of the barrels, poor light, and the hurry required of the men. In other words, it is for the jury to say whether because of the attending circumstances and conditions the work was rendered inherently dangerous. The defendant's contention that the Employers' Liability Act is as a matter of law inapplicable cannot be sustained.

Inasmuch as the case is to be retried, it is proper to call attention to the complaint. The language of the complaint is in general terms; the pleading in a large measure consists of mere conclusions of law. The motion to make the complaint more definite and certain should have been sustained on the authority of *Cameron v. Pacific Lime & Gypsum Co.*, 73 Or. 510, 517, 144 Pac. 448, Ann. Cas. 1916E, 769, and *Camenzind v. Freeland Furniture Co.*, 89 Or. 158, 171, 174 Pac. 139. However, it is not necessary to decide whether the demurrer to the complaint should have been sustained, or whether the complaint is sufficient after verdict and judgment; but it will suffice to say that, since the cause is to be remanded for a new trial, it will be proper for the circuit court to require the complaint to be made more definite and certain. The order granting a new trial is affirmed.

BENSON, J., not sitting.

McBRIDE and BROWN, JJ., concur.

BEAN, J. (concurring in part with HARRIS, J.). The motion for a new trial was based upon the grounds: (1) Insufficiency of the evidence to justify the verdict, and that the same is against law; (2) errors in law occurring at the trial and excepted to by the defendant. Defendant claimed that this was not an action that came under the Employ-

ers' Liability Act. The trial court granted a new trial, for the reason that the complaint was insufficient to justify submission of the case to the jury under the Employers' Liability Act, and that the instructions relating to the Employers' Liability Act were therefore errors.

The complaint shows that the plaintiff was employed by defendant to assist in loading empty barrels in a box car, and while so engaged he was injured by a barrel which fell upon his left hand. The negligence of defendant is set forth as follows:

"That the injury to plaintiff was caused by the carelessness, recklessness and/or negligence of defendant in requiring plaintiff to place said barrels in said box car, one barrel upon another, and to stack said barrels up as high as the roof of said car would permit, and in not using every device, care, and precaution which it is practicable to use for the safety and protection of life and limb of defendant's employees, as required by law, in that defendant did not have sufficient employees engaged in said work, and directed that said work be done in such manner that it was possible for barrels to roll down from the top of the pile and to fall upon the person engaged in said work, and directed said work to be done in such manner as to be dangerous to those employed therein; that defendant well knew of the danger involved in loading said barrels in said car at that time in the manner in which he required said work to be done, and failed to take proper and necessary precautions to prevent such accidents."

A demurrer was interposed to the complaint, which was overruled. Plaintiff also moved the court to require plaintiff to make the part of the complaint above quoted more definite and certain, and set out wherein the defendant did not use every device, care, and precaution which it is practicable to use for the safety and protection of defendant's employees. Upon the motion being overruled, defendant answered, denying the negligence and affirmatively alleging as follows:

"That plaintiff was injured through his own fault in not obeying the directions of the man in charge of the work, and that plaintiff so placed the barrels that one rolled on him and struck his hand or fingers, and that said barrel would not have fallen had plaintiff followed the directions as to the manner in which said barrel should be placed in said car; that the injury was due wholly and entirely to the negligence of the plaintiff and without any fault on the part of the defendant or his employees."

The answer further alleges that the work was not in any respect dangerous; that plaintiff assumed the risk, and that he was injured by reason of his own carelessness and negligence. Defendant's first requested instruction reads thus:

"This is an action to recover damages for negligence charged by the plaintiff against the defendant, and as there was no machinery nor

any appliance used in the work that was carried on, I charge you that unless you find, from the evidence, that the employment was a dangerous one and that the defendant directed the work to be done in such a manner as to make it dangerous to the persons engaged in the work, that this action does not come within the Employers' Liability Act, and your verdict must be for the defendant."

Defendant also requested the court to charge the jury that, if they found the work in which plaintiff was engaged was dangerous, but that no absolute duty to furnish any device or other equipment was incumbent upon the defendant, and that plaintiff knew the risk and danger in the work itself, he assumed the risk and the verdict should be for the defendant.

The testimony tended to show that at the time of the injury plaintiff was engaged in loading old empty barrels in a box car. Some of the barrels had contained oil or grease, and were slippery. The work was done at night. The light from two or three lanterns was poor. The barrels were stacked on end three high, and then the fourth barrel was crowded in on its side between the tier and the roof of the car. Mr. John P. Schuster was in charge of the work for the defendant, and assisted plaintiff to place the fourth barrel on top of the three tiers. As described in the testimony, the upper barrel being larger in the middle than at the ends, it could not be pushed in between the three barrels and the roof of the car, but projected out over where the next tier of barrels was to be piled, leaving the barrel which fell with no support except as it was wedged in between the tier of barrels and the roof of the car. Mr. Schuster testified that after they put the fourth barrel up he said to Bottig, "That barrel will have to be taken down; that may come down; safety first." He also testified that "he (Bottig) took hold of the barrel, and jammed it right up under the roof." Mr. Schuster further stated on cross-examination, in referring to the manner in which the barrel which fell was piled:

"Well, what I told him to do, take it out, but he shoved it under the roof, and I put my hand on it, and, by gosh, it was solid.

"Q. So after you got it there, and you testified it and tried it you thought it was all right?
A. Yes; I thought it was all right."

It appears that in piling other barrels the top one was jarred loose, and fell on plaintiff's hand. The testimony tended to show that if one man had held the barrel up while the other tier was placed underneath so as to support it, or if the second tier of barrels had been piled three high before the fourth barrel was placed, the barrel would not have fallen. The testimony indicated that the men sometimes piled the second tier before they put the fourth barrel on top.

There is some dispute between the plaintiff and Mr. Schuster as to the instructions given by the foreman to plaintiff. Plaintiff claims, in substance, that the foreman gave him no warning or instructions. Mr. Schuster testified to the effect that he warned the plaintiff not to hit the barrels which were under the fourth one, as there was danger of its falling.

The action was brought under the Employers' Liability Act, and the court charged the jury under the provisions of that act. The first question for consideration is as to the sufficiency of the complaint. The specifications of negligence in the complaint are somewhat general, and we think could have been made more definite and certain. The complaint charges that the defendant directed the work to be done in such manner that it was possible for the barrel to roll down from the top of the pile upon the person engaged in the work, so as to be dangerous. Tersely stated, it alleges that the barrel was suspended at the top of the car without any support. This is in addition to other general allegations of negligence showing a want of care and precaution, and a failure to use every device which it is practicable to use for the safety and protection of life and limb of defendant's employees.

[6] Where a defendant answers, after the overruling of his demurrer to the complaint, the complaint is to be construed most strictly in favor of the pleader, and will be sustained where the complaint contains a defective statement of a cause of action, but not where it fails to state a cause of action: *Shultz v. Shively*, 72 Or. 450, 453, 143 Pac. 1115; *West v. Eley*, 39 Or. 461, 65 Pac. 798; *Olds v. Cary*, 13 Or. 362, 10 Pac. 789; *Oregon & C. R. R. Co. v. Jackson County*, 38 Or. 589, 597, 64 Pac. 307, 65 Pac. 369.

[7] The defendant, by filing an answer and denying the gist of the allegations of the complaint, and affirmatively alleging contributory negligence and assumption of risk, waived his demurrer to the complaint. Defendant avers, in effect, that there was negligence in the conduct of the work in which plaintiff was engaged, but that it was through plaintiff's fault in not obeying directions of the one in charge in placing the barrel that rolled onto him. This leaves the disputed question as to whether or not plaintiff did the work under orders to which the plaintiff was bound to conform, and did conform, and whether by reason of his having conformed to such orders the injury resulted.

[8] Failure in an action for negligence to allege any specific negligent act done, or duty omitted is, in any event, a mere defective statement of a cause of action, and is waived by answering over, and cured by verdict. *Chan Sing v. City of Portland*, 37 Or. 68, 60 Pac. 718. A different test is applied to complaint after verdict than on a motion or demurrer. In *Minter v. Minter*, 80 Or. 369,

372, 157 Pac. 157, 158, Mr. Justice Burnett states the rule thus:

"It is contended here that the allegations of the complaint are not sufficient to show a partnership. A general demurrer seems to have been filed against the complaint, but without the same having been argued to the court the defendant answered, so that the case now stands and is to be determined as upon the sufficiency of a pleading after verdict. It is said in *Bates v. Babcock*, 95 Cal. 479, 482 (30 Pac. 605, 29 Am. St. Rep. 133, 136, 16 L. R. A. 745, 748): 'Objections to a complaint which should be pointed out by special demurrer, such as uncertainty or ambiguity, are insufficient, unless so specified, to defeat a verdict against the defendant, nor can they, if overruled after having been so specified, be considered for the purpose of sustaining a judgment in his favor that was erroneously rendered after a trial upon the merits. It is only when there is in the complaint an entire absence of averment of fact essential to a recovery, so that no evidence of that fact could be received at the trial, that a judgment in favor of the plaintiff cannot be sustained; but, if the objection be merely that such fact is defectively alleged, evidence received under such averment, if sufficient, will sustain the judgment.'"

We think the complaint is a defective or general statement of a good cause of action, and that it is good after verdict.

[9] It is contended by the defendant that the complaint does not show that any device could have been practically used. The averment that the defendant was negligent "in not using every device, care, and precaution which it is practicable to use for the safety and protection of life and limb," clearly implies that it was practicable to pile the barrels so that the upper one would not fall down. The Employers' Liability Act is analogous to the Factory Act (section 6738, Or. L.). In several jurisdictions, under the provisions of a factory act, the burden is on the defendant to show that it was not practicable to use a particular device or guard reasonably calculated to prevent accident. *Reddington v. Blue & Raftery*, 168 Iowa, 34, 40, 149 N. W. 933; *O'Connell v. Smith*, 141 Iowa, 1, 118 N. W. 266; *Kimmarle v. Dubuque*, 154 Iowa, 42, 134 N. W. 434; *Caspar v. Lewin*, 82 Kan. 604, 109 Pac. 657, 40 L. R. A. (N. S.) 526; *Gross v. Eagle Wheel Mfg. Co.*, 252 Pa. 361, 97 Atl. 457; *Camenzind v. Freeland Furniture Co.*, 89 Or. 158, 171, 174 Pac. 139.

[10] The rule in this state is understood to be that the burden is upon the plaintiff to show the practicability of using such a device. *Cameron v. Pac. Lime & Gypsum Co.*, 73 Or. 510, 517, 144 Pac. 446, Ann. Cas. 1916E, 769. A strict rule as to the allegations and proof as to the practicability of performing work with care and precaution, or by the use of a certain device, should not be invoked. An employer is in a better position to show the impracticability of the use of a certain

device than the employee is to prove the practicability. Moreover, there can be but little question in regard to the practicability of using care and precaution as commanded by the Employers' Liability Law. In *Quinn v. Hawley Pulp & Paper Co.*, 85 Or. 630, 635, 167 Pac. 571, 572, which in principle was much like the case at bar, it was shown on the part of defendant that the material was piled in the usual way. Mr. Justice Burnett stated:

"That the bales were stacked up in the usual way does not controvert the showing of the plaintiff. If that was the habitual method of storing the paper, the wonder is that some one was not hurt before the injury in question. If the process used was such as in fact to cause hurt to the employee, when it was practicable to obviate the danger, its long continuance does not make it less culpable."

In the present case the defendant claims that the barrels were piled in the usual manner. It is in evidence, however, that by actual experience the second tier of barrels could be piled three high before the fourth barrel was placed on top.

The testimony indicated that the foreman took hold of the barrel with the plaintiff, and assisted him in placing it, saying, "You will have to put it up there." The Employers' Liability Act, among other things, enjoins upon all owners or persons having charge of, or responsible for, any work involving a risk or danger to the employees, to use every device, care, and precaution which it is practicable to use for the protection and safety of life and limb. It will be noticed from this clause that "care and precaution" are commanded by the law equally as strong as the use of a device. We see no reason why the one is not just as essential as the other. It is true that the use of a device may include care and precaution, while care or precaution may or may not include the use of a device. In the present case there was no device such as is usually used to guard dangerous machinery, and the question in regard to a device is not involved, unless we term the third barrel which might have been placed under the barrel which fell a device. That there was a want of care and precaution in the conduct of the work is alleged, and testimony was adduced supporting such allegation. In fact, the testimony of the foreman himself showed that there was negligence in placing and allowing the barrel to remain in the precarious condition. He directed it to be put up and neglected to take it down. He neglected to put up the second tier of barrels before attempting to lay the fourth barrel on top of the tier.

[11] The testimony shows that the plaintiff, pursuant to his duty, by virtue of his employment by defendant, performed the work in conformity to the orders of Mr. Schuster, who had charge of the work. The defendant was responsible for the manner

in which the work was done under the direction of his foreman, and is not entitled to the defense of assumption of risk, according to the provisions of section 5 of the Employers' Liability Act (Or. L. § 6789).

It is urged by counsel for defendant that the work did not involve a risk or danger to employees. This question is one of fact to be determined by the jury rather than a question of law. *Mackay v. Port of Toledo*, 77 Or. 611, 152 Pac. 250; *Paullos v. Grove*, 84 Or. 106, 164 Pac. 562. From the testimony adduced the jury could reasonably believe that the work was dangerous.

The want of care and precaution upon the part of the defendant, as averred in the complaint and as shown by the testimony, was much the same in principle as in the cases of *Quinn v. Hawley Pulp & Paper Co.*, supra, *Reed v. Western Union*, 70 Or. 273, 141 Pac. 161, where a bucket of paint fell upon the plaintiff, and *Adams v. Albina Eng. & Machine Works*, 97 Or. 543, 192 Pac. 793, where a pile of angle irons fell upon the plaintiff. Therefore there was no error in overruling the motion for a nonsuit, and refusing to direct a verdict for defendant.

[12] The action was brought, as the complaint indicates, under the Employers' Liability Act. If the complaint should be amended so as to make it more specific, the same testimony could be introduced. The defendant apparently understood the allegations of the complaint, and was in no way surprised upon the trial. The court plainly and carefully charged the jury under the provisions of the Employers' Liability Act. Among other things the jury was told that they must first find by a preponderance of the evidence that the service in which the plaintiff was engaged at the time of the injury involved a risk and danger to plaintiff and other employees, practically as requested by defendant. The court instructed the jury in regard to common-law liability. Such charge, however, was favorable to the defendant, and gave him the benefit of the full defense of contributory negligence and the defense of assumption of risk. The complaint states a cause of action, and the testimony substantiates the complaint. It was therefore error for the trial court to set aside the verdict and judgment.

The judgment of the circuit court should be reversed, and the cause remanded, with directions to enter judgment upon the verdict.

BURNETT, C. J. (concurring in the result). [13] The circuit court set aside a verdict and judgment for the plaintiff and ordered a new trial. I concur in the result reached by Mr. Justice HARRIS in his opinion affirming this action, for the reasons here stated. The charge of negligence is as follows:

"That said injury to plaintiff was caused by the carelessness, recklessness, and/or neg-

ligence of defendant in requiring plaintiff to place said barrels in said box car, one barrel upon another, and to stack said barrels up as high as the roof of said car would permit, and in not using every device, care, and precaution which it is practicable to use for the safety and protection of life and limb of defendant's employees, as required by law, in that defendant did not have sufficient employees engaged in said work, and directed that said work be done in such manner that it was possible for barrels to roll down from the top of the pile and to fall upon the person engaged in said work, and directed said work to be done in such manner as to be dangerous to those employed therein. That defendant well knew of the danger involved in loading said barrels in said car at that time in the manner in which he required said work to be done, and failed to take proper and necessary precautions to prevent such accidents."

The allegation is defective in that it does not show by any statement of fact, or otherwise than as embodied in the pleader's averment of legal conclusion, what it was practicable to do that was not done, for the protection of life and limb in the progress of the work. I am not in accord with the argument, by inference at least, that the work contemplated by the Employers' Liability Act must be "inherently" dangerous. That is importing into the statute an element not within the legislative utterance. The words of the statute are, "work involving a risk or danger to the employee or public." In the instant case, so far as the allegation is concerned, at least, the plaintiff received an injury in the performance of the work in question. The danger was realized. The risk became an actuality. As the event proved, the risk or danger was involved in that particular work. It was not involved in anything else. Having been "involved" therein, it was evolved therefrom as an accomplished result as the work progressed. Had it not been for the work in which the plaintiff was engaged, the hurt would not have happened. The risk of the injury would not have been "involved" but for that very work.

The statute does not allude to suspected or foreseen danger. It is intended to apply to danger which actually produces an injury, whether the risk be anticipated or unsuspected. Whether the work did produce an injury is of course a question of fact. But if it is to be taken as granted that the plaintiff was hurt in the performance of that work, then indeed *res ipsa loquitur*; the work did involve a risk or danger. No one has yet pointed out where the risk was "involved," unless it was in the work in question. In such an instance, the case would turn upon whether or not everything practicable to use for the protection and safety of life and limb had been employed in carrying on the

work. It is the duty of the plaintiff in such cases to allege what was practicable to use, and aver that the defendant did not use the same.

The demurrer to the complaint ought to have been sustained, and for this reason I concur in the result of affirming the action of the circuit court in setting aside the judgment rendered for the plaintiff.

JOHNS, J. (concurring in the result). [14] It is my personal opinion that the loading of a box car with empty barrels in the usual and ordinary manner does not involve a risk or danger within the meaning of the Employers' Liability Act, but under the rule of stare decisis I feel bound by the decisions of this court cited in the opinion of Mr. Justice HARRIS, and for such reason I concur in his result.

MATHEWS v. TOBIAS et al.

(Supreme Court of Oregon. Oct. 11, 1921.)

1. Specific performance §8—Exercise of discretion depends on showing of clear, just, definite, reasonable, and mutual binding agreement.

Before an equity court may exercise its discretion to enforce specifically a contract to devise, the cause must come before it with proper allegations of fact supported by proof of a binding agreement that it is clear, just, definite, reasonable, and mutual in all its obligations.

2. Specific performance §121(7) — There must be adequate proof of contract to devise and showing of part performance making a fraud on plaintiff if not completed.

A contract to devise is within the statute of frauds, and to obtain its specific performance there must be adequate proof to establish the contract, accompanied by such evidence of part performance as will make it a fraud upon plaintiff not to complete the contract.

3. Specific performance §86 — Equity may seize property which testator agreed to will to plaintiff, after testator's death, and fasten trust upon it.

Where a party had made a just and valid contract to devise property by will which has been clearly proved, but breached by promisor, equity will in a proper case specifically enforce it after the promisor's death by seizing the property which was the subject of the agreement and fastening a trust upon it.

4. Specific performance §114(2)—Complaint failing to allege possession under agreement to devise, or an exception making such allegation unnecessary, is insufficient.

A complaint to specifically enforce a parol contract to devise is insufficient where it does not allege possession under the contract, nor aver facts showing the case to come under the

exception of an agreement to devise for services of such a nature or character that it is impossible to estimate their value to the promisor by any pecuniary standard, and where there was no intention to measure their value by such standard.

Department 1.

Appeal from Circuit Court, Multnomah County; R. G. Morrow, Judge.

Suit by Nannie Mathews against Mattie M. Tobias and others. Decree for defendants, and plaintiff appeals. Affirmed.

This is a suit in equity to enforce specifically the terms of an alleged contract to devise to Nannie Mathews, by will, lot 3, in block 89, Couch's Addition to the city of Portland, Or.

The complaint alleges that the plaintiff, Nannie Mathews, is the daughter of Robert T. Dale and Anna E. Dale, his wife, both of whom are deceased; that the defendant Mattie M. Tobias is the daughter of the plaintiff; that the defendant David S. Tobias is the husband of Mattie M. Tobias, and that Helen Tobias is the daughter of the defendants Mattie M. and David S. Tobias. The complaint further alleges that Robert T. Dale died in June, 1886, leaving as heirs Anna E. Dale, his widow, and Nannie Dale, a daughter; that prior to his death he had deeded to Anna E. Dale the parcel of real property hereinbefore mentioned, together with two other lots, all of which property was then of little value; that the widow had difficulty in meeting her living expenses, taxes and charges upon said property; that, in order to induce her daughter, Nannie Dale, to assist her in paying her living expenses, repairs, and taxes upon said property, she agreed with her daughter that, if she would assist her, Anna E. Dale, in meeting her living expenses, repairs, and taxes upon said property, that she would, upon her death, devise and convey by will, to her daughter, Nannie Dale, said lot 3; that Nannie Dale, plaintiff herein, accepted said offer, and agreed to, and did, for many years, live with her mother, help pay her living expenses, taxes, repairs, and the upkeep of said property; thereafter, Nannie Dale married Ezekiel Mathews, and said contract was renewed by the mother with her daughter, Nannie Mathews, and Ezekiel Mathews, her husband, by agreeing that, if they would live with and assist her in meeting her living expenses, repairs, and taxes upon her property, and if they would move a house upon said lot 3, Anna E. Dale would make a will whereby she would convey said lot 3 to her daughter; that the plaintiff and her husband accepted said offer and contract; that, in reliance upon said agreement, plaintiff, for many years, and down to and including the year 1914, assisted her mother in paying her living

expenses, making repairs on her property, paying taxes thereon, and bought and moved a house upon said lot 3; and, by means of such assistance given by plaintiff and her husband in reliance upon said contract, the mother, Anna E. Dale, was enabled to retain title to her real property; that in consideration of the money and assistance furnished to her by her daughter and son-in-law, Nannie and Ezekil Mathews, the improving of the property and the payment of taxes and expenses by them during all said years, Anna E. Dale made and executed a will whereby she performed said contract with plaintiff and willed said lot to the plaintiff, depositing said will with one George Watkins, where it remained for many years; that the aforesaid contract and will thereby became an irrevocable contract and will on the part of the said Anna E. Dale; that in 1914, and in violation of her agreement with the plaintiff, Anna E. Dale obtained said will from George Watkins and destroyed the same; that on or about the 11th day of March, 1916, Anna E. Dale, in violation of her contract with plaintiff, made and executed a will whereby she devised lot 4, in said block 89, Couch's Addition, to the defendant Mattie M. Tobias, and attempted to will said lot 3 to the defendant David S. Tobias, in trust, for Helen Elizabeth Tobias, plaintiff's granddaughter.

The complaint likewise attacks the validity of a lease upon said lot 3 to the Goodyear Tire & Rubber Company, as well as a mortgage upon said real property to Emily A. Reckard.

The defendants deny the existence of the alleged contract involved in this controversy, and aver the validity of the lease, also of the mortgage.

The case was tried, argued, and taken under advisement, and a decree rendered against the plaintiff and in favor of the defendants, without any findings of fact or conclusions of law. Plaintiff appeals, and assigns as error:

"That the court committed error in rendering said decree against appellant, and in each and every part thereof, and in not rendering a decree as prayed for in the complaint."

C. P. Olson, of Portland (Ralph R. Duniway and Olson, Dewart & Bain, all of Portland, on the brief), for appellant.

R. W. Wilbur, of Portland (Wilbur, Spencer, Beckett & Howell and E. K. Oppenheimer, all of Portland, on the brief), for respondents.

BROWN, J. (after stating the facts as above). This case, like many others, illustrates the ambulatory character of wills. The devising of property by will is a right conferred by law. So far as the statute is concerned, Anna E. Dale had the right to change her mind with reference to the ben-

eficiaries of her real property as often as she chose. We assume that her testament was the written expression of her free act and will. But it is asserted that the testatrix, in a previous will, had made the plaintiff her chief beneficiary, and for a consideration had bargained away her right to alter that will. This may be true. The inquiry then is: Was the alleged contract entered into, and, if so, did it make the will of Anna E. Dale irrevocable?

[1] Before a court of equity is empowered to exercise its discretion in this case, the cause must come before it with proper allegation of fact, supported by proof of a binding agreement that is clear, just, definite, reasonable, and mutual in its obligations, in all its parts.

"Equity will construe the contract to devise strictly against the complainant so as not to interfere with freedom of testamentary disposition." *Pomeroy's Eq. Jur.* (5th Ed.) § 2168.

[2] It has been judicially determined that persons may lawfully contract with reference to the disposition of property by will. Anna E. Dale was a competent person to execute a will; hence she could lawfully enter into a valid agreement binding herself to make a particular testamentary disposition of her real property. In *re Dale's Estate*, 92 Or. 57, 179 Pac. 274; *Kelley v. Devin*, 65 Or. 211, 132 Pac. 535; *Woods v. Dunn*, 81 Or. 457, 159 Pac. 1158; 25 R. C. L. 311. The defendants, however, deny the execution of the alleged contract and its performance, and invoke the protection of the statute of frauds.

A contract to devise real property by will is within the statute of frauds, and, in order to remove such an agreement from the protection of the statute, and enforce its specific performance, there must be adequate proof to establish the contract to the satisfaction of a court of equity, accompanied by such evidence of part performance as will make it a fraud upon the plaintiff not to complete the contract.

[3] The courts are practically a unit in holding that, where a party has made a just and valid contract to devise property by will, and the agreement has been clearly proved, but breached by the promisor, equity will, in a proper case, specifically enforce it after the promisor's death by seizing the property which is the subject-matter of the agreement and fastening a trust on it in favor of the person to whom the decedent agreed to give it by will. *Kelley v. Devin*, supra; *Woods v. Dunn*, supra; 5 *Pomeroy's Eq. Jur.* (5th Ed.) § 2168, and notes. Also see extensive note with collection of authorities, *Ann. Cas.* 1914A, 399. It has been said that the enforcement is made in harmony with the principle that courts of equity will not allow the statute of frauds to be used as an instrument of fraud. *Rowell v. Smith*, 123 Wis. 510,

102 N. W. 1, 3 Ann. Cas. 773; Wetmore v. White, 2 Caines, Cas. (N. Y.) 87, 2 Am. Dec. 323.

It is written that:

"Where the situation is such that the promisee cannot be restored to his original position, to permit the promisor to repudiate his agreement under cloak of the statute of frauds, having received a substantial and valuable consideration, would be highly inequitable. Courts of equity, from the very beginning, have striven to maintain the statute in its integrity as a preventive of fraud, while strenuously repressing its use as a means of working frauds. A defendant will not be allowed to shelter his own fraud behind the statute of frauds, nor to use that statute as an instrument of fraud and wrong. When the statute is invoked to sanction a palpable fraud upon one who has performed his agreement, and cannot be restored to his original position, a court of equity must interpose its authority." *Teske v. Dittberner*, 70 Neb. 544, 98 N. W. 57, 113 Am. St. Rep. 802.

[4] The sufficiency of the complaint in the instant case is challenged by the defendants. The complaint does not allege possession under the contract, nor does this pleading aver facts showing that the consideration of the alleged contract was such that it comes under an exception to the general rule requiring an allegation of possession. The plaintiff failed to aver (likewise to prove) possession of the lot in controversy. From the facts alleged in the complaint an allegation of possession was necessary, and its absence is fatal. We do not hold that possession is necessary in all cases to remove the bar of the statute of frauds.

As to what constitutes sufficient acts to operate as part performance, much has been written, and it can only be determined from the circumstances of each particular case. It has been truly said that:

"It is not a subject upon which it is easy to generalize." *Agnew v. Dumas*, 64 Vt. 147, 28 Atl. 634.

In general, an allegation of possession and proof thereof are necessary to establish part performance, so as to remove the shield of the statute of frauds. A rule of pleading is thus stated by this court:

Since the agreement and its part performance are the essential prerequisites to be established by evidence at the trial, it is necessary to the maintenance of a suit of this kind that the complaint should set forth the oral contract, and also allege that pursuant to its terms possession of the premises was taken by the purchaser, and, if the parties are related, that the latter has made improvements upon the land. *Barrett v. Schleich*, 37 Or. 613, 62 Pac. 792; *Zeuske v. Zeuske*, 62 Or. 46, 124 Pac. 208; *Thayer v. Thayer*, 69 Or. 138, 138 Pac. 478; *Skinner v. Furnas*, 82 Or. 414, 421, 161 Pac. 962, 964.

To the effect is *Riggs v. Adkins*, 95 Or. 414, 420, 187 Pac. 303.

However, a qualification of the foregoing rule exists where the consideration for a promise to devise land is the rendition of services of such a nature or peculiar character that it is impossible to estimate their value to the promisor by any pecuniary standard, and where there was no intention to measure them by a pecuniary standard.

In *Franklin v. Tuckerman*, 68 Iowa, 572, 27 N. W. 759, an oral contract to devise land in consideration of services to be performed and support to be furnished was specifically enforced after performance by the promisee, although he was never in possession of the property covered by the contract. Like relief was granted by specific enforcement in *Lothrop v. Marble*, 12 S. D. 511, 81 N. W. 885, 78 Am. St. Rep. 626, although the promisee never was in possession. In this case the court, basing its holding upon numerous authorities, said:

"Money was not made the standard by which to measure the value of such care and attention as his pitiable condition would be likely to require for a period as uncertain as the duration of life, and his intention to convey the premises in consideration therefor should, in the absence of fraud or injury to any one, govern the action of the court. The case is clearly within the rule justifying courts of equity, in carrying into effect parol agreements, to convey real estate after the full and faithful performance of such service in consideration therefor, as this record discloses."

To like effect is the holding of the court in *Hall v. Gilman*, 77 App. Div. 458, 79 N. Y. Supp. 303. See, also, *Kelley v. Devin*, supra.

Possession of the property is not a requisite where the consideration was personal care and services not measurable in money. *Brinton v. Van Cott*, 8 Utah, 480, 33 Pac. 218; *Schoonover v. Schoonover*, 86 Kan. 487, 121 Pac. 485, 38 L. R. A. (N. S.) 752, and note; *Bryson v. McShane*, 48 W. Va. 126, 35 S. E. 848, 49 L. R. A. 527; *Franklin v. Tuckerman*, 68 Iowa, 572, 27 N. W. 759. See, also, note, 15 L. R. A. (N. S.) 466 et seq.; *Velikanje v. Dickman*, 98 Wash. 595, 168 Pac. 465.

The question of specific performance of oral contract to devise or convey land in consideration of performing services or furnishing support, where no possession is taken, or improvements made, is the subject of notes to *Grindling v. Rayhl*, 15 L. R. A. (N. S.) 466, and *Schoonover v. Schoonover*, 38 L. R. A. (N. S.) 752. See 5 *Pomeroy Eq. Jur.* (5th Ed.) § 2248, and cases in notes.

In the case at bar as made by the pleadings, the complaint is deficient, in that it fails to aver that the plaintiff took possession pursuant to the alleged contract; nor does it allege facts showing an exception to the general rule hereinbefore referred to. In the absence of such necessary allegations and proof thereof, the evidence offered in

support of the alleged part performance, such as paying taxes, making repairs upon the property, assisting with the living expenses of Anna E. Dale, and of services performed by plaintiff as testified to by certain witnesses, can be of no avail to plaintiff. This is a family lawsuit, and the evidence shows that it could, and should, have been settled out of court. Family settlements are favored in equity. *Kelley v. Devin*, supra; *Loughary v. Simpson*, 75 Or. 219, 145 Pac. 1059; *Goodin v. Cornelius et al.*, 200 Pac. 915, decided September 27, 1921.

This case is affirmed, without costs to either party in this court.

BURNETT, C. J., and HARRIS, J., concur.

McBRIDE, J. (concurring in part and dissenting in part). I fully concur in the conclusion of Mr. Justice BROWN that this is a case where specific performance cannot be invoked on behalf of plaintiff, but I think it sufficiently appears that, upon the faith of the promise of deceased to devise the property claimed here by plaintiff to Mrs. Mathews, she, or rather her husband, on her behalf, expended money for taxes and improvements which would not have been expended if it had for a moment been supposed that the mother would practically disinherit her. I am satisfied from the attitude displayed by the Toblases in this case and the former case that they intend to take all they can get, and hold all they take. But the arm of equity is long, and the plaintiff asks equitable relief. Therefore, I would go further than Mr. Justice BROWN and take an accounting of these expenditures by plaintiff or on her behalf, and decree that she recover with interest, and make the sum as ascertained a lien on the property in dispute.

CORDREY v. THE BEE.

Appeal of BEE S. S. CO.

(Supreme Court of Oregon. Oct. 4, 1921.)

1. Admiralty §20 — No jurisdiction of proceeding to recover damages for injuries received on dock.

Admiralty courts have no jurisdiction of an action by a longshoreman, injured on a dock when a sling loaded with cement fell on a truck which he was operating, under Const. U. S. art. 3, § 2, and Judicial Code U. S. § 24, as amended by Act Cong. Oct. 6, 1917 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 991[3]).

2. Shipping §87—State can apply lien against foreign ship arising out of tort in jurisdiction.

The state can provide a remedy for a tort happening within its jurisdiction and apply a lien against a foreign vessel through whose

fault damages occurred, under Const. U. S. art. 3, § 2, and Judicial Code U. S. § 24, as amended by Act Cong. Oct. 6, 1917 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 991[3]), and hence could properly enact Or. L. §§ 10281, 10283-10288, 10291.

3. Constitutional law §306—Seizure of vessel sufficient notice to owner of claim under due process clause of Constitution.

Or. L. §§ 10281, 10283-10288, 10291, providing for action direct against vessel on claims arising out of torts committed by a vessel. Held to provide sufficient notice to the owner of the vessel, as against an objection that it denies due process of law, in view of section 799, subd. 4; amount of notice being a legislative question.

4. Commerce §80 — Statute providing for seizure of vessel in jurisdiction does not usurp federal function.

Or. L. §§ 10281, 10283-10288, 10291, providing for a lien against and seizure of a vessel within the jurisdiction of the state, to satisfy claims for damages or injuries done to persons or property, are not unconstitutional as usurping a federal function in the regulation of interstate commerce.

5. Action §35 — Remedy for foreclosure of lien on property exclusive.

The remedy in equity devised by Or. L. § 422, treating of foreclosure of liens upon real or personal property, is exclusive and must be followed.

6. Statutes §159 — Later enactment supercedes prior conflicting act.

A later enactment supersedes a prior act, where they are in conflict.

7. Shipping §86(1)—Court erred in permitting action at law against owner of vessel for damages arising out of tort.

In a proceeding under Or. L. §§ 10281, 10283-10288, 10291, to recover damages for injuries arising through fault of foreign vessel, court erred in permitting the action to be tried as one at law, and in permitting a personal judgment against the owner, in view of section 422.

8. Pleading §21—Language controls figures.

Where writing in complaint alleged damages in the sum of \$2,800 but the numerical figures were scratched out and the figures \$7,500 inserted, the writing controlled.

9. Pleading §237(7) — Amendment as to amount after case was submitted improperly allowed.

Where a complaint alleged damages in writing of \$2,899, but the figures were stricken out and \$7,500 inserted, court erred, after the testimony had been taken and the cause argued to the jury, in permitting the complaint to be amended so as to conform the written allegation to the figures, in view of Or. L. § 102, especially where the proceeding was against a citizen of another state, and the amendment in effect sanctioned a practice whereby defendant could be haled into court to answer a claim not of sufficient amount to give the federal court jurisdiction, and his right of removal be cut off.

10. Shipping — 86(3)—Whether owner of vessel knew of defective sling held for jury.

In an action by a longshoreman for damages for personal injuries caused by breaking of sling, fact that the sling was furnished from aboard the vessel sought to be held for the damages was a circumstance which gave the jury a right to determine whether or not owner of vessel had knowledge of the defect.

11. Shipping — 87 — Injury to longshoreman from breaking of sling furnished by ship held to create lien.

Where injuries to longshoreman arose out of the furnishing of a defective sling by a vessel discharging its cargo, the tort, if any, was one committed by the ship itself under Or. L. §§ 10281, 10283-10288, 10291, providing for a lien against a vessel causing injury.

Bean, J., dissenting in part.

Department 2.

Appeal from Circuit Court, Multnomah County; John P. Kavanaugh, Judge.

Action by Joseph C. Cordrey against the steamship Bee. From a personal judgment against it, the Bee Steamship Company appeals. Reversed and remanded.

While on the dock at which the steamship Bee was berthed in Portland in this state and was discharging her cargo of cement, the plaintiff, a stevedore, was hurt by a sling load of cement which fell on the truck he was operating, so that it threw him on the dock and injured him. The home port of the ship was in the state of California, and it was owned by a corporation of that state. The plaintiff had judgment in personam against the owner of the vessel, from which that owner appeals. The further facts appear in the opinion.

Wallace McCamant, of Portland (McCutch-en, Willard, Mannon & Greene, of San Francisco, Cal., and McCamant, Bronaugh & Thompson, of Portland, on the brief), for appellant.

William P. Lord, of Portland (A. I. Moulton, of Portland, on the brief), for respondent.

BURNETT, C. J. We deduce from the bill of exceptions substantially this state of facts: The vessel in question had arrived in Portland with a cargo of cement consigned to local parties. The consignee or some one operating for him on the land telephoned to the longshoremen's union for a number of stevedores to assist in unloading the cargo. Several men, including the plaintiff, were sent by the union to the dock. On arriving there, some one acting as mate of the vessel directed the plaintiff with others to remain on the dock for service there while the rest were taken into the hold of the vessel. The plaintiff took an ordinary hand truck and was engaged in receiving from the sling of

the vessel truck loads of cement. The ship's tackle by means of pulleys and ropes took a number of sacks of cement in a sling from the hold of the vessel, hoisted it up, and swung it out over the dock, lowering it upon the trucks. While the plaintiff was waiting to receive a load in this manner, the sling broke before the load reached the dock, and the sacks of cement falling upon the truck threw the plaintiff over upon his back, by which he suffered the injuries complained of.

Section 10281, Or. L., provides that—

"Every boat or vessel navigating the water of this state or constructed in this state shall be liable and subject to a lien * * * for damages or injuries done to persons or property, by such boat or vessel. * * *"

After providing for the priority of liens, the statute in section 10283 declares that—

"Any person having a demand as aforesaid, instead of proceeding for the recovery thereof against the master, owner, agent, or consignee of the boat or vessel, may, at his option, commence an action against such boat or vessel by name."

We find this in section 10284—

"Any person wishing to commence an action against a boat or vessel shall file his complaint against such boat or vessel by name with the clerk of the circuit court of the county in which such boat or vessel may lie or be. The complaint shall set forth the plaintiff's demand in all its particulars, and on whose account the same accrued, and shall be verified by the plaintiff or some credible person for him."

Section 10285 states:

"Whenever such complaint shall be filed, the clerk shall issue a warrant thereon, commanding the sheriff to seize the boat or vessel mentioned in the complaint, with her tackle, apparel and furniture, and retain the same until discharged from such custody by due course of law."

Section 10286 is as follows:

"Upon the return of any warrant issued as prescribed in the last section, proceeding shall be had in the circuit court against the boat or vessel seized, in the same manner as if the action had been commenced against the person on whose account the demand accrued."

In section 10287 it is said:

"The master, owner, agent, or consignee of the boat or vessel may appear on behalf of such boat or vessel and answer the complaint."

Section 10288 provides that—

"If in any action commenced under the provisions of this chapter the master, owner, agent, or consignee shall not appear and answer the complaint, the plaintiff may proceed to take judgment in the same manner and under the same restrictions as in a civil action against a natural person; if an issue of fact be joined, the same proceeding shall be had as in other actions."

There are other sections which provide for filing an undertaking or making a deposit in lieu thereof, for the discharge of the boat. The judgment prescribed in section 10291 is to the effect that if judgment be rendered against the boat or vessel, the court shall make an order directed to the sheriff commanding him to sell the same for the satisfaction of the judgment.

The owner of the vessel, the Bee Steamship Company, appeared as claimant, traversed most of the complaint, denied the jurisdiction of the court over the controversy or over the steamship, and averred that the accident happened on account of the negligence of the plaintiff himself; that he assumed the risks of the employment of which the liability to the injury complained of was one; that at the time of the accident and for a long time prior thereto the steamship had been engaged in interstate commerce, and was discharging a cargo which had been transported on the vessel from the state of California to the state of Oregon when the accident occurred. It is also said as a further affirmative defense that the plaintiff was employed by the Oregon Portland Cement Company, an Oregon corporation which was in actual possession of the dock upon which the cargo was being stored; and that the injury of the plaintiff was sustained while he was working for the Oregon Portland Cement Company, with the conclusion that the accident was to be governed only by what is known as the industrial accident law.

That portion of the answer averring contributory negligence is denied. The answer which sets up averments of risk is traversed as to the allegations of the foreign status of the claimant and its ownership of the Bee as well as to the averments that the plaintiff was an experienced man and informed of all the incidents of the work and of the risks and dangers attached thereto. Otherwise, the new matter in the answer is not denied.

The principal effort of the claimant and owner of the vessel is to establish its contention that the state courts have no jurisdiction of the subject-matter of the litigation. It maintains that only the federal courts of admiralty have any authority over the grievance complained of. It is true that under section 2 of article 3 of the United States Constitution it is said that—

"The judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority, * * * to all cases of admiralty and maritime jurisdiction."

Federal legislation in pursuance of this provides that the district courts shall have original jurisdiction of all suits of a civil nature at common law or in equity where the matter in controversy exceeds, exclusive of interest and costs, the sum and value of \$3,-

000, and arises under the laws or Constitution of the United States and treaties which are made or shall be made under their authority, or is between citizens of different states, and in all civil causes of admiralty or maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it. Section 24 of the Judicial Code of the United States. A later amendment enacted October 6, 1917, by Congress, adds to the saving clause as follows:

"* * * And to claimants the rights and remedies of the workmen's compensation law of any state." U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 991(3).

In this branch of the case, therefore, the crucial question is whether the grievance complained of is of admiralty cognizance, or whether it belongs to the state courts. In *Philadelphia, etc., R. R. Co. v. Philadelphia, Havre de Grace, etc., Co.*, 23 How. 209, 16 L. Ed. 433, it is said:

"The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract, but in torts, it depends entirely on locality."

It is taught in *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345, that the federal maritime jurisdiction is exclusive; that state legislation cannot bring within admiralty jurisdiction a subject not maritime in its nature, "but when a right, maritime in its nature, and to be enforced by process in the nature of admiralty process, has been given by the statute of a state, the admiralty courts of the United States have jurisdiction, and exclusive jurisdiction, to enforce that right according to their own rules of procedure." We learn from *the Willapa*, 25 Or. 71, 74, 34 Pac. 639, that state laws cannot confer admiralty jurisdiction upon the state courts so as to enable them to proceed in rem for the enforcement of liens created by such laws, for it is exclusively conferred upon the district courts of the United States. The case of *The Moses Taylor*, 4 Wall. 411, 18 L. Ed. 397, was founded on a breach of a maritime contract, and the court held that the statute of the state of California, almost precisely in terms like our own, authorizing an action against the steamer by name, established a proceeding in the nature and with all the incidents of a suit in admiralty. It was decided there that this was without the scope of state legislative power. In *The Chusan*, 2 Story, 455, 5 Fed. Cas. p. 680, and *The Roanoke*, 189 U. S. 185, 194, 23 Sup. Ct. 491, 47 L. Ed. 770, both cited in the defendant's brief, the question involved was that of furnishing materials for repairs of a vessel lying in a foreign port. This, of course, under the authorities, carries a lien, according to the general maritime law, in favor of the parties furnishing the materials.

In all of the cases cited by the defendant in support of its contention that the state has no authority to impress a lien upon the defendant's steamship, there appears the element either of maritime tort or maritime contract. For instance, in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, the cause of action was for an injury aboard the ship. In *The Rockaway* (D. C.) 156 Fed. 692, it was held that a state statute may create a lien on a domestic vessel for repairs at the home port, and that this would be enforceable in admiralty because the nature of the contract was maritime. The same reason applies in *American Co. v. Fletcher Co.*, 173 Fed. 471, 97 C. C. A. 477, to the effect that supplies and repairs to foreign vessels are lienable by the general maritime law, while the same services rendered to a domestic vessel are made lienable only by state statutes; but because of their maritime nature, when such liens are given they are enforceable only in the admiralty courts. In *The Athinal* (D. C.) 230 Fed. 1017, it is said that it is beyond the power of any state to create a lien enforceable in the admiralty by process in rem against a foreign ship; claims against foreign vessels being within the exclusive jurisdiction of admiralty. The point of that case is that state courts can neither increase nor diminish the jurisdiction of admiralty. To say that the state courts cannot create a lien enforceable in the courts of admiralty is but another way of declaring that the state can neither enlarge nor restrict the authority of the admiralty courts. The reason for the opinion in that case is thus stated:

"Any such legislation, creative of a lien enforceable in admiralty, and upon shipping, must rest upon the making or implication of a contract maritime in its nature, or on the commission of a maritime tort."

It is enunciated in *Corsica Co. v. W. S. Moore Co.*, 253 Fed. 689, 165 C. C. A. 283, as follows:

"To sustain a state statute giving a lien on a vessel, the cause of the action must be maritime in nature, and a breach of an executory contract for the charter of a vessel is not maritime in nature, and therefore cannot be enforced by a proceeding in rem in an admiralty court."

So, also, in *The Minnie R. Childs*, 10 Ben. 553, 17 Fed. Cas. 452, a lien for supplies to domestic ships created by state law is maritime and hence cognizable in admiralty. We find in *Warren v. Kelley*, 80 Me. 512, 15 Atl. 49, that the statute of a state may create a lien on a domestic vessel based on maritime service, but the jurisdiction to foreclose it belongs to the United States courts. Likewise, *Weston v. Morse*, 40 Wis. 455, teaches us that a case for sailors' wages and supplies furnished to a domestic vessel made

lienable by a state statute is enforceable only in admiralty for the basic reason that they are for incidents maritime in their nature. In *Chelentis v. Luckenbach Co.*, 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171, a sailor aboard ship on the high seas while at work on the deck was caught by a wave which came aboard and threw him against the vessel, breaking his leg. He sued the owners of the vessel for common-law damages, but the court held that under the maritime law, the case being one of maritime tort, the liability of the boat or its owners could not be extended beyond the measure allowed by the maritime jurisdiction. In *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834, 11 A. L. R. 1145, Stewart was doing maritime work on a barge for the Knickerbocker Ice Company while the barge lay in navigable waters. While so engaged he fell into the Hudson river and was drowned. It was there held that the clause saving to claimants the rights and remedies under the state workmen's compensation act was an attempt by Congress to delegate its legislative power to states, and that, on the other hand, the state could neither add to nor take from admiralty jurisdiction. Thus we find without variation that the *sine qua non* of admiralty jurisdiction is that the contract involved must be maritime in its nature, dependent upon the nature of the contract, or that the tort in question must be a maritime tort dependent upon the locality where the injury was received.

[1] Bearing in mind, therefore, that the injury received by the plaintiff and upon which this proceeding is based happened to him while he was on the land, and that for all that appears in the record he never was aboard the steamship Bee, we find the rule to be thus:

"Suits for injuries to a person sustained on land although originating or caused by a vessel are not cognizable in admiralty." 1 C. J. 1286.

In *Riley v. Philadelphia R. R. Co.* (D. C.) 173 Fed. 839, the decedent was injured on a barge navigating the Delaware river, but died ashore. It was held that admiralty had no jurisdiction, because the injury was not fully consummated in navigable water. The *Albion* (D. C.) 123 Fed. 189, was a case where the libellant walked off the dock at night, under the impression that a gangplank was there. But it had been removed, and hence he fell. It was held that admiralty jurisdiction extends only to torts committed on navigable waters. We find in *Price v. Belle of the Coast* (D. C.) 66 Fed. 62, that the libellant was helping to carry a heavy barrel of oil off the vessel and fell into a hole after leaving the ship, and it was there decided that because the injury was received ashore admiralty had no jurisdiction. In *The Mary*

Garrett (D. C.) 63 Fed. 1009, the libellant, a seaman employed on the ship, was hurt on the dock while discharging freight, making the instance, according to the decision, not within admiralty jurisdiction. A seaman who deserted the ship claimed damages for arrest on land, and it was said in the opinion in *Bain v. Sandusky Co.* (D. C.) 60 Fed. 912, that—

"Jurisdiction over torts, in admiralty, is clearly limited to maritime torts, * * * and the tort must be committed on the water, and not on land."

A similar instance is treated in *The H. S. Pickands*, 42 Fed. 239. Access to the steamer was gained by a ladder, about 12 feet in length, leading from the wharf to the bulwarks of the vessel, the foot of which ladder had been secured by a cleat on the dock which prevented its slipping. The libellant was employed in doing some work in repairing the boiler of the vessel. Having occasion to leave the ship, he went to the ladder; but in the meantime it had been moved away from the cleat, leaving the foot of the ladder insecure. While he was on the ladder in the act of leaving the vessel, the ladder slipped and he fell to the wharf, receiving an injury; and it is said in the opinion that to give admiralty jurisdiction, the injury must have been consummated, and the damage received, upon the water. "The mere fact that the wrongful act was done upon a ship is insufficient." *The Mary Stewart* (D. C.) 10 Fed. 137, is a case almost precisely like the one in hand. There, the libellant was on the dock in the employ of the stevedore who was loading the ship with cotton bales by aid of the ship's tackle. Owing to the breaking of the ship's rope, a bale being hoisted aboard fell on the libellant on the dock and injured him. The rule was thus laid down:

"Not only the wrong must originate on water, but the damage * * * must also happen on water."

The deduction is that a state statute cannot confer jurisdiction on admiralty courts except for matters maritime in their nature. Another similar case is that of *Keator v. Rock Plaster Mfg. Co.* (D. C.) 256 Fed. 574, where a vessel was unloading rock from its hold. The bucket containing a load of rock spilled its contents on a workman standing on the dock, and it was decided that the matter was not of maritime cognizance. See, also, *Smalls v. Atlantic Coast Shipping Co.* (D. C.) 261 Fed. 928. In *Billings v. Breinig*, 45 Mich. 65, 7 N. W. 722, a ferryman was ashore in the act of lowering his ferry cable to permit the passage of a vessel when a ship navigating the stream struck the cable so that it killed the ferryman, and it was determined that this did not furnish a chose in action for admiralty jurisdiction. One of the early cases is that of *The Plymouth*, 3

Wall. 20, 18 L. Ed. 125. By the negligence of its crew aboard the vessel while moored to the dock, the ship took fire, which spread to and consumed some warehouses and their contents, located on the dock; and it was held that this was not within admiralty jurisdiction. The same doctrine is taught in *Ex parte Phenix Insurance Co.*, 118 U. S. 610, 7 Sup. Ct. 25, 30 L. Ed. 274. These precedents are conclusive that the mishap involved in the present controversy is not maritime in its nature and is beyond the jurisdiction of the federal courts. There is, therefore, no ground for saying that the admiralty courts have anything to do with the grievance here in question.

[2] The investigation consequently takes this form: Can the state provide a remedy for a tort happening within its jurisdiction, and apply a lien against foreign property involved in the commission of that tort? In *The Robert W. Parsons*, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. Ed. 73, a case cited for the defendant, we find this language:

"It is equally well established that for causes of action not cognizable in admiralty, either in rem or in personam, the states may not only grant liens, but may provide remedies for their enforcement."

In *Missouri v. Lewis*, 101 U. S. 22, 31, 25 L. Ed. 989, it is said:

"There is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit for all or any part of its territory."

We learn from *Ex parte Reggel*, 114 U. S. 642, 651, 5 Sup. Ct. 1148, 1153 (29 L. Ed. 250):

"That commonwealth [Pennsylvania] has the right to establish the forms of pleadings and process to be observed in her own courts, in both civil and criminal cases, subject only to those provisions of the Constitution of the United States involving the protection of life, liberty and property in all the states of the Union."

Again, in *Iowa Central Ry. Co. v. Iowa*, 160 U. S. 389, 393, 16 Sup. Ct. 344, 345 (40 L. Ed. 467), it is said:

"The Fourteenth Amendment in no way undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations may be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and affords fair opportunity to be heard before the issues are decided."

In *Brown v. New Jersey*, 175 U. S. 172, 175, 20 Sup. Ct. 77, 78 (44 L. Ed. 119), we find this language:

"The state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable

provisions of the federal Constitution. * * * The state is not tied down by any provisions of the federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations heretofore named it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary."

See, also, *League v. Texas*, 184 U. S. 156, 168, 22 Sup. Ct. 475, 46 L. Ed. 478.

[3] Recalling the terms of the statute under consideration, we note that there is no provision explicitly requiring service of summons or notice of the pendency of the proceeding upon the owner of the vessel against which the process has been issued. Upon filing a statement of the plaintiff's claim, the clerk, a ministerial officer, issues a warrant empowering the sheriff, so to speak, to arrest the vessel. Indeed, it is provided that—

"The master, owner, agent, or consignee of the boat or vessel may appear on behalf of such boat or vessel and answer the complaint."

True enough, they have the privilege of answering, but on what compulsion must they? Is this due process of law? Does the owner have his day in court by virtue of the statute? The question is not without difficulty, but there is abundant authority in the precedents for saying that the seizure of one's property is notice to him of an invasion of his rights, calling upon him to defend. We are not concerned about the amount of notice, for that is for the Legislature to determine. The question is whether or not it has ordained notice. In *Keating v. Spink*, 3 Ohio St. 105, 62 Am. Dec. 214, the court had under consideration a statute almost in the same terms as our own, and, speaking by Mr. Justice Ranney, is said:

"This statute, then, as stated by the court in *The Huron v. Simmons*, 11 Ohio, 461, 'treats the boat as a person, and makes it responsible, in its own name, for all debts contracted for its use, and for all injuries committed against persons or property on board, by her officers or crew.' The liability is upon the craft—the proceeding is against the craft—and the judgment operates alone upon the craft. Its seizure is indispensable to the jurisdiction of the court, and its continued custody, unless released upon bond and security, indispensably necessary to the further proceedings, after final judgment.

"The proceeding, therefore, is strictly and technically in rem; it is pursued without reference to the owner, to enforce a liability which the thing itself has incurred and the thing itself is condemned to make reparation. Possession is the essential element upon which the jurisdiction of the court depends; and as this possession is deemed that of the sovereignty under whose authority the court sits, if any question can be regarded as settled by the unanimous opinion of courts and jurists, it is this that 'the law regards the seizure of the thing as constructive notice to the whole world.' *Hollingsworth v. Barber*, 4 Pet. 475. Other

means for giving notice may be provided at the discretion of the sovereign power, upon the observance of which, the jurisdiction may, or may not, depend; but where they are not prescribed, the power of the court over the thing when taken into the custody of the law, is perfect and complete, and the final disposition of it, binding upon the world. As the subject of liability and seizure described in this statute, are so uniformly attended by the owner or master representing all interests, the Legislature has regarded the seizure and taking the thing into custody, as effectual notice to those interested of the pendency of the proceedings, and has, therefore, provided for no other."

In *The Mary*, 9 Cranch, 126, 144, 3 L. Ed. 678, Chief Justice Marshall delivered the opinion, and among other things said:

"It is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally, or by publication; where they are in rem, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable because it is necessary, and because it is the part of common prudence for all those who have any interest in it, to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to the *Mary*, has constructive notice of her seizure, and may fairly be considered as a party to the libel."

In the celebrated case of *Pennoyer v. Neff*, 95 U. S. 714, 727, 24 L. Ed. 565, the court said:

"The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings in rem. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely in personam, constructive service in this form upon a nonresident is ineffectual for any purpose."

The Ann (D. C.) 8 Fed. 923, 5 Hughes, 292, was a case dependent upon the seizure of a vessel. The court there said:

"It is true that there was no notice, by service or publication of notice, to the owner or holders of maritime or other liens, that the vessel was being proceeded against; but a proceeding, in rem forms an exception to the

general rule of notice, particularly when based upon actual manucaption of the thing which is the instrument of the wrong, and in such cases the seizure has been held to be constructive notice to every one having any interest in the thing seized."

The reason for the sufficiency of notice arising from the mere seizure of the property may be found in part, at least, in the presumption "that a person takes ordinary care of his own concerns." Or. L. 799, subd. 4. In the case of a seagoing vessel especially, which is constantly in charge of a master or other representative of the owner, or of the owner himself, the mere taking is such an invasion of property rights as to notify the owner as a practical matter, that he must defend. While a foreign vessel is in the state and its owners are without the jurisdiction and likely unknown, it is clearly in the power of the state, by virtue of its authority over property within its boundaries, to devise a process to subject the offending vessel itself to the payment of damages for a tort committed with it as an instrument. Of course, as taught in the excerpt from *Pennoyer v. Neff*, supra, the remedy is limited to the res itself and cannot result in a judgment in personam. We arrive at the conclusion, therefore, that, having authority over the property within its jurisdiction, and the matter not being cognizable in the federal courts of admiralty, the state has authority to formulate a process whereby the offending property itself may be proceeded against, seized and subjected to the redress of the wrong committed. Seizure itself is notice, the quantity of which is for the legislative power to determine. The *Globe*, 2 Blatchf. 427, 10 Fed. Cas. No. 5483; *Bradstreet v. Neptune Insurance Co.*, 3 Sumn. 609, Fed. Cas. No. 1793; *Leigh v. Green*, 193 U. S. 79, 24 Sup. Ct. 390, 48 L. Ed. 623; *Freeman v. Alderson*, 119 U. S. 185, 7 Sup. Ct. 165, 30 L. Ed. 372; *Bierne v. The Triumph*, 2 Ala. 738; *Ridley v. Ridley*, 24 Miss. 648; *Stewart v. Hinds County Police*, 25 Miss. 479; *Calhoun v. Ware*, 34 Miss. 146; *New Orleans, etc., Ry. Co. v. Clements*, 35 Miss. 17; *Kwillecki v. Holman*, 258 Mo. 624, 167 S. W. 989; *Beech v. Abbott*, 6 Vt. 586; *Luther v. Fowler*, 1 Grant, Cas. (Pa.) 176.

[4] It is fallacious to assume, as the claimant does, that the statute upon which this litigation is based is unconstitutional in that it attempts to usurp a federal function in the regulation of interstate commerce, at least so far as it may be applied to foreign ships. It is not reasonable to say that a vessel of a sister state may come within the boundaries of this state and injure the persons or property of our citizens and that they are without redress for a nonmaritime tort merely because such ship is carrying goods hither from another state. The interstate commerce legislation does not countenance or authorize the commission of land

torts by any vessel whether domestic or foreign. Hence our statute, giving a remedy for such grievances, does not infringe upon that federal function.

Thus far we have a chose in action not included in admiralty cognizance, for which the state has fashioned a proceeding in rem, notice of which depends upon the seizure of the offending thing, the vessel. What, then, of the method of trial? We note that the statute provides only for a lien and for a sale of the property seized. The original statute was enacted in territorial days, in 1853. Statutes of Oregon 1853, p. 152. This enactment was amended in 1876 (Laws 1876, p. 9) only in respect to the authority for contracting debts against the vessel. The original law made the vessel liable for debts contracted by the master, owner, agent, or consignee. The amendment of 1876 limited that clause to "debts due to persons by virtue of a contract, expressed or implied, with the owners of a boat or vessel, or with the agents, contractors, or subcontractors of such owner, or any of them, or with any person having them employed to construct, repair, or launch such boat or vessel." In all other respects the law has remained the same to this day. That amendment in no wise changes the original procedure. The Code of Civil Procedure was adopted by the legislative assembly of this state in October, 1862, and took effect on the first day of June next following. Treating of the foreclosure of liens upon real or personal property, the statute as now embodied in section 422, Or. L., reads thus:

"A lien upon real or personal property, other than that of a judgment or decree, whether created by mortgage or otherwise, shall be foreclosed, and the property adjudged to be sold to satisfy the debt secured thereby by a suit. In such suit, in addition to the decree of foreclosure and sale, if it appear that a promissory note or other personal obligation for the payment of the debt has been given by the mortgagor or other lien debtor, or by any other person as principal or otherwise, the court shall also decree a recovery of the amount of such debt against such person or persons, as the case may be, as in the case of an ordinary decree for the recovery of money."

[5-7] It has been held uniformly by this court that the remedy in equity devised by this section is exclusive and must be followed. *Thompson v. Marshall*, 21 Or. 171, 27 Pac. 957; *McNeff v. Southern Pacific Co.*, 61 Or. 22, 120 Pac. 6; *Caro v. Wollenberg*, 68 Or. 420, 136 Pac. 866. The later enactment embodied in section 422, Or. L., supersedes the former where they are in conflict.

When this cause came on for trial, the claimant, appearing for the ship, objected to the same being tried as an action at law and demanded that it be tried as a suit in equity, but this was denied, and the cause proceeded as an action at law, resulting in

a personal judgment against the claimant. Under section 422, supra, it is only where a promissory note or other personal obligation for the payment of a debt has been given, that the court in a foreclosure suit can render a personal decree. Where this feature is absent, the only thing that can be done is to foreclose the lien, which includes a sale of the property. The court was in error in proceeding as in an action at law and in rendering a personal judgment. The jury was not called upon to enlighten the conscience of the chancellor. It was impaneled and to it was committed exclusively the decision of the questions of fact involved. We have not had the benefit of the personal estimate of the trial judge concerning the credibility of witnesses, or as to the true state of facts in the case. The cause was tried in the circuit court as one where the judge was bound by the verdict of the jury at all hazards, whether in accord with his judgment of a question of fact, or not. The case must be reversed on this ground at least.

[8, 9] Another matter which claims our attention is here noted: According to the bill of exceptions, at the time the judge charged the jury at the conclusion of the trial, the fourth paragraph of the complaint read as follows:

"That by reason of the injuries received by plaintiff on account of the negligence of the said steamship as aforesaid the plaintiff has been
7500.00
damaged in the sum of (\$2800.00) twenty-eight hundred dollars, and will necessarily incur an expense of ninety-nine (\$99.00) dollars in endeavoring to cure himself from said injury."

In other words, as the complaint was typewritten originally in the part involved, the plaintiff was "damaged in the sum of (\$2800.00) twenty-eight hundred dollars," and the change consisted, whenever or however made, in drawing a pen through the figures "2800.00" and writing over them "7500.00" According to the bill of exceptions, the claimant contended that because there was a discrepancy between the writing and the figures in the fourth paragraph, the complaint was to be treated as alleging damages in the sum of \$2,899 only. But after the testimony had been taken and the cause argued to the jury, and the court had instructed the jury, just before the jury retired, the plaintiff asked permission to amend the complaint to conform the written portion of the paragraph to the figures, and the amendment was allowed by the court over the objection of the claimant. The jury retired and returned with a verdict in the sum of \$3,600, in favor of the plaintiff.

Section 102, Or. L., establishes this rule:

"The court may, at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of a

party, or other allegation material to the cause; and in like manner and for like reasons it may, at any time before the cause is submitted, allow such pleading or proceeding to be amended, by striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or when the amendment does not substantially change the cause of action or defense, by conforming the pleading or proceeding to the facts proved."

This function is to be exercised at any time before the cause is submitted. Here, the parties had done all that they could do. The case was submitted, to all intents and purposes. The time for the application of this section had passed. It was too late to enlarge the demand of the complaint. Bearing in mind that the vessel was a foreign craft owned in and sailing from San Francisco, that the claimant was of citizenship diverse from that of the plaintiff, and that under the federal statute the courts of the United States have original jurisdiction where the matter in controversy exceeds the value of three thousand dollars and arises between citizens of different states, the allowance of the amendment would give sanction, in effect, to a practice whereby a defendant could be haled into court to answer a claim not of sufficient amount to give the federal court jurisdiction, and would be cut off from his right to remove the cause to that court until he had answered and submitted himself to the jurisdiction of the state court, when his right of removal would be lost. The amendment would then cast him in damages to a much greater amount than the limit of state jurisdiction. The amendment ought not to have been allowed. Whenever or however the alteration was made, the legal effect of the complaint is a claim for damages in the sum of \$2,899.00 and should have been so construed by the court. In other words, the language controls the figures. 13 C. J. 537; United Surety Co. v. Summers, 110 Md. 95, 72 Atl. 775; Romine v. Haag (Mo.) 178 S. W. 147; Bank v. Pipkin, 66 Mo. App. 592; Payne v. Clark, 19 Mo. 152, 59 Am. Dec. 333. It is not a case within section 719, Or. L., reading thus:

"When an instrument consists partly of written words and partly of a printed form, and the two are inconsistent, the former controls the latter."

The present is a case of written language controlling mere figures. The complaint, therefore, was one for \$2,800 general damages and \$99 special damages. The application to amend came too late and should not have been allowed in any event under the circumstances relating to federal jurisdiction and the right to remove the cause to the United States courts.

[10, 11] It is urged against the validity of the judgment that—

"In the absence of evidence that the claimant knew or ought to have known, that the sling which broke was defective, plaintiff has failed to make out a case of negligence."

The bill of exceptions discloses that the sling which broke was furnished from aboard the vessel. This circumstance is one which the jury has a right to consider on the question of claimant's knowledge of its defect. It is also contended that this was not a tort committed by the vessel, and that, in the language of *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, the ship must be "the offending thing." In that case it was held that an accident on board a ship was not inflicted by the vessel. And in *The Onoko*, 107 Fed. 984, 47 C. C. A. 111, cited by the claimant on this point, it was held that the statute of Louisiana, practically like that of this state, gave a cause of action in personam and not in rem. In *Tropical Co. v. Towle*, 222 Fed. 867, 138 C. C. A. 293, it was held that a seaworthy ship was not liable in damages for injury to a sailor aboard. The general admiralty rule relating to the employment of sailors was applied in that proceeding, to the effect that where the ship is seaworthy and the seaman is injured aboard the vessel, all he can claim is wages and proper treatment while he is being cured of his injury. His right to general damages beyond that depends upon the ship's not being seaworthy, or, in other words, not being a suitable place in which to work. In *The Theta*, 7 Asp. 480, a captain in going to his own ship had to cross another lying between his vessel and the dock. He fell through a hatchway on the other ship, and it was held not to be an injury by that ship aboard of which he was hurt. In the instant contention we have a ship performing a usual function of a vessel, that of discharging its cargo, in the process of which by defect of its tackle the plaintiff was injured. This is clearly a tort committed by the ship itself. The plaintiff was entitled to a foreclosure of the lien, limited to a sale of the vessel, and not including a personal judgment. The claimant's rights were infringed by the rendition of a judgment larger than the demand of the complaint when properly construed as a matter of law. The claimant was entitled to the judgment of the trial court sitting as a chancellor and passing directly upon the effect and value of the evidence.

For these reasons the judgment is reversed, and the cause is remanded for further proceedings not inconsistent herewith.

JOHNS and BROWN, JJ., concur.

BEAN, J. (dissenting in part). I heartily concur in the able opinion of Chief Justice BURNETT on what might be termed the main question in the case, to the effect that

the statute upon which this litigation is based is not unconstitutional, and does not infringe upon the federal law. I am unable to give my assent to the proposition that the action is cognizable only as a suit in equity for the foreclosure of a lien. I am constrained to mention this for the reason that for more than 30 years it has been the unquestioned practice in causes arising under section 10281 et seq., Or. L., in so far as I am able to ascertain, to try the cause as an action at law. *The Victorian*, 24 Or. 121, 32 Pac. 1040, 41 Am. St. Rep. 838; *The Victorian No. 2*, 26 Or. 194, 41 Pac. 1103, 46 Am. St. Rep. 616. When those causes were tried, the distinction between an action at law and a suit in equity was at least as broad as it is today. Eminent counsel appeared for the parties in those cases. We note on the record the names of Messrs. Bronaugh, McArthur, Fenton, and Bronaugh; Messrs. Cox, Cotton, Teal, and Minor; and Messrs. Williams, Wood, and Linticum. See, also, *Benbow v. The James Johns*, 56 Or. 554, 108 Pac. 634.

The Oregon statute was construed in *The Bee* (D. C.) 216 Fed. 709, by Judge Bean, who was for a long time a member of this court. It is there stated:

"The remedy provided by the state law for enforcing the lien given by the statute is an action against the boat or vessel by name, rather than in personam against the owner (section 7506, Lord's Or. Laws), but after the seizure of the vessel and the return of the warrant the proceedings are to be had against the vessel in the same manner as if the action had been commenced against the person on whose account the damages accrued (section 7509). And if an issue of fact be joined the same proceedings shall be had as in other actions. Section 7511. This being so, it would seem to follow that the trial should be governed and the liability of the parties determined by the same rule as if the action were in personam against the owner. * * *

This language indicates that it is also understood by the federal courts in Oregon that a proceeding under the statute in question is an action at law.

As indicated by section 10281, Or. L., which declares:

"Every boat or vessel used in navigating the water of this state or constructed in this state shall be liable and subject to a lien: * * * For damages or injuries done to persons or property, by such boat or vessel * * *

—it would seem to the writer that, strictly speaking, while the boat is subject to a lien there is no definite or fixed amount of the lien until judgment therefor is rendered, so that when the lien is finally perfected it is merged in a judgment, and is not required to be foreclosed within the meaning of section 422, Or. L. It does not appear that in the enactment of the latter section it was the intention of the lawmakers to change

the mode of procedure under the boat lien law. The law provides for a special proceeding, but it is denominated by the statute as an "action." The case at bar does not come within the ordinary list of causes of equitable cognizance. It was appropriately tried as a law action. It would be a very radical change for this court to try a damage case for personal injuries *de novo*.

It is presumed that the Legislature does not intend to make unnecessary changes in the pre-existing body of law. The construction of a statute will therefore be such as to avoid any change in the prior laws beyond what is necessary to effect the specific purpose of the act in question. *Black on Interp. of Laws*, p. 110, § 52; *Manuel v. Manuel*, 13 Ohio St. 458; *Bear's Adm'r v. Bear*, 33 Pa. 525; *Thompson v. Myline*, 4 La. Ann. 206; *Childers v. Johnson*, 6 La. Ann. 634. We quote from *Maxwell, Interp.* (2d Ed.) 96:

"One of these presumptions is that the Legislature does not intend to make any change in the law beyond what it explicitly declares, either in express terms or by unmistakable implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because, in their widest and perhaps natural sense, they have that meaning, would be to give them a meaning in which they are not really used."

If it be granted that the cause is a suit in equity, I see no reason why it should not be tried *de novo* in this court.

As to the amendment of the complaint, as I understand the record, the complaint was first typewritten, alleging damages in the sum of "\$2800.00" twenty-eight hundred dollars, and will necessarily incur an expense of ninety-nine (\$99.00) dollars in endeavoring to cure himself from said injury." Afterwards a pen was drawn through the figures "2800.00" and "7500.00" written over the same. At the time of the submission of the cause to the jury, after the instructions had been given by the court, in order to make the allegation of damages clear, plaintiff was permitted to correct the complaint to conform the written portion of the paragraph to the figures. The so-called amendment was a mere correction of an apparent clerical error, and in no way affected the issues. This was over the objection of claimant.

Section 102, Or. L., provides that the court may, at any time in the furtherance of jus-

tice and upon such terms as may be proper before the cause is submitted, allow any pleading or proceeding to be amended "by striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or when the amendment does not substantially change the cause of action or defense, by conforming the pleading or proceeding to the facts proved."

An application to amend a pleading at the trial is addressed to the sound discretion of the trial court, and the ruling of the court in such a matter should not be disturbed, except in the case of an abuse of discretion. *Brown v. Feldwert*, 46 Or. 363, 80 Pac. 414; *Wallace v. Balsley*, 22 Or. 572, 30 Pac. 432; *Garrison v. Goodale*, 23 Or. 307, 31 Pac. 709; *Filkins v. Portland Lbr. Co.*, 71 Or. 249, 142 Pac. 578; *Heywood v. Doernbecher*, 48 Or. 359, 86 Pac. 357, 87 Pac. 530; *Ridings v. Marion Co.*, 50 Or. 30, 91 Pac. 22; *Beard v. Royal Neighbors*, 60 Or. 41, 118 Pac. 171.

The trial court is in a better position than is the appellate court, to decide in regard to whether or not the circumstances warrant the allowance of an amendment of a pleading in order that the ends of justice may be met. There had been no application for the removal of the cause to the federal court. I do not think there was any abuse of discretion in allowing the amendment.

The service of process upon the *Bee Steamship Company*, a corporation, the owner of the vessel, being only a constructive service, the owner appeared for the boat and answered the complaint, and asked for judgment in its favor for costs and disbursements. It made a general appearance in the case, and is bound by the judgment. Where an undertaking is given for the discharge of a boat, under the provisions of section 10289, in a proceeding of this kind, as was done in the present case, the manner of rendering and executing judgment is directed by section 10292, Or. L., which reads thus:

"If an undertaking with surety shall have been given according to section 10289, and judgment shall have been rendered in favor of the plaintiff, a judgment shall also be rendered upon the undertaking, and execution shall be issued for the amount of judgment and costs in favor of the plaintiff, against the principal and security in such undertaking."

Judgment was rendered against claimant and its surety, and the requirements of the latter section were followed in this case. There was no error in so doing.

The judgment of the circuit court should be affirmed.

JAMES et al. v. CITY OF NEWBERG et al.

(Supreme Court of Oregon. Oct. 19, 1921.)

1. Municipal corporations §413(1) — Words "sidewalk" and "pavement" not synonymous within charter provision as to assessment.

The terms "sidewalk" and "pavement," within charter provision relating to the assessment for cost of building or repairing any "sidewalk" or "pavement," are not synonymous (citing Words and Phrases, First Series, "Sidewalk;" "Pavement").

2. Constitutional law §70(3) — Courts will not consider injustice to persons in construing provisions of city charter.

Under Const. art. 3, § 1, the court in construing a city charter provision will not consider injustice to property owners caused by construing the charter in a certain manner; such matters being for the Legislature and not the courts.

3. Statutes §220 — Legislature may define meaning of terms used.

The Legislature may properly define the meaning of terms used by it in a statute, and where this has been done the definitions prescribed are binding for the purpose of the statute.

4. Statutes §209 — Words taken to have been used in same sense where applied to same subject-matter.

If same word occurs in different parts of a statute, it must be taken to have been everywhere used in the same sense when applied to the same subject-matter, but words and phrases may be used with different significations and with different shades of meaning in different connections.

5. Statutes §206 — Effect given to every section, paragraph, sentence, clause, and word.

Effect should, if possible, be given to every section, paragraph, sentence, clause, and word.

6. Municipal corporations §8 — Charter considered in its entirety in construction of provision thereof.

In construing a provision of a city charter, the charter will be considered in its entirety.

En banc.

Appeal from Circuit Court, Yamhill County; H. H. Belt, Judge.

Suit by George W. James and others against the City of Newberg and others. Decree for plaintiffs, and defendants appeal. Affirmed.

This is a suit to restrain the defendants from assessing plaintiffs' property for street improvement purposes. The plaintiffs own lot 2, block 8, Deskin's addition to Newberg, no part of which abuts upon Garfield street, but which is separated from that street by lot 1 of the same block. The defendant city

of Newberg, a municipal corporation, contracted to pave Garfield street.

From the record before us, it appears that the council of the city of Newberg passed a resolution adopting plans and specifications for the improvement of Garfield street from the north line of First street to the south line of Sheridan street. In pursuance of that resolution, the recorder gave notices as therein directed and in the form required by law. It further appears that the city of Newberg took all necessary steps and measures to authorize it to make such improvements.

For relief, plaintiffs prayed that defendants be restrained from assessing any part of the cost of paving Garfield street against their lot. The city, through its attorney, demurred to the complaint on the ground that it "failed to state facts sufficient to constitute a cause of suit." The demurrer was overruled, and, the defendants having refused to plead further, the court entered a decree for plaintiffs.

Defendants appeal, assigning as error the overruling of their demurrer and the entering of decree for plaintiffs.

C. R. Chapin, of Newberg, for appellants.

Wood, Montague & Matthiessen, of Portland, and Clarence Butt, of Newberg, for respondents.

BROWN, J. (after stating the facts as above). [1] The one question presented for decision is whether or not the terms "sidewalk" and "pavement," as used in the proviso found in section 110 of the charter of the city of Newberg, are exact synonyms. The proviso reads:

"Provided, that all assessment for the cost of building or repairing any sidewalk or pavement shall be upon the property immediately adjacent to or abutting thereon, and for the full price of constructing or repairing such sidewalk or pavement."

[2] The defendants contend that the words "sidewalk" and "pavement," as used in the above proviso, mean the same thing, and that that thing is "sidewalk." It is urged with force that any other construction would work injustice to certain property owners. This argument may be very properly addressed to the legislative power. Our duty compels us to apply the law as it has been written by the legislative assembly into the charter of Newberg. The powers of the legislative department shall not be exercised by the judicial. Article 3, § 1, Constitution of Oregon. The writer has long been convinced of this truth:

"If you depart from the law, you will go astray, and all things will be uncertain to everybody." Co. Litt. 227b.

[3] The Legislature may properly define the meaning of the terms used by it in a statute, and, where this has been done, the definitions prescribed are binding for the purpose of that statute. But in the instant case the Legislature prescribed no definition for either of the terms under consideration.

[4, 5] A general rule of statutory construction is that if the same word occurs in different parts of the statute it must be taken to have been everywhere used in the same sense when applied to the same subject-matter. *U. S. v. Hill*, 123 U. S. 686, 8 Sup. Ct. 308, 31 L. Ed. 277. That rule does not conflict with the formula that words and phrases may be used with different significations and with different shades of meaning in different connections. In the construction of statutes a familiar rule is that effect should be given, if possible, to every section, paragraph, sentence, clause, and word.

[6] In arriving at the meaning to be given to the words "sidewalk" and "pavement," we will not confine ourselves to the language in the proviso quoted above, but, for the purpose of noting their use by the framers of the charter, will consider the charter in its entirety. At section 60 thereof we read:

"The council is authorized and empowered to improve the sidewalks, pavements, streets, and parts of streets."

The word "pavement," here used, has a distinct meaning and effect. It does not signify sidewalk.

Paragraph 17, § 16, is as follows:

"To provide for the removal * * * of all obstructions from side and cross walks."

Note the provision contained in paragraph 19 of said section:

"To regulate the use of streets and sidewalks and cross walks."

Again, note paragraph 41 of said section:

"To regulate the use of streets and sidewalks. * * * Provided that the council shall have no power to authorize any encroachment upon * * * any sidewalk."

And note, again, paragraph 46 of said section:

"Providing for the * * * repairing of * * * sidewalks."

Once more, take note of paragraph 47 of said section:

"To regulate the use of * * * sidewalks."

In each of these paragraphs, when sidewalk is referred to the term "sidewalk" is exclusively employed, and no superfluous synonym is found.

An examination of the charter convinces us that the words "sidewalk" and "pavement" are used in their ordinary sense, and that both words are effective. Many char-

ters were adopted by the legislative assembly which enacted the charter of the city of Newberg, and nowhere in those charters do we find the terms "sidewalk" and "pavement" used synonymously.

Some of the many definitions of the terms "sidewalk" and "pavement" are as follows:

Words and Phrases, First Series, gives this concise definition of sidewalk:

"Sidewalk has a definite meaning. It is a way for foot passengers." Citing *Salisbury v. Andrews*, 36 Mass. (19 Pick.) 250, 258.

In 7 McQuillin, Municipal Corporation, Supplement, we find:

"A sidewalk is a way for foot passengers or a public way especially intended for pedestrians; a path or way for the use of foot passengers at the side of the street. Street, in its broad and general sense, includes sidewalk. * * *" Section 1286.

"A sidewalk is a part of the street exclusively reserved for pedestrians, and constructed somewhat differently than other portions of the street made use of by animals and vehicles generally. It is paved differently that the public may be better served by maintaining the two portions of the way separately. Whatever may be the difference it constitutes a part of the street. *Central Life Assur. Soc. v. Des Moines*, 171 N. W. 81, 185 Iowa, 573, 577." Note to section 1286, McQuillin, *supra*.

In Century Dictionary and Encyclopedia we read:

"Sidewalk: A footwalk by the side of a street or road; * * * usually separated from the roadway by a curb and gutter. Also (in Great Britain nearly always) called pavement."

Webster's International Dictionary says:

"Sidewalk: A walk for foot passengers at the side of a street or road; a foot pavement. In Great Britain, usually called pavement; in Australia, footpath."

A statement plainly true is:

"Paving" is a word, the meaning of which, like most, any other, will depend on where and the connection in which it may be used." *Muff v. Cameron*, 184 Mo. App. 607, 114 S. W. 1125, 1126, 117 S. W. 116.

"The term 'pave,' in its generic sense, means to place some substance on the street so as to form an artificial roadway or wearing surface, which shall change the natural condition of the street. The word is much more comprehensive than the term 'macadamize,' but it embraces all that the term 'macadamize' covers." Words and Phrases, Second Series.

Volume 9, Nelson's Encyclopedia, gives this approved definition of the term "pavement":

"Pavement is a hard covering of the surface of a road or footway commonly composed of macadam, granite blocks, brick, sheet, or block, asphalt, or wood for vehicular traffic, and blue flagstones, cement, or tar, concrete and brick for sidewalks. In the United States, the term

'pavements' is rarely used to include sidewalks or any kind of footpaths."

We take the following from the New International Encyclopedia, vol. XV, p. 464:

"Pavement: This term, in its broader sense, includes any firm, hard covering for areas subjected to the wear and tear of human feet, or of hoofs and wheels, designed to keep the feet or wheels from the ground or earth, and to present a more or less dry, durable, and smooth surface. Under this definition would be included the paved floors of cathedrals and other public buildings often of an ornamental character (see Tiles), as well as the surfaces of courtyards, walks, streets, and highways, on which stones or other durable materials are placed. In the modern and more restricted sense, pavements are generally limited to the wearing surface of that portion or improved streets lying between the curbs, thus excluding the sidewalks."

We hold that the words "sidewalk" and "pavement," as used in the charter of the city of Newberg, do not express the same thing. Each word, as there used, has a distinct meaning.

The decree appealed from is affirmed.

BURNETT, C. J., did not participate in this decision.

GARY COAST AGENCY, Inc., v. LAWREY.
(Supreme Court of Oregon. Oct. 19, 1921.)

1. Appeal and error ⇨662(3)—Where statutory procedure is not followed in settling a disputed matter in bill of exceptions, the appellate court is bound by the bill as sent up.

Where the procedure of Oregon Laws, § 170, for settling the bill of exceptions in case of disagreement between the judge and counsel as to its contents, involving calling of disinterested parties to make oath as to what actually occurred, was not followed, the appellate court is bound by the bill of exceptions as sent up.

2. Action ⇨41—Plaintiff may not join tort and contract.

A plaintiff may not join a tort and contract in the same action.

3. Pleading ⇨90—Counterclaim based on fraud and breach of warranty may be set up if not inconsistent with each other.

Under Or. L. § 73, providing that a defendant may interpose as a defense a statement of any new matter constituting a defense or counterclaim, and section 74, providing that he may set forth by answer as many counterclaims as he may have, different counterclaims, if consistent, may be set up in defense though based on fraud and breach of warranty.

4. Pleading ⇨93(2)—Counterclaims for fraud and breach of warranty held not inconsistent.

In an action upon a note to pay for a motor truck, defenses of fraud and breach of warranty

are not necessarily inconsistent with each other.

5. Pleading ⇨34(7)—Where answer was not attacked for failure to state defenses of fraud and breach of warranty separately, it must be liberally construed on appeal.

In an action on a note to pay for a motor-truck, where defendant set up a counterclaim of fraud and breach of warranty, but plaintiff did not attack the answer because it did not allege these defenses separately the allegations of the answer must be liberally construed on appeal under Or. L. § 85, requiring pleadings to be construed liberally with the view of substantial justice.

6. Pleading ⇨411—Failure to demur to counterclaim because it did not separately state defenses of contract and tort in counterclaim waives the defect.

Under Or. L. § 68, making a ground of demurrer that several causes of action have been improperly united, and under section 72, providing that if no objection is taken by demurrer or answer it shall be deemed to be waived, excepting only the objection to jurisdiction and failure to state a cause of action, failure of plaintiff to demur to counterclaim because it did not separately allege fraud and breach of warranty waives the defect, if any.

7. Sales ⇨273(3)—Warranty of suitability implied.

A purchaser, contracting for truck for a use explained to the vendor, was entitled to that quality of truck under an implied warranty.

8. Sales ⇨390—One fraudulently induced to contract may return property and sue for price, or keep property and recoup damages.

A person induced by fraud to enter a contract of purchase, on discovery of fraud, may return the property and sue for the price, or keep the property and recoup the damages he has sustained when sued for the purchase price.

9. Sales ⇨425—On breach of warranty, purchaser may sue for breach or counterclaim when sued for purchase price.

A purchaser of an article warranted to him, either expressly or impliedly, may sue for a breach of warranty, or set up a counterclaim based on that breach when sued for the purchase price.

10. Sales ⇨428—Purchaser does not waive right to recoup for damages by making payments after knowledge of unfitness of thing sold.

Where a purchaser seeks by counterclaim to recoup for damages for fraud and breach of implied warranty, the rule as to waiver of right to rescind by making payments after knowledge of the unfitness of the article sold does not apply.

11. Sales ⇨442(1)—Purchaser is not limited in recovery to amount of purchase price paid as damages for fraud and breach of implied warranty.

A purchaser, counterclaiming for damages for fraud and breach of implied warranty, is

not limited in recovery to the amount of the price paid.

Department 1.

Appeal from Circuit Court, Marion County; George G. Bingham, Judge.

Action by the Gary Coast Agency, Incorporated, against Fred Lawrey. From judgment for defendant, plaintiff appeals. Affirmed.

This is an action brought by the plaintiff on a note for \$233. After denying everything in the complaint except as stated in the answer, the defendant contends that the note was given in part payment of the initial installment demanded by the plaintiff as part of the purchase price of a motor truck. He says in substance that he purchased the truck from the plaintiff for the purpose, well known to the latter, of using it in the dray and transfer business operated by the defendant; that the plaintiff warranted the truck to be suitable for that purpose; that for the purpose of inducing the defendant to purchase the truck, the plaintiff represented that it was practically new, and had been run only for a short time; that the defendant relied on the representations and believed them to be true; that the plaintiff knew they were false, and made them to induce the defendant to purchase the truck, and with the intent and design to defraud the defendant out of the purchase price; and that in fact the truck was old and worn and not suitable for the purpose for which it was bought. It is further stated that before the institution of the action the defendant tendered the truck to the plaintiff, assigning as a reason the misrepresentations already stated, but the plaintiff refused to receive it or to return the money paid therefor. The defendant demands judgment for all the money he has paid on the truck. The reply puts in issue material parts of the answer, and sets up a conditional sales contract for the purchase of the truck, the title of which was to remain in the plaintiff until all of the payments had been made. As to the \$233 note, the reply avers in substance that it was for money loaned by the plaintiff to the defendant, and had nothing to do with the transaction concerning the sale of the truck. As a waiver of defenses against the note, it is averred in effect that the defendant took the truck, operated it, and paid two installments on the purchase price, with full knowledge of the alleged defects in the truck. A jury trial resulted in a verdict and a consequent judgment in favor of the defendant, for \$475, and the plaintiff appeals.

Will H. Masters, of Portland, for appellant.
Custer E. Ross, of Silverton, for respondent.

BURNETT, C. J. (after stating the facts as above). [1] It is contended that the court

changed the transcript of testimony so as to render futile the motion of the plaintiff to require the defendant to elect whether he was defending on the ground of fraud or breach of warranty. The bill of exceptions appearing in the record is to the effect that after the jury was impaneled, the attorney for plaintiff moved that the defendant state upon what theory he elected to proceed, and that the attorney for the defendant said, "This will be on the basis of a defense at law of fraud and deceit and breach of warranty." No ruling of the court was called for, and none was made. The contention is that the court was in error in permitting the bill of exceptions to show that the words "and breach of warranty" were used in the statement of the defendant's counsel. A procedure is set down in section 170, Or. L., for settling a bill of exceptions in case the judge and counsel do not agree as to the legitimate contents thereof, involving the calling of disinterested persons to make oath as to what actually occurred, etc. Nothing of the kind appears in the record here, and hence we must be bound by the bill of exceptions as sent up. Under the circumstances it imports absolute verity. The result is that the matter is to be determined here as to whether fraud was perpetrated, and as to whether there was a breach of warranty concerning the quality of the machine.

[2, 3] It is urged in the brief for the plaintiff that, "appellant [defendant] cannot join a cause of action *ex delicto* with a cause of action *ex contractu*, because they are inconsistent," citing authorities. A fair sample of these precedents is *Miller v. Hirschberg*, 27 Or. 522, 40 Pac. 506. The doctrine of that case is, that one cannot allege a tort and prove a mere breach of contract. The question of misjoinder was not discussed. The other precedents cited under that point are substantially to the same effect. Practically, the defendant relies upon both fraud and breach of warranty. It may well be said that a plaintiff cannot join tort and contract in the same action. The defendant, however, under the provision of section 73, Or. L., may interpose as a defense "a statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition." Also, he "may set forth by answer as many counterclaims as he may have." Or. L. § 74. Of course, these different counterclaims must be consistent one with the other. They cannot be contradictory of each other. If it is possible, however, for both to be true, they both may be set up in defense.

[4, 5] Section 74 defines counterclaims, and requires that the defenses shall be separately stated. The defenses of fraud and breach of warranty are not necessarily inconsistent with each other. In the present instance they are not separately stated, but

no attack was made on the pleadings for that fault, and hence under section 85, Or. L., we must liberally construe the allegations of the answer. The fault that they were not separately stated was not called to the attention of the court. Even conceding that the defendant in urging his counterclaim is in a sense a plaintiff, and that his answers are demurrable because he has not separately stated them, that defect has been waived by not demurring to the new matter in the answer.

[8] Among grounds of demurrer specified in section 68, Or. L., one is "that several causes of action have been improperly united;" and under section 72 it is said:

"If no objection be taken, either by demurrer, or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court, and the objection that the complaint does not state facts sufficient to constitute a cause of action."

These two counterclaims, therefore, although mingled in statement were properly before the court for consideration.

The defendant contends that he informed the plaintiff of the purpose for which the truck was to be used, and that the plaintiff represented to him that it was fit for that purpose. It is argued on behalf of the plaintiff that—

"There is no implied warranty that an article will answer the purpose for which it is intended to be used, if an order is given for a specific article of a known and recognized kind and description."

Among the precedents cited in support of that proposition is *Goulds v. Brophy*, 42 Minn. 109, 43 N. W. 834, 6 L. R. A. 392. That case involved a well-boring appliance. There was no complaint about the construction of the machine, and it seems that it answered in every particular the description of it given by the seller. The rule stated in 1 *Parsons on Contracts*, 586, was cited approvingly in the opinion, thus:

"If a thing be ordered of a manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose. This principle * * * must be limited to the cases where a thing is ordered for a special purpose, and not applied to those where a special thing is ordered, though this be intended for a special purpose."

[7] In that case the defendant contracted for an auger to bore wells, and got such an auger. Here, however, in this case there is evidence to the effect that the ordinary purpose for which the truck was to be used was hauling freight, and that, owing to defects in its construction, such as breakage of the frame and defective radiator, it would not perform what was reasonably required of it.

There is enough in the testimony under the allegation of breach of warranty to go to the jury on the proposition that the truck was not reasonably fit for the purpose for which it was designed and purchased. It is true that if a man contracts for a spade and gets a spade, he is bound to pay for it, although he intended to use the spade for spreading paint. But for all this, it must be at least an ordinary useful spade. If the defendant contracted for a truck reasonably suitable for a certain use explained to the plaintiff at the time, he was entitled to that quality of truck.

[8] If one is induced by fraud to enter into a contract for the purchase of an article, on discovery of the fraud there are two methods of procedure open to him: (1) He may promptly return the property on such discovery, rescind the contract, and sue for what he has paid; or (2) he may keep the property and recoup for the damages he has sustained, when sued for the purchase price. *Scott v. Walton*, 32 Or. 460, 52 Pac. 180.

[9] If the property has been warranted to him either expressly or impliedly to be possessed of certain qualities which it does not have, he can bring an action for breach of warranty, or set up his counterclaim based on that breach, when sued for the purchase price, because it grows out of the same transaction. This is the position of the defendant here. He seeks to recover damages for the fraud in the difference in value of the machine as represented and what it actually was worth, as well as for breach of the implied warranty of fitness. There is evidence to go to the jury on both the tort and the breach of warranty, both of which are legitimate counterclaims in this action.

[10, 11] The plaintiff contends in his brief that the defendant has waived his right to rescind by making payments after knowledge of the alleged fraud and unfitness of the truck; but the answer is based upon the theory of recouping for damages, and not upon rescission. There is no averment of demand for, or notice of, rescission. The same may be said as to the point made by the plaintiff that the measure of damages on rescission is the amount of purchase price paid. In addition to that, on this contention the plaintiff is in no position to complain, for the verdict was for only \$475, while it is conceded that much more was paid on the contract price. The case framed by the pleadings is one in which the defendant, on being sued for a note given as part of the purchase price of the truck, has kept the machine and has counterclaimed for damages growing out of the transaction.

The judgment is affirmed.

McBRIDE, BEAN, and HARRIS, JJ., concur.

LONG et al. v. TITTLE et al.

(Supreme Court of Oregon. Oct. 19, 1921.)

Waters and water courses \S 158 $\frac{1}{2}$ (2)—Evidence sustained finding that lost contract reserved right to overflow land conveyed.

In a suit to restrain interference with the right to overflow lands to obtain a sufficient height of water in a milldam, and for reformation of deeds to such lands, evidence held to sustain a finding that the contract under which the deeds were made, and which could not be found, reserved the right to the use of the millpond and to overflow the land conveyed.

Department 1.

Appeal from Circuit Court, Tillamook County; Geo. R. Bagley, Judge.

Suit by Catherine A. Long and another against Lee J. Tittle and others, for an injunction and to reform certain deeds. Decree for plaintiffs, and defendants appeal. Modified and remanded, with directions.

This is a suit brought by Catherine A. Long and A. G. Beals against Lee J. Tittle and his wife, Jessie Tittle, A. M. Hare, and John Simmons, for the purpose of restraining the defendants from interfering with an alleged right to overflow a sawmill pond, and for the further purpose of reforming two certain deeds. One of the plaintiffs, while operating a sawmill, caused the waters in the millpond to overflow upon land owned by one of the defendants. Simmons tore out a portion of the dam which held the water in the pond and caused the overflow. The plaintiffs claimed, but the defendants denied, that the owner of the mill is, by force of a certain written contract executed on January 25, 1917, by Catherine A. Long and Lee J. Tittle, entitled to overflow land to which Tittle holds the legal title and in which Simmons has an interest. The dispute over the asserted right of overflow brought about this suit, in which the plaintiffs, on the one side, are seeking (1) to enjoin the defendants from interfering with the plaintiffs in the exercise of the alleged right to overflow, and (2) to reform two deeds, and the defendants, on the other side, are praying for equitable relief. A trial resulted in a decree for the plaintiffs. The defendants appealed.

The plaintiff Beals purchased the sawmill from Catherine A. Long, and now owns it. Lee J. Tittle has the legal title to the land which has been overflowed, John Simmons verbally agreed to purchase this land from Tittle, and Simmons has resided upon and made improvements on the premises, and at the time of the trial Hare held a mortgage on the overflowed land.

Webster Holmes and T. H. Goynes, both of Tillamook, for appellants,

H. T. Botts and George P. Winslow, both of Tillamook (Johnson & Handley, of Tillamook, on the brief), for respondents.

HARRIS, J. (after stating the facts as above). The facts presented by this suit are somewhat complicated. There are two tracts of land which must be kept in mind; one is the N. W. $\frac{1}{4}$ of section 31 in a certain township in Tillamook county, and the other is the S. W. $\frac{1}{4}$ of the same section. For convenience the line which marks the south boundary of the N. W. $\frac{1}{4}$ and the north boundary of the S. W. $\frac{1}{4}$ will be designated the division line. The sawmill stands on the S. W. $\frac{1}{4}$. Tittle holds the legal title to the N. W. $\frac{1}{4}$, and Simmons resides upon it under a verbal agreement to purchase. The improvements made by Simmons are valued at about \$800. The sawmill is located about 350 feet south of the division line. On the north side of the mill and next to it is an artificial pond, which was constructed by excavating and diking. According to one witness, "the main pond is in a pretty near rectangular or circular shape." Measured from the west to the east side, the "main pond" is about 300 feet wide. A creek running through the N. W. $\frac{1}{4}$ supplies water for the pond. The creek enters the N. W. $\frac{1}{4}$ and runs in a southerly direction towards the mill. When the sawmill was erected, this creek ran in a southerly direction until it reached a point somewhere between 150 and 600 feet north of the division line, and at that point the creek turned towards the east. The water was carried to the millpond by constructing a dam at the point where the creek turned towards the east and by digging a ditch from that point to the millpond. It is appropriate here to say that some of the witnesses differed widely in their estimates of distances, and, too, some of the witnesses used the words "here" and "there" when pointing to a rough sketch used at the trial—words which fail to inform a reader of the paper record. However, it is not necessary to attempt to reconcile these differences, for the reason that a statement of the approximate distances will suffice.

The creek as it now runs is only about 4 feet in width until it reaches a point about 300 feet north of the division line, and at this point the creek widens to about 8 or 10 feet, and continues to widen until it reaches a width of about 25 or 30 feet, which width is maintained until the "main pond" is reached. This widened portion is referred to as the "channel." The situation, then, is such that the water runs through the creek, passes through the "channel," and finally empties into the "main pond," or that part of the pond which one of the witnesses described as being "in a pretty near rectangu-

lar or circular shape." The whole of the "main pond" is on the S. W. $\frac{1}{4}$. The mouth of the "channel" is about 35 feet south of the division line; so that, with the exception of about 35 feet of its length, the "channel" is within the N. W. $\frac{1}{4}$. A dike or embankment and "dams" are maintained along the east side of the "channel" and creek for a considerable distance north of the division line. This embankment and these dams vary in height. One witness stated that "for about 150 feet beyond the division line" the top of the dike was 3 feet "above the level of the surrounding soil." Parallel with the "channel" and creek and on the west are some hills. It is difficult to learn from the record even the approximate distance between the foot of these hills and the creek and "channel," but we infer that it is about 200 feet. We also infer from the record that the dike or embankment and dams on the east side of the creek and "channel" are raised higher than the west side of the creek and "channel," and that therefore, when the water is permitted to reach a certain height in the pond, it begins to back up, and as the surface of the water rises in the pond the water continues to back up in the "channel" and creek, until it pours over the west side of the "channel" and creek, and spreads out towards the hills, and overflows the land between the foot of the hills and the "channel" and creek.

The sawmill was built in 1900, and at the same time the millpond was constructed, the ditch was dug, the dam was put in, and the water of the creek was diverted to the millpond. The mill was operated by different persons until 1909, when Frank Long acquired it. On June 6, 1914, the defendant Lee J. Tittle purchased a half interest in the sawmill, and Long and Tittle operated the mill as partners until Long's death. On January 16, 1917, Long died; and on January 25th following Tittle and Catherine A. Long, the widow of Frank Long, deceased, entered into a written contract. It is not entirely clear whether the contract was executed in unuplicate or in duplicate. If there was only one writing, it was lost; and if there were two writings, both were lost. The plaintiffs have at all times contended that the written contract contained a provision giving to Mrs. Long and her assigns the right to overflow the N. W. $\frac{1}{4}$ when operating the sawmill; the defendants have at all times insisted that, although the contract permitted the owner of the sawmill to back up the water in the channel and creek, the contract did not permit the owner of the mill to back up the water until it overflowed the N. W. $\frac{1}{4}$; and hence the efforts of the litigants were in a large measure devoted to an attempt to establish the contents of the lost written contract.

In order to understand the reasons in-

ducing the execution of the contract and the circumstances attending the negotiations preceding the contract, it is necessary to narrate some additional facts. The sawmill and "main pond" are upon leased ground. The S. W. $\frac{1}{4}$ has not been owned by the owners of the sawmill. Tittle contracted to pay Long \$6,000 for a one-half interest in the mill, but at the time of entering into the partnership he paid only \$750. Although Tittle may have been entitled to some credits, it is conceded that on January 25, 1917, he had not yet paid the balance of the purchase price.

O. E. Dennis owned the N. W. $\frac{1}{4}$ in 1900, when the sawmill was erected. On November 3, 1900, Dennis leased the N. W. $\frac{1}{4}$ to the owners of the mill for a period of 10 years for a stipulated annual rental, which for each of the last 6 years of that period was fixed at \$100. Upon the expiration of the 10-year period the owner or owners of the mill rented from year to year, and paid \$100 to Dennis each year. Tittle knew in 1914, when he purchased an interest in the mill, that Long had been paying rent to Dennis. In 1915 Long and Tittle purchased the N. W. $\frac{1}{4}$ from Dennis and incumbered the land with a purchase money mortgage for \$2,250. No payments were made on this mortgage prior to Long's death. At some time during the existence of the partnership, the sawmill was destroyed by fire, with no insurance. The mill, however, had been partially reconstructed before January 25, 1917. The books of the partnership were in confusion and difficult to understand. The partnership owed many creditors. The debts exceeded the credits. There was no cash on hand. Apparently there were no "live" assets at all, except the sawmill. In this situation Beals and Connie Dye entered into negotiations for a lease upon the sawmill.

Mrs. Long, Beals, Dye, Tittle, and Frank Long, Jr., met on January 25, 1917, at the office of S. S. Johnson, who was acting as Mrs. Long's attorney, and then and there Mrs. Long and Tittle entered into a written contract. It is conceded that Tittle agreed to transfer to Mrs. Long all his interest in all the partnership property except the N. W. $\frac{1}{4}$, and that Mrs. Long obligated herself to cause to be conveyed to Tittle, subject to the Dennis mortgage, all the interest which her husband had in the N. W. $\frac{1}{4}$ at the time of his death, except certain rights reserved to her in the written contract. Tittle assigned the partnership accounts to Mrs. Long, but she agreed to pay the partnership debts. We also understand that Tittle was relieved from any obligation to pay the balance due on his contract made with Long, the deceased, on June 6, 1914. The parties do not agree upon the extent of the reservation expressed in the contract, and this disagreement is the cause of this lawsuit. It is

admitted by all parties that the contract reserved the right to construct a logging road over the N. W. $\frac{1}{4}$, although the parties disagree as to the place where the road was to be located. Tittle says that the logging road was to be built on the west side of the creek and as near as possible to it. Mrs. Long says that it was to be located as near the foot of the hill as practicable. In this particular the trial court found in favor of the contention of Mrs. Long, and decreed that the right of way for logging purposes be confined to a location on the west side of the creek "following the foot of the hill thereon." We approve this finding of the trial court.

Tittle claims that the contract did not reserve to Mrs. Long the right to overflow any land in the N. W. $\frac{1}{4}$ west of the creek. He testified that the question of overflow was discussed at length; that it was not necessary to overflow any of the N. W. $\frac{1}{4}$; that he finally convinced Mrs. Long and Beals that it was not necessary to overflow the N. W. $\frac{1}{4}$; and that, employing Tittle's language, "if I remember it," the contract contained an express provision "that they should not overflow the land."

The plaintiffs allege that the contract provided that—

"There should be reserved in the conveyance of said property to said Tittle, as appurtenant to said mill, all of the rights of way for logging and mill purposes then existing over and upon said land for the purpose of operating said mill, and including the right to extend said pond over and upon said land, and to use said pond and to overflow said land from said pond in such use thereof as the owner of said mill might find convenient in the operation thereof."

The court found from the evidence that the contract reserved to Mrs. Long the right—

"for herself individually, and for the estate of her deceased husband, to make use of said northwest quarter so far as should be found necessary or convenient in the ordinary operation of said sawmill, and that there should be reserved in the conveyance of said property to said Tittle, as appurtenant to said mill, all of the rights of way for logging and mill purposes then existing over and upon said land for the purpose of operating said mill, including the right to extend said pond over and upon said land, and to use said pond and to overflow said land from said pond in such use thereof as the owner of said mill might find convenient in the ordinary operation thereof."

Pursuant to the contract, Tittle executed and delivered a conveyance to Mrs. Long on January 25, 1917. There were two minor grandchildren and there were also some adult heirs. The contract contemplated that Mrs. Long would acquire the interests of the adult heirs and then convey to Tittle all her interest, and appropriate steps would be taken to bring about a guardian's sale of the interests of the two minors. Time was required for obtaining the interests of the

adult heirs and for bringing about a sale of the interests of the minor heirs. Apparently the parties did not think it would be necessary to cause a sale to be made by the legal representative of the estate of the deceased, but it subsequently appeared to be necessary; and accordingly Mrs. Long, who had been appointed administratrix of the estate of her deceased husband, petitioned for an order to sell the estate's interest in the N. W. $\frac{1}{4}$, and afterwards it was sold by the administratrix to Tittle.

On December 10, 1917, Mrs. Long, as guardian of the minors, executed a deed conveying to John Simmons the interest of the two minors. On December 17, 1917, Mrs. Long quitclaimed to Tittle. On March 30, 1918, Mrs. Long, as administratrix, conveyed to Tittle. It will be observed that the guardian conveyed to the defendant John Simmons. It is conceded that the guardian in truth sold to Tittle, and so reported to the county court. The execution of this deed to Simmons, instead of to Tittle, was probably due to the fact that soon after January 25, 1917, Simmons verbally agreed to purchase the N. W. $\frac{1}{4}$ from Tittle, and in April, 1917, Simmons took possession and thereafter remained in possession continuously.

We may now proceed to eliminate the defendants Simmons and Hare as litigants. At some time prior to October 21, 1918, Simmons quitclaimed to Tittle. Tittle had reduced the Dennis mortgage to \$1,500, and on October 21, 1918, Tittle paid the Dennis mortgage by borrowing \$1,500 from the First National Bank of Tillamook, and he then gave a mortgage on the N. W. $\frac{1}{4}$ to secure the bank. Subsequently the bank sold and assigned the mortgage to Hare. When Simmons took possession of the N. W. $\frac{1}{4}$ the legal title was held by Tittle and the heirs of Frank Long, deceased, subject, of course, to the right of creditors of the partnership. Simmons made a verbal contract with Tittle, and at that time the latter owned an undivided half interest in the land. It must be remembered that deeds were not delivered to Tittle until the following December, or several months after Simmons took possession under his verbal agreement. Simmons knew that the partnership owned the mill and the N. W. $\frac{1}{4}$. When Mrs. Long executed her deed in December, 1917, it contained language which notified all persons of a reservation; and so did the deed given by her as administratrix on March 30, 1918. Simmons has not even yet paid a dollar on the purchase price, although he has made improvements worth about \$800. While there is no evidence that Simmons saw or read the written contract, it is fair to suppose that his son-in-law, Tittle, told him that a contract had been made with Mrs. Long for the purchase of the premises. In the circumstances disclosed by the record, if a right to overflow can be asserted

as against Tittle, the same right can be asserted as against Simmons, for the right of the latter is no greater than that of the former.

The record shows that on March 27, 1920, after the trial in the circuit court, Hare satisfied the mortgage given by Tittle, and hence Hare is no longer interested in the controversy. Having determined that Simmons does not possess any rights in excess of those acquired by Tittle, and that Hare no longer has any interest in the N. W. $\frac{1}{4}$, we may again turn our attention to the inquiry: What did the contract between Tittle and Mrs. Long reserve to the latter?

It is conceded that the contract contained some reservation. The contract, the papers filed in the probate court in connection with the sale by the administratrix and the orders made by that court, the deed given by the administratrix, and the deed made by Mrs. Long in her individual capacity were all prepared by the same attorney. So far as the reservation is concerned, the language in the administratrix's deed is different from that in the individual quitclaim deed made by Mrs. Long. The language of the reservation in the administratrix's deed is not as broad as found in the papers filed in the probate court, nor is it as broad as the language of the orders made by that court; and yet it is admitted that the proceedings in the probate court were had and the two deeds were executed in an attempt to carry out the provisions of the contract. The explanation of the differences to which attention has been directed is found in the fact that the written contract was not available, and it became necessary to depend upon memory alone in the preparation of the deeds, the papers filed in, and the orders made by the probate court.

The language of the reservation in the quitclaim deed made by Mrs. Long is:

"Reserving the rights of way for logging and mill purposes now existing over and upon said land for the purpose of operating" the mill.

It is here important to note that on January 25, 1917, when the contract was executed, the right of way for a logging road, although admittedly reserved in the contract, had not yet been established or located upon the ground, and so far as is disclosed by the record there was no right of way in use "for logging and mill purposes," except the creek and "channel."

In the administratrix's deed the language of the reservation is as follows:

"Except the right of way for logging and timber purposes, being in connection and appertaining to" the mill.

The reservation, it will be noted, speaks of "the right of way." Upon turning to the petition of the administratrix for an order

to sell the N. W. $\frac{1}{4}$, we observe that it speaks of "the right of way for logging and timber purposes" and "the right to use the pond thereon for mill purposes." The order for the issuance of a citation to the heirs speaks of the right of way and pond in the same language as does the petition for the order of sale. The citation to the heirs gives notice that a petition has been filed for authority to sell the N. W. $\frac{1}{4}$ "except the right of way for logging and timber purposes" and "the right to use the pond thereon for mill purposes." The same language is found in an order appointing a guardian ad litem for the minor grandchildren, the order authorizing the sale of the real property, the notice of sale as published in a newspaper, and the report of the administratrix showing the sale to Tittle. The language which refers to the pond is significant. It is not to be supposed that the word "pond" would have been used unless Mrs. Long had reserved some right in the pond when she made the contract with Tittle. Although the trial did not occur until October, 1919, the probate proceedings for the sale of the property were begun in December, 1917, or only about 11 months after the execution of the contract. No dispute about the language of the contract arose until about June, 1918, when Simmons tore out a dam which Beals had recently built; and, consequently, the papers filed in the probate court were all filed before any controversy arose.

When Tittle and Mrs. Long made their contract, they were contracting with reference to a sawmill, which had been in operation for nearly two decades, and had been operated under practically the same conditions during that entire period. The mill cannot be operated successfully without a millpond. The defendants say that the "channel" is "no part of the pond." Our conclusion is that the evidence shows that logs have been stored in the "channel," that the "channel" has been used as a part of the pond, and that it is to be deemed a part of the pond.

Beals and Dye were interested in knowing whether, if they leased the mill, they would secure the pond rights, because they knew that the mill could not be operated without the pond, and they also knew that the pond could not be used unless the water could be backed up so as to obtain a sufficient depth to float logs. Mrs. Long was to receive the partnership assets, but she was to take care of the partnership debts. Mrs. Long knew that Beals and Dye would not lease the mill unless they could also have the pond rights. Beals expressly stated when in Johnson's office that he would not consider a lease unless he could get the pond rights. When we view the positions occupied by the contracting parties in connection with the

admitted provision of the contract, it becomes manifest that there were strong inducements for both Tittle and Mrs. Long to make a contract which would meet with the approval of Beals and Dye, and it is likewise manifest that it is not at all likely that Beals and Dye would have been satisfied with a contract which did not reserve to Mrs. Long all necessary pond rights. It is a significant fact that the evidence shows that the contract, when signed, was satisfactory to Beals, who it appears conducted the negotiations for himself and Dye.

The evidence shows conclusively that Long and his predecessors had so used the pond as to overflow the N. W. $\frac{1}{4}$. Mrs. Long testified that her husband and Tittle bought the N. W. $\frac{1}{4}$ for the purpose of avoiding payment of rent for the right of overflow. Although contradicted by some of the witnesses for the defendants, witnesses for the plaintiffs testified that Long and Tittle continued to overflow the N. W. $\frac{1}{4}$ after the formation of the partnership and during its existence; and we think that the clear weight of the evidence is that the partnership continued to overflow the N. W. $\frac{1}{4}$ just as Long and his predecessors had overflowed it, although the extent of the overflow may have been at times less than before, due to the fact that the pond was "dug out" twice. The trial court viewed the premises, and, we infer, concluded from the evidence that the overflowing did not cease with the formation of the partnership.

The interested parties were dealing with a mill which had been operated for 17 years; they knew there was a creek and a pond; they knew whether the pond had overflowed, and, if so, how much; and although the written contract, if discovered and produced, might actually show, on the one hand, an express provision prohibiting all overflow, or, on the other hand, an express provision permitting overflow without limit, we must necessarily base our conclusions upon the testimony of witnesses who have undertaken to tell of the contents of the writing; and after giving to the evidence our most careful consideration we find ourselves unable to reach any other conclusion than that it was agreed that Mrs. Long should be entitled so to use the pond, if necessary, as to overflow the land west of the creek and "channel." The written contract may have used the word "overflow"; or it may have employed the words "pond rights, with the right of overflow"; or it may have used merely the words "pond rights," meaning by those words the right to back up the water and to overflow in order to secure enough water to float logs in the pond. Beals testified:

"Mrs. Long was to have the pond rights and the overflow rights;" "the pond with the privilege of overflowing." "I think it said the

pond rights with the privilege of overflowing." "That is my recollection" that something was said about "pond rights with overflowing."

Mrs. Long testified that Tittle was to—

"give me the right for a logging road and the right to overflow the pond on that property." "The sense of it was that he was to give me the right of that overflowing." "I was to have the right to overflow; that pond overflow."

Harry Long read the contract, and he stated that—

"It was for the pond right; it gave her the pond right;" "the overflow; the right to back the water up with this dam, for the pond."

Connie Dye testified thus:

"I know that Tittle agreed there in the office that he would give Mrs. Long all rights and title to the pond."

S. S. Johnson, the attorney who prepared the contract, testified that according to his recollection the right to overflow was discussed and agreed upon, and that the written contract reserved to Mrs. Long the right to overflow. Tittle stated that, as he recollected the contract, it contained an express provision prohibiting the overflow of the land.

No witness corroborated Tittle, unless it can be said that he was corroborated by Frank Long, Jr., who is a son-in-law of John Simmons and a son of Mrs. Long. This witness stated that "the water was not to be raised in the pond any higher than my father and Mr. Tittle had raised it when they were logging there," and that at that time "it was not overflowing the property." Frank Long, Jr., also testified that "there was a reservation kept for the pond right."

The overwhelming preponderance of the evidence is that the pond right was reserved by Mrs. Long. Pond right meant the right to use the pond, and the right to back the water up sufficiently to float logs in the pond. The evidence shows that the interested parties understood such to be the meaning of the words "pond right." When the parties talked about the pond right, and contracted with reference to the pond right, they must be deemed to have had in mind the pond right as it had been exercised in the past, 13 C. J. 280. There is no evidence warranting any other conclusion. As previously stated, it is our conclusion from the evidence that the partnership overflowed the N. W. $\frac{1}{4}$. When, therefore, the parties agreed that Mrs. Long should have the pond right, and they failed to specify the extent of the right to overflow, they must be deemed to have agreed that Mrs. Long should have the right to overflow to the extent that such right had been previously exercised.

Beals and Dye leased the mill from Mrs. Long soon after the contract of January 25,

1917, and they operated the mill under the lease until February 9, 1918, when Beals purchased the mill from Mrs. Long. The evidence indicates that in 1918 Beals raised the dams and embankment higher than they had been before, and that the overflow was therefore greater than before. The evidence also indicates that the process of bringing logs into the pond also brings debris, which, as it accumulates, raises the bed of the pond, and, unless removed, necessarily raises the surface of the water higher, with the result that the overflow correspondingly increases. The evidence indicates that since February, 1918, debris has accumulated in the pond, and that on that account it became necessary to back the water up higher than it had been before. The parties must be deemed to have agreed that the pond should be maintained in the future as it had been maintained in the past. It appears from the evidence that the pond was "dug out" twice during the existence of the partnership. In a word, by reserving the pond right, including the right of overflow, Mrs. Long reserved the privilege of exercising the same rights that had been previously exercised, and the privilege of exercising those rights to the same extent as before, but no more than before.

The parties may wish to have the trial court determine the exact extent of the right of overflow, so that it may be marked upon the ground, and thus avoid future confusion and controversy; and in order that they may do so the cause will be remanded, with directions to the trial court, upon application of any interested party, to hear evidence and determine the extent of the pond rights, measuring those rights by the extent to which they have been previously used. As already explained, the pond was dug out twice during the existence of the partnership. Manifestly it would not be fair to use as a measure the extent of the overflow as it was immediately after the ditch was dug out. Long operated the mill alone from 1909 until 1914, when Tittle became a partner. When Tittle purchased, he knew the extent to which Long had overflowed the land, and so, too, did Mrs. Long know the extent of such overflow. Whatever, under ordinary working conditions, was the maximum of the overflow between 1909 and January 25, 1917, ought to be taken as the limit beyond which Beals cannot go.

If the administration of the estate of Frank Long has been closed, then there is no legal representative who can make a corrected deed; and in that event it will be appropriate for the trial court to reform the administratrix's deed, so as to make the reservation in the deed correspond with the papers filed and orders made in the probate

court. If the estate has not been closed, application can be made to the probate court for an order authorizing the administratrix to execute a corrected deed. The language of the decree of the trial court is possibly too broad, in that it fails to measure the right of overflow as herein indicated. With the slight modifications indicated in this opinion the decree of the trial court is affirmed; but the cause is remanded to the court below for the purpose of enabling the trial court, upon proper application, definitely to fix the limit of the right of overflow, and also in order that the trial court may decree a reformation of the administratrix's deed in the event it is made to appear that the estate has been closed. See *Smith v. Butler*, 11 Or. 46, 4 Pac. 517; note in 11 Ann. Cas. 85. Neither party shall have costs in this court.

BURNETT, C. J., and McBRIDE and BEAN, JJ., concur.

PHEZ CO. v. SALEM FRUIT UNION et al. (Supreme Court of Oregon. Oct. 19, 1921.)

1. Contracts \S 187(1)—Third person may sue to enforce contract in his favor.

Where two persons make a contract for the benefit of a third party, he may maintain a suit directly against the promisor to enforce the contract.

2. Contracts \S 187(1)—Contract between others held for plaintiff's benefit and enforceable by him.

Where by the terms of a contract between plaintiff and a fruit company it was bound to deliver to plaintiff berries grown by several independent growers who executed an agreement with the company binding themselves to deliver to plaintiff and not to the company all the berries grown on their respective lands for a stipulated price, the grower's contract was enforceable by plaintiff.

3. Injunction \S 57—Buyer held entitled to enjoin seller from selling to others.

Where plaintiff contracted with a fruit company for loganberries, and certain growers agreed with the company for plaintiff's benefit to deliver such berries directly to him, plaintiff, if not entitled to decree of specific performance, might be aided by injunction against sale of fruit to others.

4. Equity \S 41—Jurisdiction not lost because relief asked has been rendered unavailable by defendants' acts.

In a suit by a buyer to enjoin sellers from selling to others, the fact that the remedy of injunction was not applied, and that defendants by selling their product to other parties put it out of their power to comply, would not oust equity of the jurisdiction it had when the

suit was instituted, but it might retain jurisdiction to award damages if deserved, especially in view of the probable necessity of an accounting.

5. Abatement and revival ¶9—Suit held not barred by pending action with divers parties.

A suit by a purchaser of fruit against a fruit company and against various fruit growers, who had agreed with the company to deliver fruit to plaintiff, was not barred by a suit by the company against the plaintiff, in which he had filed an answer, there being a diversity of parties.

6. Sales ¶92—Burden of proving rescission by agreement held on defendants.

In action by buyer against fruit company and fruit growers to enforce contracts whereby the company had agreed to sell fruits and the growers by subsidiary contract with the company had agreed to deliver their fruit to the buyer, the defense that both company and growers had been released from performance by rescission by verbal agreement between the buyer and company was an affirmative defense, burden of proving which was on defendants.

7. Sales ¶92—Evidence held insufficient to show rescission by agreement.

Evidence held insufficient to show rescission by verbal agreement of contracts whereby a fruit company agreed to sell fruit to buyer and growers agreed with company to deliver fruit to the buyer.

8. Release ¶28(1)—Release of party to contract held not to release others similarly situated, but under independent contracts.

Where a fruit company agreed to sell fruit for several seasons to buyer, and several fruit growers by independent contracts agreed with the company to deliver fruits grown by them to the buyer, a release of one of the fruit growers from his contract by the buyer and the company did not release the other fruit growers from their contracts.

9. Sales ¶418(1)—Buyer on sellers' sale to others held entitled to difference in price he was to pay and that paid by others.

Where fruit company agreed to sell fruit for several seasons to buyer, and several growers agreed with the company to deliver all their fruit to the buyer, he was entitled, on breach of the agreements by sales to others, to recover the difference between the price of berries sold to the other parties and the amount which he was to pay, though impracticability of ascertaining probable profits might preclude recovery therefor.

Appeal from Circuit Court, Marion County; George G. Bingham and Percy R. Kelly, Judges.

Action by the Phez Company against the Salem Fruit Union and others. From judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

This is a suit brought by the plaintiff to enforce by injunction the performance by defendant Salem Fruit Union of a contract

entered into on May 24, 1917, between the Northwest Fruit Products Company, plaintiff's predecessor, and the defendant, whereby defendant agreed to sell and deliver to plaintiff's predecessor about 1,200 tons of fresh loganberries of the crops of 1917, 1918, 1919, 1920, and 1921, at the agreed price of 3 cents per pound for the crop season of 1917, and thereafter during the remaining years at the rate of \$61.50 per ton. Said berries were to consist of the entire crops of certain growers named therein and including those mentioned made defendants in this action. The contract is designated Exhibit A to plaintiff's complaint, and its due execution is not disputed. Said exhibit is too long to be set out in this statement, but such features of it as are essential are referred to in the opinion.

The complaint alleges that contemporaneously with the execution of Exhibit A the defendant Salem Fruit Union, for the protection of itself and plaintiff's predecessor, entered into a written agreement with each of the defendant growers of loganberries, which contract provided that each grower should sell and deliver to the fruit union all the loganberries grown during the years above mentioned upon certain specified tracts of land, the acreage and estimated tonnage of each tract being particularly specified. Other conditions of this contract are as follows:

"3. The grower agrees that his fruit may be sold and the proceeds prorated under such pooling system as is now used or shall hereafter be adopted by the union.

"4. The grower agrees that the union shall have, and he hereby gives and grants to the union, a first lien or crop mortgage on all his crop of fruit growing or to be grown on said premises to secure the payment of any indebtedness now owing by him to the union or any indebtedness which he shall hereafter incur to said union by virtue of this contract or transactions arising thereunder. The grower hereby authorizes and instructs the union to deduct from the proceeds of the sale of his fruit any sums which he may owe the union.

"5. The union agrees to receive, store and market said grower's fruit, provided said fruit is, in the judgment of the union, of marketable standard and quality, and it is understood and agreed that the union shall not be liable for any unavoidable loss, damage or injury, or for any unavoidable failure to secure storage or to sell said fruit.

"6. The union agrees to pay over to the grower the entire proceeds of the sale of his fruit after deducting such amounts as the grower shall then be indebted to the union; such indebtedness to include all handling and marketing charges as filed and assessed by the board of directors of the union, which charges shall be sufficient to pay the general operating expenses; such indebtedness shall also include all the accounts for supplies purchased, for stock subscribed or money advanced.

"7. The grower hereby appoints the union

his exclusive agent and hereby gives said union an exclusive right to sell said fruit.

"8. Whereas the union must provide for the payment of certain overhead expenses and fixed charges and must expend such sums as are necessary to keep in touch with crop and market conditions and must provide warehouse and storage facilities in proportion to the tonnage contracted; and whereas such expenses should be prorated over all of the fruit contracted to be sold, the grower therefore agrees that in the event he withholds his fruit or any part thereof in contravention of this agreement, he will pay to the union for each package of fruit so withheld as liquidated damages for such violation of his contract, the sum of ten cents (10 c.) for each box of apples or pears, ten cents (10 c.) for each crate of berries or cherries; five cents (5 c.) for each crate or box of prunes or peaches, and for other varieties of fruit an amount in such proportion to above charge made for apples as the average market price of apples during the season in which the violation occurred.

"9. The grower agrees that in the event suit or action is brought to recover for supplies furnished, services rendered or expenses incurred or to enforce any of the provisions of this contract, to pay such attorneys' fees in such suit or action as the court shall adjudge reasonable.

"10. It is mutually understood and agreed that this contract shall remain in effect for a period of time from date until March 1, 19—, and every year thereafter continually until canceled by one of the parties hereto, providing that it shall only be canceled on the first day of March of any year after said period by the party so canceling giving notice in writing to the other party thereto during the twenty days prior to said March first, that he desires to cancel his contract; provided, however, that neither party shall cancel this contract until that party shall have fully paid any indebtedness due by it or him to the other party, including all stock subscriptions due or to come due or notes given for the same."

It further appears that about January, 1918, the defendant union secured from a large majority of the growers a contract materially modifying the contract as it appears in Exhibit B above set out. The form of such modification is set forth as Exhibit C to the complaint, and is as follows:

"This agreement, made this — day of —, 19—, by and between Salem Fruit Union, a corporation, hereinafter referred to as the union, and — of the county of —, state of Oregon, hereinafter referred to as the grower, witnesseth, that for and in consideration of the covenants and agreements herein contained, the said grower does hereby constitute and appoint the said union, as his sole and lawful agent, to enter into contract for him, and on his behalf, and in his name, for the sale of all the loganberries to be grown upon his premises, for the years 1918 to 1921, inclusive, which crop of berries shall be delivered to said union to be sold by it, with other growers entering into similar contracts with such union, which shall constitute a pool, and shall be designated as the '1917 Five-Year Lo-

ganberry Pool,' which said pool shall be sold in its entirety by said union to the Northwest Fruit Products Company, at three and one-half cents (3½ cents) per pound net to said grower, and the grower, as part of said pool, hereby gives the said union full power of attorney to make said sale.

"That the yard herein mentioned consists of approximately — acres and is located near —, Marion county, Oregon, and the crop of the year 19— is estimated at — tons.

"That said berries, in the judgment of the union, shall be marketable and of standard quality, to be delivered by the grower to the Northwest Fruit Products Company or its assigns at their factory or subject to their order, in accordance with terms and conditions of said authorized contract. Grower agrees to care for and harvest the crop in a husbandlike manner.

"In case said Northwest Fruit Products Company shall fail by reason of act of God or public enemy or other unavoidable occurrences, to perform its part of such agreement, or any part thereof, entered into with said union as the agent of the grower, the said grower agrees that his said fruit may be handled in said pool with the fruit of other growers making contracts similar to this, for any year or years or portions of a year that the Northwest Fruit Products Company shall be so prevented from fulfilling its part of the agreement, in which event said union shall market said fruit as a continuation of the said five-year loganberry pool of 1917, to the best advantage of the grower as the judgment of the board of directors of said union may dictate. The said grower shall receive his pro rata of the net returns for the sale of said pool after deducting for the services in the handling and marketing of such fruit, the charges and assessments that may be made by the board of directors of said union, which may be deducted from the amount of the money received from the sale of said fruit before paying the same to the grower.

"The grower agrees that in the event of suit or action brought to recover for supplies furnished, services rendered or expenses incurred or to enforce any of the provisions of this contract, to pay such attorney's fees in such suit or action as the court shall adjudge reasonable.

"It is understood that the conditions herein contained shall run with the land on which said berries are to be raised, and shall bind the parties herein, their heirs, administrators and assigns and shall continue to be in full force and effect during the crop years of 1918, 1919, 1920 and 1921. It being understood that upon the execution of this contract, the former contract heretofore entered into on the — day of —, 19—, between the undersigned grower and said union, shall become null and void and of no effect, except that the pool created by such agreement shall be continued by this agreement. This agreement is binding upon the successors and assigns of each party hereto.

"In witness whereof, the said parties have hereunto set their hands this — day of —, 19—.

Salem Fruit Union,

"By —

"Grower."

(201 P.)

The complaint alleges that plaintiff and its predecessor in interest have been at all times since the date of the contract, Exhibit A, engaged in the business of buying and selling loganberries at Salem, Ore., and in manufacturing loganberries into certain products now known as "Phez," "Loganberry Juice," "Loju," and "Phez Jellies and Jams," and by the expenditure of large sums of money in advertising and in securing the service of salesmen and solicitors, have built up a trade demand for said products which will require the use of all the berries contracted for by plaintiff with individual growers and all fruit contracted for by plaintiff with defendant pursuant to Exhibit A. It is further alleged that plaintiff has contracted for and has expended in advertising said products for the year 1919 sums of money particularly set forth and aggregating more than \$200,000, whereby it has created a nation-wide demand for its said products, and that for the purpose of caring for such demand it has greatly increased the capacity of its plant at a cost of more than \$50,000, and has now on hand for the purpose of marketing the said 1,200 tons of berries the necessary bottles, caps, labels, cartons, etc., which have been manufactured and prepared for that purpose and will be of no value for any other purpose. The plaintiff states that the loganberry is of recent origin, and not extensively grown in any section of the United States or of the world save the Willamette Valley, and that the acreage thereof is limited, to that the plaintiff, if it cannot secure the berries contracted for with defendant, cannot supply the demand for its products or fill its contracts, will lose the benefit of its advertising and of its expenditures for increased working forces and enlarged capacity of its plant and machinery, will lose its prestige with the wholesale trade, and will be irreparably damaged in a sum which it is impossible to compute and for which the Salem Fruit Union will be unable to compensate the plaintiff in damages. The complaint alleges in effect that such damages will not aggregate less than \$375,000, and that the whole assets of the Salem Fruit Union do not exceed the sum of \$50,000, and would be wholly insufficient to compensate plaintiff in damages in an action at law. The concluding allegation of the complaint is as follows:

"That under and by virtue of the terms and conditions of the contract and agreement between the Salem Fruit Union, defendant herein, and the Northwest Fruit Products Company, predecessor in interest of the plaintiff herein, the said fruit union was obliged to deliver to said Northwest Fruit Products Company and to plaintiff as its successor, all of the loganberries grown during the season of 1918 by the several members of its so-called 1917 pool, the names of said members being attached as a

schedule to plaintiff's Exhibit A. That as a means of assuring and protecting itself in the fulfillment of the terms and conditions of said contract, the Salem Fruit Union entered into certain written contracts and agreements with the said several growers whose names are attached to Exhibit A for the growing and producing of loganberries for the seasons of 1917, 1918, and other years, which said contracts and agreements were in full force and effect during the berry season of 1918, a copy of the form of said contracts used by said fruit union in contracting with its said growers being hereto attached, and for identification marked Exhibits B and C. That said contracts designated as Exhibits B and C were made by said fruit union with each of the individual defendants herein for the benefit of plaintiff, and under the terms thereof the said Salem Fruit Union was legally entitled and bound to enforce delivery from said growers, and was legally entitled to collect damages from such of its said growers as failed to deliver berries in accordance with their several contracts with said fruit union for the difference between the contract price and the market value of 5 cents per pound. That there is an unsettled balance due from plaintiff to defendant on account of the berries delivered by defendant Salem Fruit Union to plaintiff, during the year 1918, under the contract herein mentioned, and that plaintiff has a good and valid counterclaim as against a portion or all of said balance due for the purchase of berries, on account of damages accruing to plaintiff by virtue of the nondelivery to plaintiff of all the berries grown by the several growers whose names are designated in said schedule attached to Exhibit A, for the difference between the contract price and the market value of said loganberries which at date of delivery was 5 cents per pound. That plaintiff has no knowledge or information as to the number of pounds of berries so produced by said growers and not delivered to plaintiff in accordance with the terms of said agreement, and that the knowledge and information regarding such facts lies solely with the defendant Salem Fruit Union and the several other defendants herein named. That in order to ascertain the extent of said counterclaims, and in order rightfully to adjust the balance due to the defendant for berries delivered during the season of 1918, it is necessary that an accounting be had between plaintiff and defendant as to the number of pounds of berries produced during the season of 1918 by the several growers named in said contract and named as defendants herein, which said berries were not delivered to plaintiff in accordance with the terms of said contract, so that the damages resulting from such nondelivery may be ascertained and computed as a set-off and counterclaim to the amount due and owing from plaintiff to defendant. That there are approximately 100 growers whose names are attached to said contract, and that in order to secure any relief whatsoever in actions at law for damages, it would be necessary to institute and prosecute a large number of actions for damages, to wit, approximately 100 actions, and that a multiplicity of suits may be avoided by an accounting as herein demanded. That plaintiff has duly demanded of the defendant Salem Fruit Union that it account to plain-

tiff for the number of pounds of berries produced by its several growers, which were not delivered by defendant to plaintiff, and that defendant has refused, and now refuses, so to account or to furnish plaintiff any information thereon."

The plaintiff's prayer is in part as follows:

"First. That a temporary restraining order be issued, restraining and enjoining the defendant Salem Fruit Union, its officers and agents, from in any manner whatsoever offering to sell the 1,200 tons of loganberries, commonly known as the 'Salem Fruit Union Pool,' and from in any manner releasing the several growers constituting said so-called pool from their several contracts to deliver berries to it for the purpose of sale to plaintiff in fulfillment of the contract and agreement attached to plaintiff's complaint, and designated as Exhibit A."

Second. It is asked that the several defendant growers, naming them, be enjoined from singly or collectively attempting to dissolve said pool or to dispose of the whole or any part of the berries covered by the contracts constituting said pool, to any purchaser or purchasers whatsoever pending the final hearing of this suit.

Third. The prayer requests that at the final hearing said temporary injunction be made permanent, and that the defendant Salem Fruit Union be enjoined from delivering said 1,200 tons of loganberries to any corporation, person, or persons whomsoever other than plaintiff, and that the defendant Salem Fruit Union and the defendant growers be decreed to perform specifically the contracts set forth in Exhibits A and C, and to deliver the loganberries which defendants contracted for the year 1919 to plaintiff, also for other and further equitable relief.

The defendant Salem Fruit Union answered, admitting the corporate existence of plaintiff and the Northwest Fruit Products Company, and admitting the existence of the contract between itself and the latter corporation (Exhibit A) and also the identity of the contract between said defendant and the other defendants (Exhibit B). The execution of the contract between defendant Salem Fruit Union and the defendant growers (Exhibit C) was also admitted, as well as the fact that there was an unsettled balance due from plaintiff to defendant on account of berries delivered in 1918. All the other allegations of the complaint were denied.

The answer then sets up the following affirmative defenses:

"That after the making of the contract alleged in said complaint, designated therein as Exhibit A, to wit, on or about the 1st day of January, 1918, and before any alleged breach thereof, it was agreed by and between the plaintiff, assignor of said contract, viz. Northwest Fruit Products Company, a corporation and the defendant Salem Fruit Union that the said contract should be waived, abandoned, and re-

scinded; and they then waived, abandoned, and rescinded the same accordingly.

"That before the commencement of this suit the defendants herein, who signed the contracts of which a form is attached to said amended complaint and marked Exhibit C, and who are referred to in said contract as 'growers,' each and all revoked and withdrew any and all power, authority, and agency which the said defendant Salem Fruit Union then or theretofore had under said contracts, designated as Exhibit C, to sell or dispose of any of the loganberries to be grown by the defendants who executed said contracts, or any part of such berries, and that since said revocation the defendant Salem Fruit Union has not had and does not now have any power, authority, or agency to sell or deliver any of the loganberries grown by said defendants who signed said contracts designated as Exhibit C.

"That the plaintiff ought not to be permitted to allege or say that the said contract designated in said amended complaint as Exhibit A, is now in force or effect, or that any pool of loganberries organized or created by said contracts designated as Exhibit B or Exhibit C has been continued or is now in existence, or of any validity whatsoever, or that the defendant Salem Fruit Union is obligated to deliver to plaintiff all or any part of the loganberries mentioned in the said contracts, for that the defendant Salem Fruit Union signed said contract so designated as Exhibit A after the growers therein mentioned had all executed contracts in form as Exhibit B, and at the time of the execution of said Exhibit A, and at all times thereafter, the Northwest Fruit Products Company well knew that the berries to be delivered under said Exhibit A did not belong to this defendant, and that the same could be produced by this defendant for delivery only by the enforcement of said growers' contracts so designated as Exhibit B, but with such knowledge the said Northwest Fruit Products Company, on or about the 1st day of January, 1918, requested and induced the defendant Salem Fruit Union to procure the execution by the defendants whose names are set forth in paragraph 4 of this defendant's answer of the contracts of which a form is attached to said complaint and marked Exhibit C, whereby the pool formed by the defendants who executed the contracts designated as Exhibit B was dissolved, and this defendant was rendered powerless to make delivery of the berries so pooled as required by said Exhibit A, all of which was at all times well known to the plaintiff; and for that the said Northwest Fruit Products Company, with the knowledge and consent of the plaintiff, on or about the 29th day of March, 1918, for a valuable consideration, executed jointly with this defendant a release, whereby the defendant Roy V. Ohmart was duly released and discharged from any and all obligation to deliver the loganberries then or thereafter grown on his premises to plaintiff or to the said Northwest Fruit Products Company or to the defendant Salem Fruit Union, or otherwise to keep or perform any of the covenants or agreements of the purported pool formed by said contracts designated as Exhibit B, or the pool intended to be created or continued by said contracts designated as Exhibit C, and the

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other growers who were so interested in said pools did not consent to or acquiesce in said release or discharge, but, on the contrary, objected thereto, and thereafter withdrew from said pools, by reason of which said facts the pool alleged in said complaint was dissolved and destroyed; and the defendant Salem Fruit Union now prays the decree of this court whether the plaintiff ought to be permitted, contrary to its agreements, acts, and conduct aforesaid, now to allege or say that the said contract, designated in said amended complaint as Exhibit A, is now in force or effect, or that any pool of loganberries organized or created by said contract designated as Exhibit B or Exhibit C has been continued or is now in existence, or of any validity whatsoever, or that the defendant Salem Fruit Union is obligated to deliver to plaintiff all or any part of the loganberries mentioned in said contracts."

The plaintiff filed a reply, denying the new matter in the answer. Later, plaintiff, by leave of court, filed a supplemental complaint, setting forth the fact that a preliminary injunction had been issued in accordance with the prayer of the original complaint, and that since that complaint was filed all loganberries contracted to be delivered by the defendant Salem Fruit Union for the season of 1919 matured, and the defendant Salem Fruit Union had permitted them to be harvested and marketed so that it had become impossible to secure said berries or any of them under a decree of specific performance, and that notwithstanding said injunction the Salem Fruit Union had failed to deliver to plaintiff the 1,200 tons of berries under said contract, or any berries, except 34,419 pounds delivered by E. H. Dokken thereunder. The plaintiff further alleged that loganberries of the class contracted to be delivered to plaintiff by the union for the season of 1919 were of the reasonable market value of 9 cents per pound; that it was necessary that an accounting be had of the number of pounds of loganberries produced by the several growers named in plaintiff's Exhibit A and of the berries produced by said growers upon the acreage set out, in order that plaintiff might ascertain the amount of damages accruing to it by virtue of the failure of the union and the growers to deliver the loganberries produced in 1919. There was a prayer for such accounting and for a decree that plaintiff receive from the defendant union the difference between the contract price and the market value of the berries for 1919, also for a decree that it recover from each grower the difference between the contract price and the market value of berries sold by such grower in 1919, and for other and further equitable relief. An answer was filed putting these matters in issue.

Thereafter the defendant union filed what it termed a "supplemental answer," too lengthy to be inserted here, but to the effect

that the suit was commenced in the circuit court on June 10, 1919, and that theretofore on June 5, 1919, the union had commenced an action at law against the plaintiff to recover the sum of \$5,001.71 as a balance due defendant union from this plaintiff on account of fruit and berries furnished to the Phez Company in 1918, in which action the Phez Company filed an answer, containing among other matters the following allegations by way of counterclaim:

"That on or about the 24th day of May, 1917, it entered into a written contract with this defendant, Salem Fruit Union, by the terms of which said union agreed to sell and said company agreed to buy annually for the years 1917 to 1921, inclusive, a certain quantity of loganberries, and that a copy of said contract is attached to said answer, marked Exhibit A, and made a part thereof; that during the season of 1918 said union failed, neglected, and refused to deliver to said company the 1,200 tons of loganberries mentioned in said contract, or any part thereof, save and except 993,001 pounds of loganberries; that for the season of 1918 the reasonable market price for loganberries in Marion county, Or., was 5 cents per pound, but said company agreed to pay said union a bonus over and above the contract price, of one-half cent per pound for said year, and that on account of the failure of said union to deliver said loganberries to said company, in accordance with the terms of said contract, said company has been and is damaged in the sum of \$28,189.78."

The identity of the contract and breach of that agreement are set up in the supplemental answer, coupled with an allegation that the said action at law is at issue and pending in the circuit court, with a prayer for abatement of the present suit. There is a further allegation in the supplemental answer that no part of the berries of the crop of 1919 was ever delivered to or came into the possession of the union, but that the growers, without the advice, assistance, persuasion, or encouragement of the union, separated and sold their berries to other firms or persons. The new matter in the supplemental answer was put at issue by a supplemental reply.

Previous to the filing of the answer of the defendant Salem Fruit Union a demurrer of the defendant growers to the complaint was sustained, the court holding that as to the growers the complaint did not state facts sufficient to constitute a cause of suit, so that the trial of the case upon the merits was solely between the plaintiff and the Salem Fruit Union. Upon the hearing on the merits the court found that the cause of action arising from the conduct of the fruit union involved the same subject-matter as the instant suit. There is no express conclusion of law that by its answer and counterclaim for damages in that case the plaintiff has

barred itself from the prosecution of this suit.

The court also found that during the season of 1918 the contract Exhibit A between the plaintiff and the Salem Fruit Union was mutually rescinded, and it entered a decree dismissing the complaint without prejudice. The plaintiff appeals from the order sustaining the demurrer of the growers, and from the decree in favor of defendants.

John H. McNary, William H. Trindle, and W. C. Winslow, all of Salem, for appellant.

Oscar Hayter, of Dallas, and Roy F. Shields, of Salem, for respondents.

McBRIDE, J. (after stating the facts as above). This appeal involves three propositions: First, the correctness of the order sustaining the demurrer of the growers to plaintiff's complaint; second, the correctness of the implied finding that by its answer and counterclaim in the case of Salem Fruit Union v. Phex Company, plaintiff here was barred from prosecuting the present suit; and, third, the correctness of the finding that the contracts, Exhibits A and C, were rescinded. These propositions will be considered in the order above named.

[1] The ruling upon the demurrer of the growers depends upon the question as to whether there was such privity between the growers and the plaintiff as would entitle plaintiff to sue for breach of the contract as being one made for its benefit. The cases in this state have held generally that where two persons make a contract for the benefit of a third party, such third party may maintain a suit or action directly against the promisor to enforce such contract. *Baker v. Eglin*, 11 Or. 333, 8 Pac. 280; *Strong v. Kamm*, 13 Or. 172, 9 Pac. 331; *Parker v. Jeffery*, 26 Or. 186, 37 Pac. 712; *Washburn v. Interstate Investment Co.*, 26 Or. 436, 36 Pac. 533, 38 Pac. 620; *Feldman v. McGuire*, 34 Or. 309, 55 Pac. 872; *Kiernan v. Kratz*, 42 Or. 474, 69 Pac. 1027, 70 Pac. 506; *Oregon Mill Co. v. Kirkpatrick*, 66 Or. 21, 133 Pac. 69; *Davidson v. Madden*, 89 Or. 209, 173 Pac. 320, in which last case all the Oregon precedents are cited. As a rule the Oregon cases arose out of the fact that the promisee owed some debt to the beneficiary which the promisor as part of the consideration agreed to discharge; but in other jurisdictions where such a promise has been held enforceable by the beneficiary no distinction appears to have been made between such a debt and any other legal duty which the promisee owed to the beneficiary, and legally this would seem to be the correct rule. Indeed, in the case of *Washburn v. Interstate Investment Co.*, supra, the rule is impliedly as stated, with the distinction pointed out in that case that the supposed beneficiary was not named in the contract, and that there was no intimation therein that the agreement was for

its benefit, which also seems to be a salutary and logical limitation. Thus, if the promisor agrees generally with the promisee that he will discharge all the promisee's obligations, without specifying them or to whom they are owing, no cause of action or suit arises in favor of a creditor of the promisee. But if, on the other hand, he agrees as part of the consideration or substance of the contract that he will discharge a particular debt or legal duty from the promisee to a particular person, he will be liable at the suit of such person for nonperformance.

The English authorities and many earlier American cases are no doubt in conflict with this view. The great divergence of judicial opinion may be seen by a perusal of chapter 8 of *Williston on Contracts*, but it is believed that with few exceptions the later American cases may all be harmonized with the doctrine above laid down. For a learned and interesting discussion of this subject, see *Seaver v. Ransom*, 224 N. Y. 233, 120 N. E. 639, 2 A. L. R. 1187, and authorities cited in the exhaustive notes to the principal case in A. L. R.

Assuming, then, that the law will uphold the right of a beneficiary to sue the promisor directly whenever the contract is made for his benefit, provided that the duty or obligation to be discharged by the promisor was one originally owed to the beneficiary by the promisee, we will apply this rule to the facts pleaded by the plaintiff here.

[2] By the terms of the contract, Exhibit A, as modified by the agreement of plaintiff to pay an additional one-half of one cent bonus, the Salem Fruit Union was bound to deliver to plaintiff, and it was its legal duty to deliver to plaintiff, the berries grown by the several defendants who executed Exhibit B as modified by Exhibit C. By Exhibit C, the growers signing the same bound themselves to deliver to plaintiff, not to the fruit union, all the berries grown on their respective lands, for the price of 3½ cents per pound. By so doing the duty owed by the fruit union to the plaintiff would be discharged. As between the growers and the fruit union, the latter was merely the agent to make the contract and to see that it was executed, the conduit or hopper through which the berries were to be conveyed to the plaintiff's possession and by which it was assured of receiving them. Clearly the plaintiff, or, to speak more accurately, the plaintiff's predecessor in interest, was the intended beneficiary of Exhibit C. The fruit union was made the agent of the growers for the very purpose of entering into a contract binding them to deliver the fruit grown by them to the plaintiff's predecessor. It had an agency coupled with an interest, to the extent of being permitted to deduct from the sum received for the berries a compensation for its services and expense in market-

ing them, and therefore irrevocable, to make the very contract it did make with plaintiff's predecessor. Here, then, are all the elements which go to authorize the growers signing Exhibit C, and the fruit union, to make a valid contract for the benefit of plaintiff. *Seaver v. Ransom*, *supra*, and cases cited in notes in 2 A. L. R. p. 1193. We are of the opinion that the court erred in sustaining the demurrer of Paxton et al. to the complaint, which seems to us sufficient.

[3] While it is practically impossible to compel specific performance of a contract of this nature, there is abundant authority that the court may, by enjoining the contractor from selling his wares to any one else, place him in a position where his own interests may be powerful enough to induce him to perform his contract. A leading case on this subject is *Lumley v. Wagner*, 1 De Gex, M. & G. 604, sometimes given in other reports as *Lumley v. Gye*. In this case a Mrs. Wagner, a noted singer, had engaged herself to sing exclusively at plaintiff's theater, but broke her contract and engaged to sing at the theater of Gye, who was made a defendant with her. The suit was for an injunction forbidding her to sing in the theater of Gye or elsewhere during the season that she had engaged her services to plaintiff. In deciding the case the Lord Chancellor said:

"It was objected that the operation of the injunction in the present case was mischievous, excluding the defendant J. Wagner from performing in any other theater while this court had no power to compel her to perform at Her Majesty's Theater. It is true that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do, and thus possibly cause her to fulfill her engagement."

[4] The same doctrine is announced in *Montague v. Flockton*, L. R. 16 Eq. 189, and is settled in this state by the case of *Cort v. Lassard & Lucifer*, 18 Or. 221, 22 Pac. 1054, 6 L. R. A. 653, 17 Am. St. Rep. 726. The present case is one where the invoking of this power might be peculiarly efficacious. The growing of loganberries is a new industry; their production is limited to a comparatively small area; they are perishable fruit incapable of shipment in a raw state to distant markets; and had the court below seen its way clear to enjoin the defendant growers from making delivery to any other party than this plaintiff, it seems almost inevitable that the contract would have been observed and the business which the complaint indicates the plaintiff had so assiduously and expensively labored to build up would have been saved from embarrassment and possible destruction. The fact that the remedy was not applied, and that defendants by selling their product to other parties have now put it out of their power to comply, ought not to oust equity of the juris-

isdiction it had when this suit was instituted, but the court should retain the case, and if the allegations of the complaint and the supplemental complaint are found to be true, it should compel the defaulting parties to make good in damages the losses directly sustained by plaintiff by reason of their default. If plaintiff has a right to recover at all as against the growers, the jurisdiction of equity is obvious: First, because of the necessity of an accounting as between them, the fruit union, and plaintiff; second, to avoid a multiplicity of actions or suits between plaintiff and the large number of individual growers; and, third, because of alleged collusion between the promisors and promisee fruit union to avoid the contract, which, if true, amounts to constructive or perhaps actual fraud upon plaintiff. Indeed, respectable authorities are to the effect that the appropriate remedy in this class of cases is in equity rather than law. 1 Williston on Contracts, §§ 358, 359, where the author observes:

"There is no satisfactory solution of these difficulties in the procedure of a court administering legal remedies only. But one of the functions of equity is to provide a remedy where the common-law procedure is not sufficiently elastic, and no opportunity can be found for the exercise of this function more appropriate than the sort of case under consideration. Much of the difficulty of the situation arises from the fact that three parties are interested in the contract. Common-law procedure contemplates but two sides to a case, and cannot well deal with more. Equity can deal successfully with any number of conflicting interests in one case, since defendants in equity need have no community of interest, and under the procedure of the so-called code states, the same thing is possible though separate courts of equity are abolished.

"In the case under consideration the only satisfactory relief is something in the nature of specific performance. The basis for equity jurisdiction is the same as in other cases of specific performance. There is a valid contract, and the remedy at law for its enforcement is inadequate. As the promisee and the beneficiary have both an interest in the performance of the promise, either should be allowed to bring suit joining the other as codefendant with the promisor. In this way all parties have a chance to be heard. There may always be a possible question as to the respective rights of the promisee and the beneficiary, and also whether the promisor has a valid defense against the promisee, and these questions should not be determined in any litigation in which all three interested parties are not joined. Any procedure, which not only permits but requires this, meets the necessities of the case."

[5] We now come to the second proposition: Is the action of Salem Fruit Union v. Phez Company, now pending, a bar to this suit? To this we must answer in the negative. It is conceded that the ruling of the learned circuit court was predicated upon

the theory that, the growers not being proper parties and being out of the case by reason of the fact that their demurrer had been sustained, there remained nothing but a question of damages to be litigated between plaintiff and the union, and that plaintiff had its remedy at law upon the counterclaim pleaded against the union in that action. But, holding as we do that the union was in fact a proper party, the whole foundation upon which that conclusion rested is destroyed. There is a lack of that substantial identity of parties which is required in order that one action may be pleaded in abatement of the other. 2 C. J. § 99 et seq.

[6, 7] We next approach defendant's third proposition, which is that both the fruit union and the growers have been released from the performance of the contract, Exhibit A, as modified by Exhibit C; that the contract has been expressly rescinded by a verbal agreement between plaintiff and the officers of the fruit union. This is an affirmative defense, and the burden of proof is upon the defendant to establish it by the preponderance or outweighing of testimony. As the testimony is conflicting, it will be of advantage to take a view of the situation at the time defendant claims the contract was rescinded. There is no complaint that the contract between the fruit union and the plaintiff, Exhibit A, and the contract between the union and the growers, Exhibit B, were not satisfactorily carried out in 1917. Both agreements were substantially performed. Late in the year 1917 the increased price of labor and other conditions incident to the war indicated that the crop for 1918 could not be produced profitably at the price of 3 cents per pound, and the fruit union found itself in the predicament of being absolutely bound by Exhibit A to furnish to plaintiff 1,200 tons at that price, while its growers could relieve themselves of the obligation to deliver the berries upon which the union depended to fulfill its contract, by the payment of the trifling penalty of 10 cents a crate for all berries delivered by them to other parties. While the contract with the growers, Exhibit B, is termed a pool, it was and is in legal effect a separate and individual contract between the union and each separate grower, there being no covenant binding the growers to each other, and the breach of each individual grower could not affect in any way the contract between other growers and the union. There was also the possibility that a grower might sell his land to some other party, and, such party not being bound and the land not being bound, there would remain to the union as a remedy only a personal action against the party signing the contract. It was apparent that many growers would take advantage of the 10-cent forfeiture clause in their contracts with the union and sell to other parties, and

the union would thereby be rendered unable to comply with its contract with plaintiff's predecessor, and find itself liable to the latter in damages. What plaintiff desired was a sufficient supply of berries to fill its contracts and carry on its business. What the union wanted was some arrangement whereby it could secure the berries to meet its obligation to plaintiff and incidentally get rid of the inadequate penalty clause contained in its original agreement with the growers. The clause in Exhibit C, providing that the covenants in the agreement should "run with the land," was no doubt considered important, although it is doubtful whether it could be enforced in an action at law. *Gibson v. Holden*, 115 Ill. 199, 3 N. E. 282, 56 Am. Rep. 146; *Hurxthal v. St. Lawrence Boom & Mfg. Co.*, 53 W. Va. 87, 44 S. E. 520, 97 Am. St. Rep. 954. Whether any equitable remedy would arise out of such a covenant need not here be considered. Perhaps another reason which produced in the mind of the officers of the union a desire to have the contract here designated as Exhibit A changed was that under its provisions the union was directly liable in damages for nondelivery of the berries, while under the terms of the modification, Exhibit C, the ultimate responsibility for nondelivery was shared by, if not entirely shifted to the shoulders of, the individual growers, unless the union should have openly or tacitly concurred in such failure to deliver. Exhibit C was highly advantageous to the union, and in some respects beneficial to plaintiff's assignor. But there is nothing in any of the correspondence prior to the final breach of the contract that indicates that plaintiff's assignor ever intended to rescind a perfectly valid written contract for the delivery of berries at 3 cents a pound and substitute therefor a verbal agreement for their delivery at 3½ cents.

We do not have to depend upon oral testimony alone to ascertain the fact that a modification of Exhibit A as to price had been discussed between the officers of the union and the officers of plaintiff's predecessor. Among other things we have this letter:

"Dec. 14, 1917.

"Attention Mr. Frank T. Schmidt.

"Northwest Fruit Products Company, Salem, Oregon—Dear Sir: After talking with you a few days ago in regard to the proposal of your company to increase the price of the loganberry contract we now have with you to 3½ cents net to the grower, the writer took the matter up with the board of directors and they stated that they would be willing to do this, and will take immediate action to re-sign all of these contracts with the growers on a very much stronger basis than heretofore. We will have a copy of the new contract to-morrow some time and will bring it down to you to look over, and we wish you would write us a letter

confirming the proposal you have made to us so we can have a record for our files.

"With best wishes, we are

"Yours truly, Salem Fruit Union,

"By Robert C. Paulus, General Manager."

From this we naturally infer that two facts had been the subject of discussion between these parties: First, an increase of half a cent per pound in the price of berries; second, a new contract with the growers, that would make it certain or at least more probable that the growers would deliver at that price. It therefore appears probable that Frank T. Schmidt had offered an advance of half a cent a pound, and that the fruit union had in contemplation a modification of its contract with the growers so as to bind them to deliver at the advanced price. The modification was for the mutual benefit of both parties. It also appears probable that plaintiff was desirous that such contract with the growers should be so arranged as to give plaintiff's predecessor a remedy against the growers individually, instead of against the corporation, practically composed of these same growers.

Attention is called in plaintiff's reply brief to the fact that verbal agreements and proposals between these parties were almost invariably supplemented by confirmatory correspondence, while in the present instance evidence of what the defendant union claims to have been an actual rescission of contract relations between the parties rests entirely in parol. This is an important circumstance, when we consider that defendant's evidence of a rescission rests almost entirely upon the testimony of defendant's manager, and is flatly contradicted by the testimony of Frank T. Schmidt, who is said to have been the officer of plaintiff's predecessor who made the rescission. In addition, we search the record in vain for any evidence that at any meeting of the directors with officers of plaintiff's assignor was the subject of rescission of Exhibit A alluded to or discussed. In fact, the excuse of a rescission of Exhibit A was never mooted in any correspondence between the parties until the growers (who to a great extent compose the Salem Fruit Union), with the tacit consent of the Salem Fruit Union, made up their minds to violate their contracts and sell their product to other parties at a greatly enhanced price.

The following letter, written by the manager of the union, is a distinct recognition of the existence of the original contract:

"January 18, 1918.

"Northwest Fruit Products Company, Salem, Oregon—Dear Sirs: We confirm conversation of the writer with your Mr. Frank Schmidt, in which he stated that you wish to raise the fresh loganberry contract with you ten dollars per ton. In accordance with the above desire we have had new contracts printed for our growers and will commence signing them up

immediately. We also think it will be best for us to make out the contract with you on a basis of 1,200 estimated tons, the same as the one made last year, and make a new contract for whatever additional tonnage we can contract at that price.

"Yours truly, Salem Fruit Union,

"By Robert C. Paulus, General Manager."

Here is no word in relation to the rescission which defendant now claims had been previously made, but rather "you wish to raise the fresh loganberry contract [Exhibit A] ten dollars per ton." Why "raise" a contract which had been rescinded, annulled, and abrogated? This pretext of rescission seems to us to have been an afterthought, conjured up to escape the consequences of what war conditions had rendered an unprofitable, if not a losing, contract.

Up to May, 1919, there is no written evidence that the defendant fruit union was claiming the complete rescission of the original contract, and then only apparently on the theory that by agreeing to pay and by paying more than it was required under the contract as originally drawn, the plaintiff's assignor had abandoned the whole contract. In a letter of May 22, 1919, the secretary of the union says:

"The crop of 1918, as you know, was handled, not under the written contract of May 24, 1917, but pursuant to an oral agreement with your company, fixing the price of the berries at $3\frac{1}{2}$ ¢ per pound and more if conditions warranted. This later condition you met during the month of March, by directing us to pay our growers an additional $\frac{1}{4}$ ¢ per pound, which we did.

"This oral agreement also provided for a new form of general contract to be executed by our growers, requiring delivery to be made directly to your factory. This agreement was intended to operate in lieu of the old written contract, which had to be abandoned on account of war conditions."

This seems to have been the inception of the idea that by voluntarily advancing the price paid to growers in order to meet changed conditions, plaintiff's assignor had abandoned the original contract entirely. The communication does not say to plaintiff what defendant now claims, to wit: "In January, 1918, you expressly agreed that Exhibit A should be rescinded." On the contrary, it reads:

"Pursuant to an oral agreement with your company fixing the price of berries at $3\frac{1}{2}$ cents per pound and more, if conditions warranted."

A voluntary agreement to advance the price did not have the effect to rescind the contract in other respects, and the testimony shows that the plaintiff kept its agreement in that particular in 1918, and was ready and willing to make further concessions later. We do not feel that defendant has made out a case of rescission. Perhaps it could have compelled the plaintiff to pay the increased

price in succeeding years, although the consideration for such increased price is not apparent. But, as before remarked, that question does not arise here. We conclude that there is not sufficient evidence to justify the finding that the contract was rescinded.

[8] Another contention is that the release by plaintiff and the fruit union of one Roy V. Ohmart from his contract to deliver berries dissolved the so-called pool and released all the other parties, including the union. It should be remembered that each grower made a separate contract with the fruit union, authorizing it to sell for a fixed price all his berries. The price did not depend on what any other grower was to get, and the release of another grower could not in any way increase or diminish his compensation. The only parties who could be injured by the failure of any grower to observe his contract were the union and the plaintiff. While the arrangement is called a pool and has some of the attributes of that rather hazily defined association, it lacks the element of mutual interdependence between the producers. No grower either gained or lost anything by reason of the fact that the growers' agent and the plaintiff agreed that Ohmart should be released. The objection is highly technical, and has no merit. The fact that the defendant union as between it and the growers stood in the relation of principal and agent, coupled with the fact that the plaintiff's assignor and plaintiff knew of this relation, cannot excuse it from liability in this case. 2 Mechem on Agency, § 1714 et seq. The union was to an extent a beneficiary in this transaction, in the respects heretofore mentioned: It furnished greater assurance that its growers would deliver their products, and by Exhibit C divided the responsibility for failure to deliver. It placed upon the growers the onus of seeing that its contract that they should "deliver the goods" was faithfully carried out so that it might collect for them the amounts due them for such delivery, and incidentally collect the compensation due it for its services. Its contract with plaintiff, although in a sense a contract of an agent for known principals, was nevertheless its covenant by which it pledged its own good faith and credit that the fruit mentioned therein should be delivered. The evidence indicates that it was entirely willing that its growers, who as stockholders practically composed the corporation, should make default. There is of course a technical distinction between

the growers as growers and as stockholders, but it is in this case a distinction that has no foundation in morals and should not stand in the way of the administration of equity.

Some question is raised as to the validity of the assignment from the Northwest Fruit Products Company and allied companies to plaintiff. Such defect is not pleaded by way of abatement, and, if it were so pleaded, we think the assignment sufficient, especially in equity and where it has been substantially recognized and acted upon by the parties.

[9] These considerations naturally lead to a reversal of the decree of the circuit court and the order sustaining the demurrer of the growers. As to future procedure there are practical difficulties. We might upon the showing here render a decree against the fruit union and send the case back with directions that the issues between the growers and the plaintiff be tried, but such a course would subject the parties to many inconveniences and would leave unsettled the equities between the union and the growers. There is an account to be stated between each individual grower and the plaintiff, together with an account between these and the union. As for the damages caused by loss of profits and expenses of advertising, these in view of the disturbed condition of trade are too largely speculative to be capable of appraisal. But taking the allegations of the complaint to be true, the growers who signed Exhibit C should account to plaintiff for the difference in the price of berries sold to other parties and 3½ cents per pound, the contract price mentioned in Exhibit C. And the fruit union should be held to a like accounting for each of the years in which there has been default. The impracticability of ascertaining the probable profits, if any, which plaintiff may have lost, and of apportioning these among the parties, seems to preclude further litigation along that line.

The order will therefore be that this cause be remanded, with directions to overrule the demurrer as to all the defendants who signed Exhibit C; to permit plaintiff, if it be so advised, to file a supplemental complaint as to these defendants; to retry the case as to the growers and plaintiff, and as between the fruit union and plaintiff, so far as either shall desire to do so, leaving the testimony already taken to stand as between the union and the plaintiff; and otherwise to proceed as indicated herein.

**EDWARDS v. CITY NAT. BANK OF
McALESTER. (No. 10188.)**

(Supreme Court of Oklahoma. Sept. 13,
1921. Rehearing Denied Oct. 18, 1921.)

(Syllabus by the Court.)

1. Evidence \S 443(1)—Parol evidence rule does not apply to a contract mainly oral but embracing writings.

The rule that a written contract cannot be altered, changed, or terms varied in the absence of allegations and proofs of mistake, fraud, or failure of consideration by parol proofs does not apply invariably and without exceptions, and one of those exceptions is that, where a transaction is entered into between parties, the terms of which are yet to be carried out—in other words, are executory—as future covenants and promises, some of the provisions of which are verbal and some one or more are in writing, the above rule as to varying the terms of a contract does not apply and the parol terms and provisions of said contract may be proved; and this is upon the theory that the main transaction rests in parol, the written portion being an incident connected with the main transaction.

2. Evidence \S 443(2)—Trusts \S 30½(1)—Maker of note may show promises made as inducement to sign; held, that maker of note to bank could hold bank to faithful performance of its agreement to apply funds from partnership it was liquidating to note it induced such maker to sign.

Where E. executes a promissory note to a bank of which C. is president, and before E. executes the note C., representing said bank, as an inducement to E. to sign the note to said bank, represents to E. that a business concern in which E.'s son-in-law is a partner is in a failing condition, and that the bank has advanced all the money to said concern that it can do legally, and that the bank is liable to lose a certain security held by it on the property of said concern by reason of bankruptcy proceedings if settlement with the creditors of said concern is not carried through, and that it will be necessary for said bank to advance a certain amount of money to consummate said settlement, and that it was desired that E. sign a note to the bank to cover the amount of said advancement, and that, if E. would sign said note, the bank would supervise and carry through said settlement and see that the concern was sold out, and that the proceeds of said sale would be applied in liquidation of the debt and note which it was sought that E. execute before any of said fund would be applied to any debt owed to the bank, and that other promises were made as to the handling of said settlement that would safeguard and procure the liquidation of the note by E., and upon said promises and assurances E. signed said note, and afterwards the consummation of said plan was carried out, and the bank and C. came into possession of the funds from said sale of the business and had charge of the disbursement of the same. Held that E. could prove the terms of said agreement, and held, fur-

ther, that the bank was in a position in the nature of a trustee for E., and that E. can hold the bank to a faithful performance of the terms of said agreement.

Nicholson, J., dissenting.

Appeal from District Court, Pittsburg County; R. W. Higgins, Judge.

Action by the City National Bank of McAlester against Sarah J. Edwards. Directed verdict for plaintiff, attachment on defendant's residence sustained, defendant's motion for new trial overruled, and defendant appeals. Reversed, and cause remanded for new trial.

O. A. Keach, of Wichita, Kan., and A. O. Markley, of McAlester, for plaintiff in error.

Fuller, Porter & Fuller and J. S. Arnote, all of McAlester, for defendant in error.

ELTING, J. This action was brought by the City National Bank of McAlester against the defendant, Sarah J. Edwards, on a promissory note, and was filed on March 28, 1916. Prayed for judgment against the defendant in the sum of \$3,087.33, together with interest thereon at 10 per cent. per annum from the 1st day of February, 1916, until paid.

The plaintiff at the same time filed an affidavit for attachment asking for same upon the grounds that the defendant was a non-resident of the state of Oklahoma and resided at Wichita, state of Kansas, and caused an attachment to be issued and levied upon a residence of the defendant in the city of McAlester, Okla., and afterwards caused service to be had by publication.

On the 20th day of December, 1916, the defendant filed an answer in said cause. Said answer contained a general denial of the allegations of the plaintiff's petition except such allegations as were admitted in the answer. The allegations of said answer were in substance as follows: That J. F. Craig was president of the plaintiff bank at the time the transaction and incidents hereinafter set forth took place, and that he was the agent of the said bank in said transaction; that during the year 1912 Ben Durfee, a son-in-law of the defendant, was engaged in a mercantile business in the city of McAlester, and that said business was conducted under the name of Ben Durfee & Co., and was a partnership composed of Ben Durfee and another party; at the close of 1912 the said concern became insolvent, owed more debts than it could pay, and was in bankruptcy, and that the plaintiff bank undertook, through J. F. Craig, to make a settlement and did make a settlement with the creditors of said concern at 30 cents on the dollar; that it was estimated by J. F. Craig that it would take something like \$6,500 to make the set-

tlement, and that said bank had already advanced to Ben Durfee & Co. all the money they could legally do, which amount so advanced was in the sum of \$6,500; that on or about the 3d day of April, 1913, the said president of plaintiff bank, J. F. Craig, appeared at the home of the defendant, Sarah J. Edwards, in company with Ben Durfee, and the defendant, talking through and being represented by her daughter, Mrs. Durfee, had a transaction with J. F. Craig, if not with the specific consent of Ben Durfee, representing Ben Durfee & Co., it was at least by his implied assent thereto, and as a result of the negotiations this defendant signed the note sued on herein.

The defendant was not inclined to sign the note, but it was represented by J. F. Craig to Mrs. Durfee as the agent of her mother, the defendant, and it is alleged that a part of the transaction of which was in the presence of and the hearing of Mrs. Edwards, the defendant, whereby it was represented by Craig that the bank had advanced all the credit to Ben Durfee & Co. that it could legally advance, and that it was necessary that a settlement with the creditors be made, and asked the defendant to sign a note covering the amount of \$6,500, not with a view of collecting the same from the defendant, but the indebtedness would be carried in her name to make it legal. It was further represented to her that the settlement could be made at 30 cents on the dollar, and only such part of the \$6,500 as was needed to make the settlement would be used, and what was not used would be credited on the note. It was further represented that the bank held a mortgage on property belonging to the concern at Kiowa, Okla., and that they would give credit for \$4,000 on the debt due the bank from the concern when a deed was given to said property to the bank. It was further agreed that for the balance of said indebtedness due from the concern to the bank in the sum of \$2,500 the bank was not to participate in the 30 per cent. settlement. It was further agreed by the bank that Ben Durfee would keep in charge of the business under the control of the bank, and that as soon as the same could be done that said business would be sold, and that the indebtedness of said concern would be paid out of the proceeds of the sale, including the balance of the debt covered by the note, and that the debt of the bank was not to be paid out of said proceeds until the amount covered by the note by defendant was first settled. It was further alleged that on the strength of these representations and assurances, believing that they would be carried out, the defendant signed said note; that settlement was perfected and consummated whereby the debts of the concern were paid and settled at the rate of 30 cents on the dollar and that the amount of money covered by said note was in excess of what was

required to liquidate said indebtedness at 30 cents on the dollar in the sum of \$961.03, and that this amount was credited by two different credits on said note; this was in pursuance of the agreement made by Mr. Craig representing the bank with the defendant; that in breach of one of the agreements made with the defendant, however, the bank permitted the balance of the indebtedness of \$2,500 due from the concern to the bank to participate in that settlement, and received \$750 that should have been credited, as the defendant contends, upon her note, in addition to the \$961.03; that afterwards a deed was made to the property in Kiowa to the bank for \$4,000, which would cut the debt due by the concern Ben Durfee & Co. to \$2,500; that about a year after the note was executed a sale of said concern was consummated to one Joe Bell, who paid something like \$13,500 for said property; this sale was consummated by J. F. Craig and Ben Durfee acting together, and the money was paid into the bank and by it disbursed; that Ben Durfee and J. F. Craig secured a settlement with the creditors at 56 per cent. on the dollar; that after the settlement, with said creditors, there was a considerable sum of said proceeds of said sale still remaining in said bank, and that J. F. Craig, without consulting this defendant in any particular about the transaction, and in breach of his agreement with the defendant, did, in addition to paying 30 per cent. of the debt of \$1,000 owed to the First National Bank of McAlester, and a note of \$1,000 owed by Ben Durfee to the bank of Krebs, paid to the first-named bank \$443.27, and to the bank of Krebs \$418.35, which two amounts should have gone to the liquidation of the debts evidenced by defendant's note under the agreement.

In addition thereto this plaintiff bank, through J. F. Craig, had charged up against said fund and liquidated \$1,750 of debts of the concern in the favor of the bank instead of crediting the note upon which defendant was sued, and as it was agreed by J. F. Craig with the defendant and Mrs. Durfee, her agent, would be done if she would sign said note. Then the answer alleged and states that the defendant owed the bank nothing and prayed that the defendant be permitted to go hence without a day.

The plaintiff filed a demurrer to portions of the defendant's answer setting out her defense as above recited, and the same was by the court overruled. Whereupon the plaintiff filed a reply denying the allegations of the answer, and admitted that J. F. Craig was the duly appointed and acting agent of the plaintiff bank. Whereupon the plaintiff made proof of the execution of the note and rested. Whereupon the defendant introduced her evidence in support of the allegations of her answer. The plaintiff offered no evidence in rebuttal thereto, and the plaintiff demur-

(201 F.)

red to the evidence of the defendant as not constituting a defense to the plaintiff's action on the note, and said demurrer was sustained by the trial court. Then it was moved by the plaintiff that the court instruct the jury to return a verdict in favor of the plaintiff for the amount of the note sued upon.

The court directed the jury to return a verdict in favor of the plaintiff. The court was then requested to sustain the attachment upon the residence of the defendant, and the same was done.

Defendant filed a motion for a new trial, and same was overruled, and gave notice of and prayed an appeal to this court, and the same appears in this court upon said appeal and petition in error with case-made attached, setting up several grounds of error.

The main and really only proposition for the decision of this court is the question: Did the court commit error in sustaining the demurrer to the evidence and directing a verdict? We hold that the trial court did commit error in sustaining the demurrer to the evidence and directing the verdict. We have reviewed and examined the evidence, and find that under the pleadings and proofs adduced and uncontradicted the defendant has made proofs supporting the answer, and that, in the absence of any rebuttal proofs, the trial court committed error in sustaining the demurrer to the evidence and in instructing a verdict for the plaintiff bank.

We will state briefly the reasons for our holding in this matter. Our holding in this matter is that under the facts as alleged and proved by the defendant and uncontradicted the transaction proved constituted a verbal understanding constituting a comprehensive plan for the handling of the estate of the concern in which the defendant's son-in-law was a partner, and that the taking of the note was one of the incidents connected with the said plan; that in right, law, and in equity, if the proofs of the defendant are to be taken as true, and under the state of this record they must be so taken, the plaintiff bank was bound in good faith to carry out the agreement that had been made by its president with the defendant. The bank, through J. F. Craig, as the uncontradicted proofs show, had the absolute charge and control of and did handle and control the settlement and liquidation of this estate, and did so without in any manner consulting this defendant or her wishes in the matter. If the handling of said estate had been conducted in accordance with the agreement, and as the uncontradicted proofs show it to have been, the debt, if any, the defendant owed the bank, would have been liquidated and paid either in part or in full, as the facts may show.

We state that the examination of the record shows that the allegations of the plaintiff's answer are fully supported by the evidence of the defendant. The following is

quoted from pages 21 and 22 of defendant in error's brief:

"There is no evidence of the amount of cash that came into the hands of Mr. Craig. Bell could not tell and there is nothing in the record that warrants the computations made by the counsel for the defendant in their brief filed in this case, in which they attempt to show that there was received \$13,500, and then attempt to figure from the checks offered in evidence that there was a large sum left of cash in the hands of Mr. Craig undisbursed, and much more money than enough to pay the Edwards note.

"The facts are that, if the demurrer to the evidence had not been sustained, and we had put on our rebuttal evidence, the record would have shown that the amount due to the Carelton Dry Goods Company on its 56 per cent. distribution would have amounted to \$2,677.42, and there was only \$1,527.43 paid in cash, and the balance was paid by Bell making a note to the Carelton Dry Goods Company for \$1,149.99, which note was left by the Carelton Dry Goods Company for collection with the City National Bank, and that is the note that Mr. Bell referred to in his testimony on pages 157 and 158.

"The evidence shows that there was no check made for the note of \$1,750 which Durfee owed the bank. There was also a large overdraft owing the bank from Ben Durfee at the time of the sale to Bell which participated in the distribution of the cash that was paid into the City National Bank, all of which would have been shown on rebuttal testimony, although no check was given in payment of that. We merely call attention of this to the court to show that the calculations in the brief of the counsel for the plaintiff is of no value whatever and proves nothing, in no way tends to sustain the theory of the plaintiff in error."

The defendant in error in the statement, of course, is talking outside of the record.

We think that the statement of the plaintiff in error's brief on page 125 states the truth as to what the uncontradicted evidence in this record shows as to the state of the account as to this fund which came into the hands of the plaintiff bank or its president and was disbursed by J. F. Craig:

"Under these authorities the conclusion seems inevitable that the note has been paid in full, and this fact may be shown by any competent evidence, whether in writing or in parol. The very fund which it was agreed should come into Mr. Craig's hands to pay the note was actually received by him, and he applied \$2,303.88 of it on the principal of the note. There was no agreement that he was to apply only that amount and then stop. He had an abundance of this specific fund left after compromising with the last creditors of the store of 56 cents on the dollar to settle the Edwards' note in full, and the law says that he must use this fund as agreed. Not only do the decisions of the courts hold this to be the law, but the statutes of Oklahoma on negotiable instruments permit parol evidence to show the method of payment and

discharge of promissory notes. See section 4169, Statutes of 1910."

It appears from the evidence that the proceeds received by the bank for the sale of the concern Durfee & Co. amounted to something like \$13,300. According to the proofs there was only expended in satisfaction of the new crop of creditors, who were settled with at 56 per cent. on the dollar, the sum of \$7,609.39, which would leave unexpended of the proceeds of the sale and still in the possession of the bank, \$5,690.61, which would be \$151.64 in excess of the balance due on said note after giving credit for \$500, and the other item of \$461.03 not used in the first settlement, and which two items were credited by Mr. Craig on the note, and by which credit the bank admitted that it was agreed that the note should be credited.

The evidence further shows, and is contradicted, that J. F. Craig acted solely without the consent of or in any manner consulted the defendant as to any of said matters.

[1] The following authorities are in point and apply in this case:

Stuart v. Meyer (Tex. Civ. App.) 196 S. W. 615, the third syllabus of which case reads as follows:

"The rule which excludes parol evidence when offered to contradict or vary the terms, provisions, or legal effect of written instruments has no application to collateral undertakings or cases in which the written instrument was executed in part performance of an entire oral agreement."

The case of Goldstein v. Union National Bank of Dallas, Tex. (Tex. Civ. App.) 216 S. W. 409. This case is almost identical with the one at bar, if not entirely so. The principle is absolutely identical and applies to a state of facts such as was proven in the instant case. The first and fifth syllabus read as follows:

"Where a national bank loaned money to the statutory limit to a company, and that the company might have further funds, agreed with defendants, its vice president and a controlling stockholder of the company, to discount their notes, paying the proceeds to the company, and to apply in extinguishment of the notes deposits subsequently received from the company, the agreement was collateral to the promise in the note sued on, executed pursuant to it, and was not merged in the note, being provable by parol and valid as a defense, whether made orally or in writing."

"Where a company solicited its controlling stockholders to execute a demand note to be discounted for its benefit with a national bank, agreeing to make deposits with the bank to be applied solely to payment of the note, to which the bank agreed, and subsequently sufficient deposits were made to pay off the note, though the bank wrongfully applied them to another debt, the bank cannot recover against the accommodation makers on the note, which, in legal contemplation, has been paid."

The case of Mackin v. Darrow Music Co., 169 Pac. 497. A part of the second syllabus reads as follows:

"Where the plaintiff sold to the defendant a piano at a stipulated price, to be paid a certain amount down and the balance in installments, and the plaintiff retaining title to the same until full amount was paid, the terms of the sale being evidenced by a written contract, it is competent for the defendant to show by parol evidence in an action for the balance due on the purchase price that the plaintiff and the defendant entered into a contemporaneous parol agreement whereby it was agreed that the defendant might pay for the piano in hauling for the plaintiff, and that the plaintiff breached the parol agreement by refusing to furnish the defendant hauling as provided for in the parol agreement, as the parol agreement did not contradict or vary the written contract, except as to the matter of payment, which could be shown by parol."

To the same effect is Weeks v. Medler, 20 Kan. 57, by Justice Brewer; Rex Petroleum Co. v. Black Panther Oil & Gas Co., 166 Pac. 1083; Noel v. Kessler, 252 Pa. 244, 97 Atl. 446.

Section 4169 of the Statutes of Oklahoma 1910 reads as follows:

"When an Instrument is Discharged.—A negotiable instrument is discharged: * * * Fourth. By any other act which will discharge a simple contract for the payment of money."

It is contended very strenuously by the plaintiff bank in its brief that this is an attempt to vary and modify a written contract by parol proof. We assert that that is not the fact in this case. The defendant proved a contemporaneous verbal agreement with the bank providing how and in what manner and method such credit and debt should be liquidated, and the evidence shows that under the facts as proven and uncontradicted the bank had it within its power and control to carry out and consummate said agreement as made with the defendant, and, if that had been done, said debt of the defendant would have been paid either in part or in full as may be shown by a proper accounting. This right to such an accounting the ruling of the trial court denied the defendant.

The plaintiff bank cites the case of Colbert v. First National Bank, 38 Okl. 391, 133 Pac. 206, as applicable to the facts in this case. We have examined that case, and find that the same does not apply to the case at bar. Colbert, the plaintiff in error, undertook to plead that he was not to be bound and held responsible on a note for \$7,000 which he had signed and delivered to the bank as surety for his brother, B. H. Colbert. He did not allege mistake, fraud, or failure of consideration, but pleaded a defense that was absolutely contradictory to the written terms of the contract. Neither did Colbert plead that there was a conditional delivery of his note.

The issue involved in the Colbert Case and the only issue involved is stated in the opinion in the following language:

"At the trial plaintiff in error undertook to introduce evidence to establish a parol agreement with the cashier of the defendant bank, by which it guaranteed that he should not be personally liable on the notes. The rejection of this testimony constitutes the only assignment of error presented for reversal of the cause."

We think that this court, in the cited case, upon the issue involved therein, decided correctly. But the law laid down in the cited case does not apply to the facts and issues involved in the instant case. If we understand the defense plead and undertaken to be proved in the instant case, the defendant is not relying upon the fact that she is not bound by said note, and is not relying upon any parol contract that she was not to be bound by signing the note. If such was the contention of the defendant, we would hold against her. Our understanding of the contention of the defendant is that J. F. Craig came to her with a plan and scheme for getting Durfee & Co. out of financial difficulties and to prevent a loss to the bank of which Mr. Craig was president, and to assist in promoting and carrying through that plan the note was taken as an incident of the plan. Under the uncontradicted facts of the record this plea is corroborated by the fact that the note of the defendant Mrs. Edwards, was of no financial force, as the only property which she possessed was the homestead on which she resided with the family of her daughter, and by the further reason that Mr. Craig, president of the bank, asked no security for said note.

The plan was detailed to Mrs. Durfee and Mrs. Edwards by Mr. Craig whereby the amount of this money, \$3,500 to be advanced by the bank was to be liquidated. The uncontradicted proofs show that Mrs. Edwards relied on this plan being carried out, and the bank and Mr. Craig, its president, having it in their power, as shown by subsequent events, to carry it out, the defendant had a right to demand that the bank comply with its plan and agreement as far as it affected her.

The record in the instant case does not disclose that Mrs. Edwards, the plaintiff in error, was guilty of any bad faith, carelessness, or other dereliction of duty; neither has the rights of any innocent person intervened. And it is right, it is equity, and it is the law that the defendant in error and its agent be compelled to carry out this agreement with the plaintiff in error in good faith.

The reason that the litigants in some instances do not get their contentions litigated in accordance with right and merit is not the fault of the law or its established principles; but such failure is in many instances due to a wrongful application of the law, and

this is for the reason that courts are often swayed by an overreager sense of the force of technical law and often fail to search out and apply the proper rule. The law says that no wrong shall go uncorrected for want of a remedy. And while the law will not place a premium on carelessness and lack of diligence, its policy is however against permitting one to admit the commission of a wrong and plead a technicality to escape the consequences of such wrong.

Speaking of the changed attitude of the courts in the enforcement of technical rules, Justice Cooper of the Supreme Court of Tennessee, in the case of *Jordan v. Jordan*, 10 Lea (Tenn.) 128, 43 Am. Rep. 297, makes the following observation:

"No rule was better settled or longer adhered to by the courts than that under the common-law escrow there could be no conditional delivery to the grantee or obligee. It was so held by this court in 1851, and applied to an ordinary bill single for money (*Johnson v. Branch*, 11 Humph. 521), citing the old text books and several then recent decisions of other courts. The same train of reasoning would have forbidden the delivery of an instrument conditionally to a co-obligor, who could not be treated as a third person in the old sense of the law, and so it has been expressly held. *Willet v. Parker*, 2 Metc. (Ky.) 608; *Deardorff v. Forseman*, 24 Ind. 481. But the rule is manifestly too technical for the attainment of the ends of justice, and this court has held, and there are decisions of other courts to the same effect, that a negotiable instrument may be delivered conditionally to a co-obligor (*Perry v. Patterson*, 5 Humph. 133), or to the payee or obligee himself (*Breeden v. Grigg*, 8 Baxt. 163; *Majors v. McNelly*, 7 Heisk. 294). The modern tendency is to decide the rights of parties upon their merits, and not upon technical rules. *Benton v. Martin*, 31 N. Y. 382."

In proving this plan and scheme, an agreement by parol is not a contradiction of the terms of the note, which was made at the time the agreement was made, but was granting to the defendant the right to prove how the debt evidenced by the note was to be liquidated. This contravenes no rule of law, and the proof of such an agreement is not out of consonance with the rule that forbids the introduction of parol proofs in contradiction of written agreements.

In the instant case, while there are some intimations in the plea that there was an agreement that Mrs. Edwards was not to be bound and held responsible upon the note, and which we would have held if she had relied upon the same as her defense to be not a legal defense, since the note was not delivered conditionally, such is not the defense that she relies upon in this case. To repeat, she relies upon a collateral oral agreement entered into by the bank with her providing how the bank should handle certain funds and proceeds in liquidation of her note, and which was in the power and control of the

bank to carry out, and which under the proofs they have failed to do, and which is parallel with and almost identical with the facts in the case of *Goldstein v. Union National Bank of Dallas, Tex.*, heretofore cited.

The third syllabus of the case of *Stuart v. Meyer* (Tex. Civ. App.) 196 S. W. 615, reads as follows:

"The rule which excludes parol evidence when offered to contradict or vary the terms, provisions, or legal effect of written instruments has no application to collateral undertakings or cases in which the written instrument was executed in part performance of an entire oral agreement."

The principle enunciated in the instant case and applied to the facts therein are discussed in 10 R. C. L. 1019, chapter on Contracts, §§ 211, 213, 228, and 230. Section 228 reads as follows:

"*Generally.*—The authorities are agreed that a parol contract may be added to a written one, and the two may stand together, though made simultaneously. The same principle declares that the reduction to writing of one feature of an entire transaction, in part execution thereof, does not preclude proof by parol of the other features. Otherwise stated, the rule is that proof is admissible of any collateral, parol agreement or independent fact which does not interfere with the terms of the written contract, though it may relate to the same subject-matter; and whether such collateral agreement was made or independent fact occurred contemporaneously with or as preliminary to the main contract in writing is quite immaterial. In order, however, to permit parol evidence to be admitted to show an agreement collateral to a written contract, it must appear, according to some authorities, either from the contract itself or from the surrounding circumstances, that the contract is incomplete. And such a collateral parol agreement is not admissible in evidence when the effect is to alter the scope and meaning of the written instrument."

[2] In the instant case the bank was in a relation of trust toward Mrs. Edwards in carrying out the plan and provisions of the agreement made with her at the time the note was signed by Mrs. Edwards.

While we are upon this subject we will state that Mrs. Edwards, the defendant in this case, was purely an accommodation obligor. She had no direct financial interest in this transaction, but there was an ample legal consideration to bind her in this transaction. There can be a conditional delivery of a note, and the condition must be complied with before it becomes a binding obligation

as between the parties to the transaction. And this can be shown as a defense to a note as between the parties. The allegations of the defendant's answer and her proofs are not sufficient to show a conditional delivery. We can illustrate the legal distinction in the following manner: A. signs a note as surety for B. to C. with the understanding that, before said note is delivered and becomes binding upon A., D. and E. are to sign as sureties. If the payee of the note has notice of such condition and D. and E. do not sign, A. can defend against said note as being not binding and of no effect. Upon the other hand, if A. signs a note as surety for B. to C. with the understanding with the payee and the principal that they are to procure the signatures of D. and E. on said note as additional sureties, and they fail to procure those signatures, A. is bound to the payee on said note; but he has a right to set up damages for a breach for failure to procure the signatures of the two additional sureties, since, if the additional sureties are solvent, he would be entitled to contribution.

In the first instance, the surety is not bound upon proof of breach of condition and notice to payee. In the second instance, he is bound to the payee, with, however, a cause of action by way of counterclaim for any damage suffered by reason of a breach of covenant. For a discussion of these distinctions and principles, see the following Oklahoma cases: *Sellers et al. v. Territory ex rel. County Attorney*, 32 Okl. 147, 121 Pac. 228; *Mitchell v. Altus State Bank*, 32 Okl. 628, 122 Pac. 666; *Rex Petroleum Co. v. Black Panther Oil & Gas Co.*, heretofore cited.

The first syllabus of *Mitchell v. Altus State Bank*, above cited, reads as follows:

"It is no defense to the maker of a nonnegotiable note that it is signed upon a mere representation or promise that the payee would procure a third person to sign it. The rule, however, as to such a note is different where at the time of signing it is understood that the note was not to become a completed or binding obligation until signed by another, nor to be delivered until so signed."

The judgment of the trial court is therefore reversed, and this cause is remanded for a new trial not inconsistent with the holdings herein.

HARRISON, C. J., PITCHFORD, V. C. J., and JOHNSON, McNEILL, and KENNAMER, JJ., concur.

NICHOLSON, J., dissenting.

KANE and MILLER, JJ., not participating.

TROJAN DRILLING CO. v. MORRISON.
(No. 10255.)(Supreme Court of Oklahoma. July 12, 1921.
Rehearing Denied Oct. 13, 1921.)*(Syllabus by the Court.)***Appearance** ⇨ **§(1)—Stipulation to arbitrate constitutes general appearance.**

Where a defendant intends to rely on want of jurisdiction over his person, he must appear, if at all, for the sole purpose of objecting to the jurisdiction of the court. An appearance for any other purpose is usually considered general, and arises by implication from the defendant agreeing to some step or proceeding in the cause beneficial to himself or detrimental to the plaintiff other than the one contesting jurisdiction only, and a stipulation as to arbitrators constitutes a general appearance.

Appeal from County Court, Tulsa County;
H. L. Standeven, Judge.

Action by A. B. Morrison against the Trojan Drilling Company. Judgment for the plaintiff, and the defendant appeals. Affirmed.

Carroll & Mason, of Tulsa, for plaintiff in error.

Stuart, Cruce & Bland, of Tulsa, for defendant in error.

JOHNSON, J. On the 18th day of September, 1917, A. R. Morrison as plaintiff commenced an action in the county court of Tulsa county, against the Trojan Drilling Company, A. R. Thomas, and Lottie G. Thomas, as defendants, to recover the sum of \$360 upon a stated account. A summons was issued, but before the same was served, and on September 26, 1917, a stipulation was filed by the parties in said cause, in which the parties agreed to arbitrate said cause. On February 14, 1918, a judgment by default was rendered against the defendants, and on the 15th day of February, 1918, or the next day, the defendants filed a motion to set aside said judgment, which was heard and overruled by the court on the 5th day of March, 1918, and thereafter on the 16th day of March, 1918, the defendants filed a second motion to vacate said judgment, and upon the 2d day of April, 1918, a hearing was had upon the said motion, and leave was granted the defendants to amend their petition, and after hearing upon proof had the court overruled the same and refused to vacate the judgment theretofore rendered in said cause in favor of the plaintiff, to reverse which judgment, refusing to vacate the former judgment, the defendants have regularly commenced this proceeding in error. For convenience the parties will hereinafter be referred to as plaintiff and defendant respectively, as they appeared in the trial court.

The defendant's assignments of error are:

(1) The order and judgment of the court in denying and overruling the said motion is contrary to law; (2) the order and judgment of the court in denying and overruling the said motion is not supported by the evidence; (3) the court erred in denying and overruling the said motion, in that said court was without jurisdiction to render said judgment; (4) court erred in overruling the said motion, in that said judgment purported to be rendered on default when the cause was reached in regular order upon the call of the calendar, whereas the said cause was not reached or set down because it had been stipulated and agreed between the parties that the controversy involved in said suit should be settled by arbitration, which settlement and agreement was in full force and effect at the date of the rendition of said purported judgment; (5) the court erred in admitting evidence to which exception was saved. Counsel say in their brief:

"Only the first four of these assignments will be argued, and for convenience these will be grouped together and argued under one heading.

"The stipulation and agreement filed in this cause to submit the same to arbitration, which agreement was still in force and effect at the time judgment was rendered, ipso facto worked a discontinuance of the suit as far as plaintiff in error was concerned, and the court was without jurisdiction to render judgment against plaintiff in error."

Counsel for plaintiff, in answer to the propositions of counsel for defendants, supra, say:

"Plaintiff in error, having elected to stand on the defense that the trial court was without jurisdiction to hear and render judgment in this case against the plaintiff in error, and the plaintiff in error having failed and refused and neglected to plead, answer, or appear in the trial court on the day set for the trial of this cause, after the same had been regularly set for trial and reached in its regular order on the calendar, it is our contention that there is one question of law upon which this court has to pass and decide the case, namely, did the agreement to arbitrate work a discontinuance of the suit so as to deprive the trial court of jurisdiction to hear and determine the cause at that time, or did the agreement to arbitrate merely work a suspension of the proceedings, and in no way deprive the trial court of its jurisdiction to render a judgment against the plaintiff in error? If the agreement to arbitrate merely worked a suspension of the proceedings and did not deprive the trial court of jurisdiction to hear and determine the cause, then the judgment of the trial court must stand."

The record discloses that no arbitration on the stipulation filed was had. The court never made any order of reference in said cause or in any way acted upon the stipula-

tion of the parties for an arbitration. The stipulation was abandoned by the parties. The testimony showed that the parties had agreed upon referees, but they declined to act, and never qualified as such, and that some time in January, 1918, the court set the cause for trial upon the calendar of the court for February 14, 1918, and that counsel representing the defendants communicated by telephone with one of the defendants concerning such setting of said case, and that the same counsel, on the 15th day of February, 1918, filed in said cause a motion, verified by his affidavit to vacate the default judgment rendered the day before, making as an exhibit to said motion the written stipulation for arbitration filed in said cause.

This motion was overruled by the court on the 5th day of March, 1918, and on the 16th day of March, 1918, thereafter, the second motion was filed as hereinbefore stated, and overruled by the court, and from which judgment overruling the same this appeal resulted. The grounds of this action to vacate the judgment was because the court was without jurisdiction to render the same for the reason that the defendants were never served with summons, that they had never entered any appearance, and that the stipulation filed by J. W. Sykes, as the alleged attorney of the defendants, was wholly unauthorized, and therefore not binding upon them. We cannot agree with counsel for the defendant that the trial court was deprived of jurisdiction by reason of the proceedings had in said cause and on account of the filing of the stipulation of the parties for arbitration.

In 3 Cyc. 510, it is stated as follows:

"A stipulation of the parties as to the time and place of the trial or a change of venue or a continuance, or taking testimony or for reference to a commissioner or to arbitrators, constitutes a general appearance." *Robinson v. Potter*, 43 N. H. 188; *Ratcliff v. Nyers*, 43 Ill. 318; *Jones v. Wolverton*, 15 Wash. 590; 47 Pac. 36.

In the case of *Deal v. Thompson*, 51 Okl. 256, 151 Pac. 856, in which the subject of arbitration was one of the matters involved in the suit, this court, by *Dudley, C.*, said:

"We have no statute on the subject, and therefore the common law prevails."

In *Burke Grain Co. v. Stinchcomb*, 173 Pac. 204, it was said:

"While it is true that our statutes do not provide for an arbitration, yet the common law of arbitration prevails in this state, and the courts in this state favor the same."

Concerning the rule of common law where a stipulation to arbitrate is filed, in 5 Corpus Juris, it is said as follows:

"Where a case was depending in court, the parties might, at common law, agree to arbitration, and obtain an order referring the

cause to arbitrators or referees, designated either by themselves or by the court. However, an order of court is necessary.

3 Cyc. 597:

"Where a cause was depending in court the parties might, at common law, agree to an arbitration and obtain an order referring the cause to arbitrators or referees designated either by themselves or by the court."

In the case of *Hardy v. Hardy*, 2 Ga. App. 580, 58 S. E. 779, which matter was pending in court and later referred to arbitrators without any order of court being obtained, and the arbitrators made an award, a judgment was entered against the appealing party on the basis of the award, and the appellate court of Georgia, in reversing the case and holding that the award was of no effect, first held that the arbitration amounted to a common-law arbitration, and that the rules of common law must prevail and govern, and, second, gave as one of the reasons for not holding the award to be binding and effective that an order of court had not been obtained referring the cause to arbitrators or referees. In this case the court, speaking through *Justice Hill*, said as follows:

"There is no order of the court in this case submitting the matters in controversy. The judgment is based upon the unsworn statement of three men selected by the parties, who arrived at their conclusion without evidence and without giving the parties an opportunity to be heard."

Again:

"At common law the fact of an agreement to arbitrate the matter in litigation is no more than to entitle the parties to a stay of proceedings in the suit. 2 Tidd, Pr. 822; 1 Stephen's N. P. 39."

In the case of *Hunsden v. Churchill*, 20 Minn. 408 (Gil. 360), which case involved a matter of arbitration and whether or not an arbitration of pending matters ipso facto worked a discontinuance, the Supreme Court of Minnesota said as follows:

"A discontinuance being but a species of dismissal, * * * it follows that a mere submission to arbitration, though followed by an award, is not here a discontinuance of an action, since it is not one of the prescribed modes of dismissal."

We think it is quite clear that the trial court had jurisdiction to render the judgment complained of, and the court having done so upon a hearing regularly had for that purpose, and the motion to vacate having been filed and heard at the term of court in which the original judgment was rendered, the judgment of the trial court appealed from is affirmed.

PITCHFORD, V. C. J., and KANE, MILLER, and KENNAMER, JJ., concur.

**SCHOOL DIST. NO. 24 OF CUSTER COUNTY
V. RENICK, COUNTY SUPERINTENDENT.** (No. 12336.)

(Supreme Court of Oklahoma. Oct. 4, 1921.)

(Syllabus by the Court.)

1. Schools and school districts \S 38—Method of proceeding for consolidation on petition and notice to, and meeting of voters set out.

"A special meeting of the voters of any two or more adjacent school districts or parts of districts or territory, may be called for the purpose of establishing a consolidated school, said call to be made by the county superintendent of public instruction, upon petition signed by one-half of the legal voters residing in each district of the territory proposed to be included in the consolidated district. The meeting shall be held at some convenient point to be named by such superintendent. Notices of said special meeting shall be posted in at least five public places in each of the districts or parts of districts, proposed to be consolidated, at least ten days prior to date of said meeting, and also by publication, for at least two consecutive weeks in a weekly paper, if same be published in the school district, and, in addition thereto, notices of said special meeting shall be mailed by such county superintendent to each voter residing in the districts proposed to be consolidated." *Sess. Laws 1919, c. 186.*

2. Schools and school districts \S 38—Voter signing petition for a meeting to establish consolidated district may withdraw before petition is acted on.

A qualified voter signing such petition has the absolute right to withdraw his name from such petition at any time before the petition is acted upon and the election called by the county superintendent. Upon such name being withdrawn from the petition, it cannot thereafter be counted as one of the signers of said petition to make up the requisite number of one-half of the legal voters residing in such district.

Appeal from District Court, Custer County; Thomas A. Edwards, Judge.

Action by School District No. 24 of Custer County, Okl., against Elizabeth Renick, County Superintendent of Public Instruction of Custer County, Okl., asking for an injunction against the defendant in her official capacity. Injunction denied. Plaintiff appeals. Reversed and remanded, with instructions.

Henry Bulow and E. L. Mitchell, both of Clinton, for plaintiff in error.

Sam L. Darrah and A. E. Darnell, of Arapaho, for defendant in error.

MILLER, J. This action was commenced in the district court of Custer county by school district No. 24 of Custer county against Elizabeth Renick, county superin-

tendent of public instruction of said county, asking that said county superintendent be enjoined from calling a meeting of the voters of certain districts to form a consolidated school district including, among others, district No. 24.

A temporary order of injunction was issued by the county judge in the absence of the district judge from the county.

On the 5th day of May, 1921, the case was tried to the court without the intervention of a jury. At the close of the plaintiff's testimony the defendant interposed a demurrer to the evidence, which demurrer was by the court sustained, and judgment rendered dissolving the temporary injunction. The plaintiff filed a motion for a new trial, which was overruled by the court, saved all necessary exceptions, gave notice of appeal, and perfected this appeal. The parties will be referred to as they appeared in the lower court.

The admitted facts are as follows: Petitions were circulated throughout various school districts in the vicinity of Thomas for the purpose of securing the signatures of the legal voters of such districts, asking that the county superintendent call a meeting of all the voters to vote upon the question of consolidating the several school districts into one consolidated school district. More than one-half or about 35 of the 60 voters in school district No. 24 signed the petitions.

The petitions so circulated were filed with the county superintendent from the 16th to the 19th of October, 1920. On the 20th day of October, 1920, and before the petition had been acted upon by the county superintendent, 30 of the 35 voters residing in district No. 24, who had signed the original petition, petitioned the county superintendent, in writing, to strike their names from the original petition. On the same day a remonstrance was filed with the county superintendent containing the names of 47 voters in school district No. 24. The county superintendent ignored the application of the 30 signers to have their names withdrawn from the original petition and proceeded to call the election. It was to prevent the calling of this election that the injunctive relief was sought.

The plaintiff in error makes three assignments of error.

"(1) The court erred in overruling the motion of plaintiff in error for a new trial.

"(2) The said court erred in sustaining the demurrer to the evidence of the plaintiff in error.

"(3) The court erred in rendering judgment for the defendant in error."

[1, 2] The only question presented here that is necessary for us to pass upon is whether or not these persons who had signed the petition could withdraw their names from the peti-

tion before the county superintendent had acted upon it by calling the election.

The evidence of the county superintendent discloses that she had not yet called the election. She testified as follows:

"Q. Now, had you taken any action in the way of sending out notices or calling a meeting of the patrons and voters of the district at the time the application was filed to withdraw their names from the petition? A. Yes, sir; I was doing all the work myself, and I addressed envelopes at—

"Q. Had you sent out any notices? A. I sent them out at the same time.

"Q. Had you sent any notices out? A. No, sir.

"Q. Well, you hadn't taken any action? A. I thought you meant had I started the work on them. No; I hadn't sent any notices."

The plaintiff in error refers to the school district in the city of Thomas as an independent school district. The defendant in error insists that said school district in the city of Thomas is not an independent district. It is unnecessary for us to pass on that question.

The plaintiff in error says that this proceeding was had under House Bill No. 225 (chapter 186, Session Laws of 1919). This act of 1919 amended Senate Bill No. 54 (chapter 258 of the Session Laws of 1917). The act of 1917 amended section 1 of article 7 of chapter 219, of the Session Laws of 1913. The law relating to independent districts is contained in article 6, c. 219, Session Laws of 1913. The defendant in error has failed to point out any other section or provision of the statute authorizing the formation of a consolidated school district. Therefore we assume they are proceeding under chapter 186, Session Laws of 1919. The section of the statute, so far as applicable to this case, reads:

"A special meeting of the voters of any two or more adjacent school districts or parts of districts or territory, may be called for the purpose of establishing a consolidated school, said call to be made by the county superintendent of public instruction, upon petition signed by one-half of the legal voters residing in each district of the territory proposed to be included in the consolidated district. The meeting shall be held at some convenient point to be named by such superintendent. Notices of said special meeting shall be posted in at least five public places in each of the districts or parts of districts, proposed to be consolidated, at least ten days prior to date of said meeting, and also by publication, for at least two consecutive weeks in a weekly paper, if same be published in the school district, and in addition thereto, notices of said special meeting shall be mailed by such county superintendent to each voter residing in the districts proposed to be consolidated. * * *

The earliest case we find on this question is from Pennsylvania, decided October 29, 1883, *In re Independent School District*, 2

Chester Co., Rep. (Pa.) 132. We will quote from the body of the opinion:

"There is another difficulty in the way of the erection of the contemplated district. The act of assembly requires that it shall be done upon the petition of not less than 20 taxable inhabitants of the township or townships desiring the formation of the territory upon which they reside into a separate and independent school district. The petition in this case was signed by 25 taxable inhabitants, but 7 of them now object to the formation of the district, and have signed a paper addressed to the court in which they say that they are satisfied with the present school facilities, and that they signed the petition for the new district without due consideration. This leaves but 18 in favor of the new district—2 less than the number contemplated by the act of assembly.

"We regret that some of the petitioners are at an inconvenient distance from a school-house where a school is maintained, and hope that some way may be found for their proper accommodation, but we cannot relieve them by the erection of this new district."

The Supreme Court of New Mexico in the case of *Territory ex rel. Stockard v. Mayor and City Council of Roswell*, N. M., 16 N. M. 340, 117 Pac. 846, 35 L. R. A. (N. S.) 1113, has held that persons who signed a petition to be presented to the mayor and city council authorizing them to call an election to vote on the question of establishing a commission form of government may withdraw their names before the petition is acted upon by the mayor and council. In the body of the opinion the court says:

"Various objections against the validity of their action are urged in behalf of the appellee. It is said, for instance, that the right to withdraw under such circumstances would, in its exercise, be subject to great abuses. That is no doubt true; but it is probably true of all human devices for government which ever have been or ever will be put in operation. It is true of the right of petition itself, as it is a matter of common knowledge that people will sign petitions from caprice, good nature, thoughtlessness, malice, fear of injurious consequences to themselves if they refuse, expectation of favor or reward if they consent, as well as from more exalted and patriotic motives. Often they 'sign in haste and repent at leisure.' That may have been the case with the 87 who signified their desire to withdraw from the petition in question. * * *

"We think the petitioners had the right to withdraw, at least up to the time when the mayor and council acted on the report of the committee. And this conclusion, which seems to us the reasonable and just one, we think has also the better foundation in the authority of decided cases. * * * Some of the cases which are most analogous to the one at bar, and which we think best sustain the view we adopt, are *People v. Sawyer*, 52 N. Y. 296; *Dutton v. Hanover*, 42 Ohio St. 215; *La Londe v. Barron County*, 80 Wis. 380, 49 N. W. 960; *Davis v. Henderson*, 127 Ky. 13, 104 S.

W. 1009, 31 Ky. Law Rep. 1252; *Littell v. Vermillion County*, 198 Ill. 205, 65 N. E. 78."

In *State ex rel. Andrews v. Boyden et al.*, 21 S. D. 6, 108 N. W. 897, 15 Ann. Cas. 1122, the syllabus reads:

"Under the provision of the South Dakota Constitution that whenever a majority of the legal voters of a county shall petition the board of county commissioners to change the location of the county seat the board shall submit the question to the voters at the next general election, the signers of such a petition have the right to withdraw their names before final action has been taken thereon, and withdrawn names cannot be counted to make up the requisite number of voters."

In *Malcomson v. Strong et al.*, 245 Ill. 166, 91 N. E. 1036, paragraphs 1 and 2 of the syllabus read:

"Voluntary subscribers to a petition may withdraw their names at any time before it is finally acted on.

"Where highway commissioners merely meet and note that a petition has been filed, fix a date for its consideration, and order the town clerk to give notice, it is not such final action thereon as deprive subscribers of the right to withdraw."

See *Barton v. Edwards*, 143 Ky. 718, 137 S. W. 218; *State v. Seattle*, 59 Wash. 63, 109 Pac. 309.

Defendant in error cites *School District No. 11 v. School District No. 20*, 63 Ark. 543, 39 S. W. 850. She contends this opinion sustains her theory that good cause must be shown before a person may withdraw their name from a petition. Paragraph 4 of the syllabus reads:

"A signer of a petition to change school district boundaries should be permitted, on application to the county court while the petition is pending therein, to remove his name from the petition, on a showing that he signed it under a mistake of fact, produced by misrepresentations."

An examination of the opinion discloses that evidence tending to show mistake of fact produced by misrepresentations had been proffered, but excluded by the trial court. The Supreme Court of Arkansas was only holding that this evidence should have been admitted. In the body of the opinion this statement appears:

"Without deciding whether or not a signer of a petition should be privileged to have his name taken off the petition as a matter of right, and without good cause shown, especially when the request to that end is made after the petition has been considered and acted upon in the county court, yet, as the applica-

tion was made to the county court in this instance, and reiterated in the circuit court on appeal, with an offer to make a good showing therefor, we think the three Bamsons should have been permitted to erase their names from the petition, on such showing having been made."

In *People ex rel. Koensgen et al. v. Strawn et al.*, 265 Ill. 292, 106 N. E. 840, paragraph 12 of the syllabus reads:

"A petition for the organization of a school district, which after certain names had been withdrawn therefrom was without a majority of the legal voters, left the trustees without jurisdiction to proceed, so that an order creating the district was void."

We do not think it is necessary for a person to give any reason why he withdraws his name from a petition thus signed by him where no action has been taken on the petition. It is not for a court to determine whether his reason for withdrawing his name is sufficient or not. He was induced to sign the petition under some representations made by the person or persons seeking his signature. The ingenious argument that may have been made to induce him to sign the petition was probably sufficient to satisfy his mind and he acted upon the representations made in such argument. He may find out that he has acted on a misapprehension of the facts or that the results to be obtained are not as he understood them in his own mind. Where the petition has not been acted upon by the officers clothed with the authority to act upon it, a signer has an absolute right to withdraw his name from the petition. It is not within the province of any court to inquire into the psychology of his mind or the sufficiency of his reasons for withdrawing his name from the petition.

It is conceded that if these names are legally withdrawn there is not a sufficient number of petitioners to authorize the election to be called so as to include school district No. 24 in the proposed consolidated district. These signers had withdrawn their names from the petition; therefore their names could not be counted, and the county superintendent was without authority to call any election for the consolidating of school districts which would include school district No. 24.

The judgment of the trial court is reversed, with instructions to grant the plaintiff a new trial and proceed in accordance with the views herein expressed.

HARRISON, C. J., and KANE, JOHNSON, and BLTING, JJ., concur.

**SOUTHERN SURETY CO. v. WILLIAMS
et al. (No. 10169.)**

(Supreme Court of Oklahoma. Oct. 11, 1921.)

(Syllabus by the Court.)

1. Pleading \S 350(1).—Where answer raises fact issue and both parties move for judgment on the pleadings, granting plaintiff's motion is error.

Where the answer of the defendants raise an issue of fact and both plaintiff and defendant move for judgment on the pleadings, it is error for the court to grant the plaintiff's petition.

2. Pleading \S 350(1).—Defendant moving for judgment on the pleadings does not waive his right to send fact issue to jury.

The defendant by presenting a motion for judgment on the pleadings does not thereby waive the right to have an issue of fact set out in his answer tried to a jury.

Appeal from District Court, Choctaw County; C. E. Dudley, Judge.

Action by Zegar Williams and others, by their legally appointed and acting guardian, Isreal Williams, against the Southern Surety Company and others, upon the bond of Eastman Roberts as guardian of such minors. Judgment for plaintiffs on the pleadings, and the Surety Company appeals. Reversed and remanded, with directions to overrule motions of both parties for judgment on the pleadings and proceed as indicated.

Calvin Jones, of Hugo, for plaintiff in error.

Howe & Stanley and E. A. Blythe, all of Hugo, for defendants in error.

Works & Pascal, of Hugo, for Eastman Roberts.

KANE, J. This was an action upon the official bond of Eastman Roberts, as guardian of the minors whose names appear in the caption of this action. The Southern Surety Company was sued as surety. The bond involved is what is generally known in this jurisdiction as a special sales bond for the sale of real estate. It was alleged in the petition of the plaintiff that Eastman Roberts, the principal, breached this bond by failing to account for the sum of \$700, the same being the purchase price paid to him for a tract of land belonging to his wards, sold at guardian's sale. It was further alleged that in a proceeding questioning the correctness of Eastman Roberts' final account as guardian the probate court found that by the silence, concealment, and conduct of said Eastman Roberts respecting the said \$700 item no knowledge of it was brought to the attention of the court; that the same had been disposed of by said Eastman Roberts, and that he had never made any account re-

specting the same, wherefore the said court ordered Eastman Roberts to pay said \$700 to Isreal Williams as the present legally acting guardian. Copies of this order and the bond sued upon were attached to the petition as exhibits and made a part thereof.

The answer, after denying each and every material allegation of the petition except such as are hereinafter specifically admitted, further alleged in substance that any and all sums of money derived from the sale of said real estate was duly and regularly expended by the guardian for the sole use and benefit of said minors for the necessities to support, maintain, and educate the said minors owning an interest in said real estate, all of which said sums were so expended as aforesaid by the said guardian under the orders and with the approval of the county judge of Choctaw county, Okl., and the said minors whose interests in said real estate was sold have received the full benefit of all of the purchase money of the said real estate mentioned in said petition for the necessary support and maintenance of the said minors so interested as aforesaid.

The reply was a general denial of each and all allegations of said answer inconsistent with plaintiff's petition. After the issues were thus joined the defendant, Southern Surety Company filed its motion for judgment on the pleadings as follows:

"Comes now the defendant, Southern Surety Company, and moves the court to render judgment in favor of the defendant, Southern Surety Company, and against said plaintiffs upon the pleadings on file herein."

Whereupon the plaintiffs filed their motion for judgment on the pleadings as follows:

"Comes now said plaintiffs and move the court to render judgment herein for them on the pleadings filed in this cause for the reason that plaintiffs' petition is verified and defendant's answer unverified."

These motions coming on for hearing, the court sustained the motion of the plaintiffs and rendered judgment in their favor against the Southern Surety Company and the former guardian, Eastman Roberts, for the sum of \$600. It is to reverse this action of the trial court that this proceeding in error was commenced.

[1] Originally the cause was submitted in this court on the brief of counsel for the plaintiff in error, there being no brief filed in behalf of the defendants in error. The court without noticing the authorities cited by counsel in this brief handed down an opinion affirming the judgment of the trial court, holding:

"(1) The motion for judgment on the pleadings admits the truth of the allegations con-

tained in the pleadings to the same extent as the demurrer admits the truthfulness of such allegations.

"(2) When both parties to an action file a motion in writing for judgment on the pleadings and both motions are presented to the court, the court may assume that the parties are waiving their right to the testimony and may arrest the pleadings as the admitted testimony in the case."

In a petition for rehearing counsel for plaintiff in error particularly call our attention to the case of *Atwood v. Massey*, 54 Okl. 178, 153 Pac. 629, not noticed in the former opinion, which they say is in direct conflict with our former ruling, in which it was held:

"(1) Where the answer of the defendants raises an issue of fact and both plaintiff and the defendants move for judgment on the pleadings, it is error for the court to grant the plaintiff's motion.

"(2) The defendant by presenting a motion for judgment on the pleadings does not thereby waive the right to have an issue of fact set out in his answer tried to the court or jury."

Although counsel for defendant in error did not file a brief upon the merits, in a response to the petition for rehearing they say:

"The case cited by counsel as the controlling case in this state on this question which is *Atwood v. Massey*, 54 Okl. 178, is not in point for the reason that in the *Atwood-Massey* Case defendant admitted the execution of the notes sued on and admitted liability on one of the two notes, but pleaded a release from the first note by reason of an extension of time granted without the knowledge or consent of the defendants."

In this response it is not denied that the answer of the defendant raises an issue of fact for trial, it being conceded that—

"The sole question presented in the petition for rehearing is whether or not upon the filing of a motion for judgment on the pleadings by the defendants in the trial court the defendants waived their general denial filed in the trial court."

[2] This seems to be the precise question passed upon in the *Atwood* Case, *supra*. In this case, as in the *Atwood* Case, the answer of the defendants joins a question of fact for trial, and the plaintiffs and defendants in both cases moved for judgment on the pleadings. The trial courts in both cases sustained the motion of the plaintiff for judgment on the pleadings. This court reversed the ruling of the trial court, in the *Atwood* Case, holding that:

"The defendants had the right to have this issue tried by a jury, if they wished. This right was not waived * * * by their moving the court for judgment on the pleadings."

We are unable to perceive any distinction between the two cases; and, as we see no reason for overruling the rule of practice announced in the former opinion, which seems to be well supported by the authorities cited therein, it follows that the judgment of the trial court must be reversed, and the cause remanded, with directions to overrule both motions for judgment on the pleadings and proceed as herein indicated.

HARRISON, C. J., and JOHNSON, MILLER, ELTING, and KENNAMER, JJ., concur.

ROSEBAUGH et ux. v. JACOBS. (No. 10033.)

(Supreme Court of Oklahoma. April 12, 1921. Rehearing Denied May 10, 1921. Motion for Leave to File Second Petition for Rehearing Denied Oct. 25, 1921.)

(Syllabus by the Court.)

1. Mortgages \S 32(2), 32(5)—Whether particular transaction amounts to mortgage depends upon whether there was a loan and upon intention.

Whether any particular transaction amounts to a mortgage, or a sale upon condition, or with agreement to reconvey upon a contingency, is to be determined by ascertaining whether the transaction was intended as a loan. If there remains a debt for which the conveyance was only a security, and the collection of which may be enforced independently of the security, the whole transaction amounts to a mortgage, whatever language the parties may have used in expressing their agreement. In such cases, it matters not that the transaction is evidenced by one or more instruments, or what the writings may or may not show, if, nevertheless, the agreement in fact exists. The real intention of the parties, either as shown upon the face of the writing or as disclosed by extrinsic evidence, must govern in equity.

2. Pleading \S 93(1) — Inconsistent defenses are permissible.

Inconsistent defenses are permissible under the practice of Oklahoma, unless prohibited by statute.

Appeal from District Court, Lincoln County; Chas. B. Wilson, Jr., Judge.

Action by K. Jacobs against William M. Rosebaugh and wife, for cancellation of a contract. Judgment for plaintiff, and the defendants appeal. Reversed and remanded, with instructions to set aside the judgment and to overrule plaintiff's motion to strike the amendment to the amended answer.

Erwin & Erwin, of Wellston, for plaintiffs in error.

F. A. Rittenhouse, of Chandler, and Geo. B. Rittenhouse, of Oklahoma City, for defendant in error.

McNEILL, J. This action was commenced in the district court of Lincoln county by K. Jacobs to rescind a written contract to sell 160 acres of land to Rosebaugh and wife, and as ground for cancellation of said contract it is alleged that Rosebaugh and wife had failed to comply with the terms of the contract and made default therein, and that the plaintiff had elected to rescind.

The defendants filed an answer, contending that the plaintiff had brought a former action, and had elected to affirm the contract, and is estopped from rescinding the contract. The defendant filed an amendment to the amended answer, and pleaded an oral agreement, and contended the sheriff's deed under which plaintiff claimed title was in fact a mortgage to secure an indebtedness owing by the defendants to plaintiff, and a further defense, and by way of cross-petition alleged that the plaintiff had charged usury on the money loaned, and asked judgment for double the amount of usury charged. The plaintiff filed a motion to strike the amendment to the amended answer for the reason that the court had prior thereto sustained a demurrer to the plea of usury, and the answer did not state facts to constitute usury, but was simply a restatement of the allegations relative to usury to which a demurrer had been sustained, and the court sustained the motion, and the defendants excepted to the ruling of the court, and assigned this as a ground for reversal. Upon trial of the case to the court, the court found the issues in favor of plaintiff, and rescinded the contract and canceled the notes given by the defendants to the plaintiff, and quieted title to plaintiff.

[1] Plaintiffs in error, for reversal, have 22 assignments of error, only a few of which are briefed and presented. We think it is unnecessary to consider any of the assignments of error except the question whether the court erred in sustaining the motion to strike the amendment to the amended answer of the defendants, to wit, the plea that the deed and contract were given to secure an indebtedness, and were intended as a mortgage. The answer contained the allegation that the land in question was and had been the homestead of the defendants for a number of years, and then the following allegation:

"That on or about the 7th day of June, 1914, a foreclosure judgment having been entered against these defendants in a certain action

brought by one, E. E. Fuller, in this court, the defendants procured the plaintiff to lend them sufficient money to pay off the said judgment; that by the special request of the plaintiff in the making of said loan and securing the plaintiff therefor the defendants consented that the said lands should be bought in at sheriff's sale in the name of the plaintiff, but for the use and benefit of these defendants, and that the consideration therefor was paid by these defendants; that said sheriff's deed was issued in the name of the plaintiff solely and only by reason of the said arrangement; that the plaintiff did not pay any of the consideration therefor, and that such deed was taken and is held by plaintiff for the use and benefit of these defendants; that on the same date and as a part of the same transaction and as security for the loan of said money, to wit, the sum of \$680, a deed was executed to the plaintiff by these defendants, which deed was intended and given only and solely for security for said loan and for no other purpose; and that on the same date and as a part of the same transaction aforesaid, and at the special instance and request of the plaintiff, the contract set forth in plaintiff's said petition was entered into between the plaintiff and defendants, it being understood, agreed, and intended by the parties that said contract and said deeds should be and operate simply and only as security for the loan and advancement of the said sum of money to defendants by the plaintiff, and for no other purpose whatever."

The allegations of the answer must be taken as true, in considering this question, and alleged sufficient facts to sustain the contention that the contract and deed was a mortgage under the holding of this court in the cases of *Worley v. Carter*, 30 Okl. 642, 121 Pac. 669, *Voris v. Robbins*, 52 Okl. 671, 153 Pac. 120, and *Hall v. Russell*, 173 Pac. 679. The striking of this portion of the answer deprived the defendants from presenting a material defense, and was error.

[2] It is contended, however, that the defendant could not plead inconsistent defenses, as the defense that this was a mortgage was inconsistent with the defense pleaded that the plaintiff had elected to affirm said contract, and therefore was estopped from rescinding the same. This court in a long line of decisions has held that inconsistent defenses are permissible under the practice in Oklahoma, unless prohibited by statute. *Metcalf v. Glaze*, 173 Pac. 446; *Covington v. Fisher*, 22 Okl. 207, 97 Pac. 615; *Clowers v. Snowden*, 21 Okl. 476, 96 Pac. 596.

The judgment of the court is therefore reversed, and the cause remanded, with instructions to set aside the judgment of the court and to overrule the motion of the plaintiff to strike the amendment to the amended answer.

HARRISON, O. J., and PITCHFORD, NICHOLSON, and ELTING, JJ., concur.

CLEMENT MORTGAGE CO. v. JOHNSTON.
(No. 10272.)

(Supreme Court of Oklahoma. Oct. 4, 1921.)

*(Syllabus by the Court.)*1. Usury \S 42—"Usurious contract" defined.

The test as to whether a contract is "usurious," is: Does the interest charge agreed to be paid under the terms of the contract exceed the amount of interest that would accrue for the term of the loan figured at the full legal contract rate? If it does exceed such amount, it is usurious; otherwise it is not.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Usurious.]

2. Usury \S 64—Contract not usurious at inception not made so by subsequent transfer increasing interest.

If a contract, at its inception, is not shown to be usurious as tested by the above rule, it is not made usurious by any subsequent transaction liquidating said loan, even though there is paid by the borrower for such liquidation a sum in excess of a sum for interest which would accrue if calculated at the legal rate for the time the sum loaned was held by the borrower. The reason for this rule is that, a loan consummated being a fixed investment, and for and in consideration of consenting to an accelerated liquidation or payment before the expiration of the period of the loan a charge is made of the borrower by the lender, this charge is not for further forbearance and detention of the money, but is a charge for ending the loan or forbearance by the lender consenting to its accelerated liquidation or payment, and a statute as to usury does not apply to such a transaction, and is held to be an agreed consideration for such accelerated liquidation or payment.

Appeal from District Court, Pontotoc County; J. W. Bolen, Judge.

Suit by B. F. Johnston against the Clement Mortgage Company. Judgment for plaintiff, motion for new trial overruled, and defendant appeals. Reversed and remanded, with directions to dismiss petition.

J. B. Dudley, of Oklahoma City, for plaintiff in error.

B. O. and A. W. Wadlington, of Ada, for defendant in error.

ELTING, J. This suit was commenced by B. F. Johnston defendant in error, against the Clement Mortgage Company, a corporation, plaintiff in error, in the district court of Pontotoc county, to recover the sum of \$966.80 for alleged usury in a loan transaction.

On November 15, 1913, the plaintiff in error, defendant below, loaned the plaintiff \$1,100 for the term of 10 years, which loan was evidenced by a principal promissory note for said sum bearing date of November 15,

1913, and due and payable January 1, 1924, with interest at 6 per cent. per annum, payable annually, the annual interest payments being evidenced by ten coupon notes attached to said principal note and of even date therewith, due and payable to its order January 1, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, and 1924, respectively, and the said coupons were to draw 10 per cent. from maturity.

The said principal note is an ordinary negotiable promissory note payable at the defendant's office, and contains, among other things, the following provision:

"The principal sum of this note and any unpaid interest coupon shall bear interest after maturity at the rate of 10 per cent. per annum until paid."

The plaintiff below, defendant in error herein, secured said note and interest coupons by a mortgage upon certain real estate. The mortgage securing said principal note and interest coupons was in the usual form and gave the borrower the privilege of paying a portion of said mortgage before maturity in these words:

"Upon 60 days' written notice, privilege is hereby granted to pay \$100.00 or multiples thereof at any interest-paying date."

There was a charge of \$220 in addition as commission, which commission was evidenced by two promissory notes of \$110 each of even date with the principal note and mortgage, and said notes were made due and payable January 1, 1915, and 1916, respectively, and bearing 8 per cent. interest from date, and were secured by a second mortgage upon the lands. The last two notes mentioned are referred to in the record as commission notes, but are treated by both parties as additional interest.

This is called by loan men a "6-2" loan. The 6 per cent. being evidenced by ten coupon notes and the 2 per cent. evidenced by what is called the two commission notes.

On January 17, 1916, the plaintiff in error, defendants below, received from the defendant in error, plaintiff below, the following letter:

"I have sold the 80 acres which you hold a mortgage on, and if you will send your notes and mortgage to the Farmers' State Bank at Ada, they will be paid off just as soon as title is approved."

Up to this time the defendant in error had not paid anything upon the mortgage, notwithstanding the fact that there was two interest coupon notes due and both commission notes were due. The next day after receiving the above letter the following was received from the defendant in error:

"Please forward my abstract with all the notes you hold against me, coupons, and all

others to the Farmers' State Bank at Ada, Oklahoma."

To these two letters the loan company plaintiff in error replied as follows:

"We have your favor asking that we forward your abstract and all our notes and coupons to the Farmers' State Bank of Ada for collection. We have sent for the abstract to-day and will send it over as soon as we can get it in. Please advise by return mail, Mr. Johnston, whether or not you want the \$1,100.00 note sent also, or whether you just want the two commission notes and interest coupons which are past due. Let us know at once please in order that we may send for the \$1,100.00 note if you want to pay it."

On the bottom of this letter the defendant wrote the following words and returned the same to the loan company:

"I have sold the place and I want the note and all commissions sent to the above bank for payment."

On January 31, 1916, the loan company sent to the Farmers' State Bank of Ada, for collection, the principal note, coupons, and the two commission notes, with instructions to collect the amount due to date of payment with 10 per cent. advance interest on principal note added for 10 days. On February 19, 1916, the mortgage company received from the Ada bank \$1,533.40. After receiving the money, the plaintiff in error discovered an error in its favor of \$9.58, and on February 23d they returned a check to the bank for the amount of \$9.58, which amount the defendant in error refused to receive, and the same was deposited in the Ada bank to his credit.

This suit was filed March 7, 1916, asking for \$866.80 interest and costs and \$100 attorney's fee, alleging the same to be for usurious charge. Defendant filed answer, issues were joined, and the cause came on for trial November 27, 1916. A jury was impaneled, but during the trial by agreement of parties the case was withdrawn from the jury and was tried to the court. The evidence was taken, and the court entered judgment for the plaintiff below, defendant in error herein, in the sum of \$866.80 and \$10 attorney's fee. Motion for a new trial was filed, and the same was by the court overruled, and the defendant below, plaintiff in error herein, prosecuted an appeal to this court. The trial court made the following findings of fact and conclusions of law:

"The plaintiff sues the defendant for usury and asks for judgment for double the amount of the usurious interest collected, amounting to \$866.80. He bases his cause of action upon two counts:

"First, reserving and charging a greater rate of interest than 10 per cent. on a loan of \$1,100 obtained on the 15th day of November, 1915. The evidence in the case is overwhelming that the contract in its incipency was not usurious; there not being a greater rate of

interest reserved or charged in said contract than 10 per cent.

"His further claim of usury is that the defendant on the 18th day of February, 1916, knowingly took and received from the plaintiff \$433.40 for an amount of \$1,100 from the 15th day of November, 1913, to the 18th day of February, 1916, or for a period of 2 years 3 months and 3 days.

"The evidence shows that the plaintiff obtained a loan of \$1,100, and that he executed his note and mortgage to secure same, also executed a note and mortgage for \$220 as interest in the form of a commission, and that the plaintiff on the 18th day of September, 1916, became desirous of paying off the mortgage debt before it became due, and that an agreement of settlement was entered into upon said date, and that the defendant in said settlement knowingly took and received for the use of his money of \$1,100 for said 2 years 3 months and 3 days the sum of \$433.40.

"Revised Laws of 1910, § 1002, defines interest as compensation allowed for the use or forbearance, or detention of money or its equivalent. So the question in this case is very simple: Did it knowingly take and receive for the use, forbearance, or detention of money under this agreement a greater rate of interest than 10 per cent.? It does not take a lawyer to understand what this statute means. Anybody knows what taking and receiving means. I know the courts have gone a long way to avoid the plain provision of this statute, on the idea of encouraging capital and making the circulation of money easy; but I see no reason why courts should have the power of legislation, and I see no reason why the courts should read into a plain statute that which is not there.

"This statute says that any party who knowingly takes or receives a greater rate of interest than 10 per cent. per annum that it is usurious, provided it is taken for the use or forbearance or detention of money.

"Johnston received nothing from this defendant but the \$1,100, and he detained this money from it for the term of 2 years 3 months and 3 days, and that is all he owed, and when this settlement was made they made an agreement of settlement, and that agreement included the knowingly taking and receiving of a greater rate of interest than allowed by law.

"It is true that the defendant could have refused to allow this money to be paid at the time it was paid. They could have forced the plaintiff to wait until an interest-paying period or until the mortgage debt matured, but they saw fit to make a settlement, and entered into a new agreement. They did enter into a new agreement, but the mere fact they entered into a new agreement did not authorize the defendant to violate the law, and when the defendant agreed to take nearly 20 per cent. for the use of this money, it violated the express provision of this statute, and therefore knowingly received and took usurious interest.

"Therefore judgment for the plaintiff in the sum of \$866.80 and \$10 attorney fee and costs.

"To all of which findings of fact and conclusions of law the defendant excepts, and exceptions allowed.

"J. W. Bolen, District Judge."

[1] There is no dispute in this case as to the facts and the findings of the trial court

thereon, but the conclusions of law by the court that the transaction as finally consummated constituted usury and entitled the plaintiff below, defendant in error herein, to recover the amount set forth in the judgment of the trial court as being usurious, are questioned.

As to the abstract proposition laid down by the trial court in his judgment as to what ought or ought not to constitute usury, we are not going to discuss it in this opinion. To consider this proposition would involve a consideration of numerous and intricate deductions and various shades of right and ethics that the present holdings of this court have long since settled and make unnecessary. These holdings the court will, no doubt, continue to adhere to, and hence it is up to the people and their representatives to change it, if changed at all.

The conclusions of law of the trial court as applied to the undisputed facts in this case are erroneous and are contrary to the holdings of this court in its former decisions.

Section 1002, R. L. 1910, reads as follows:

"Interest is the compensation allowed for the use or forbearance, or detention of money, or its equivalent."

Section 1004, R. L. 1910, reads as follows:

"The legal rate of interest shall not exceed six per cent., in the absence of any contract as to the rate of interest, and by contract parties may agree upon any rate not to exceed ten per cent. per annum. Said rates of six and ten per cent. shall be respectively, the legal rate and the maximum contract rates of interest."

Section 1005, R. L. 1910, reads as follows:

"The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section shall be deemed a forfeiture of twice the amount of interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case a greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover from the person, firm or corporation taking or receiving same, in an action in the nature of an action of debt, twice the amount of the interest so paid: Provided, such action shall be brought within two years after the maturity of such usurious contract; provided, further, that before any suit can be brought to recover such usurious interest, the party bringing such suit must make written demand for return of such usury."

[2] The statutes of the territory of Oklahoma were the same as are our statutes, except that the contract rate was 12 per cent., instead of 10 per cent. The trial court finds that the contract entered into between the plaintiff in error and the defendant in error in the instant case was not usurious in its incipency. In the interpretation of usurious contracts the rule for the test of usury is laid down in the case of Metz v. Winne, 15 Okl. 1, 79 Pac. 223, opinion by Burford,

Chief Justice, and the rule laid down therein has been followed by this court since statehood.

The facts in the above case are similar to the facts in the instant case. We quote the following from Judge Burford's opinion:

"The facts specially pleaded in the answer are that the defendants borrowed from Winne \$600, payable in 10 years, with interest at 7 per cent., and that they executed the note for \$600 and ten notes for \$42 each, representing the interest for the 10 respective years; that they also executed the note for \$150, which was for additional interest, and aver that such sum was usurious and excessive. A mere matter of mathematical calculation is sufficient to refute the conclusion of the pleader. Parties may contract for a rate of interest not to exceed 12 per cent. The interest on \$600 for 10 years at 12 per cent. is \$720. The interest contracted for as shown by these notes is as follows: Ten notes, \$42 each, \$420, one note \$30, and one note \$150, total, \$600—which is \$120 less than the maximum interest the mortgagee was entitled under the law to deduct.

"It is argued that the law does not permit more than one year's interest to be deducted in advance. Section 848, Wilson's Stat. 1903, provides: 'The interest which would become due at the end of a term for which a loan is made, not exceeding one year's interest in all, may be deducted from the loan in advance if the parties thus agree.' But it is not alleged or contended that any portion of the interest claimed was deducted from the loan in advance. On the contrary, it appears from the pleading that the mortgagors borrowed and received \$600, and executed interest notes, payable in installments after the first year. If they comply with the contract, they will have the use of the principal sum for the period of 10 years, and the presumption is that they will do so. We know of no law that will prevent a borrower from paying all the interest on a loan at the end of one year, or in such installments as he may desire, and the parties may agree upon, so long as the person making the loan does not exact over 12 per cent. per annum, nor deduct more than one year's interest from the amount of the loan in advance. The courts do not undertake to make contracts for individuals, nor to relieve them from burdensome obligations voluntarily assumed and entered into."

The above rule for testing a contract for usury laid down in this case has been followed by this court in the cases of Covington et al. v. Fisher, 22 Okl. 207, 97 Pac. 615; Garland v. Union Trust Co., 63 Okl. 243, 165 Pac. 197; Baker et al. v. Pittsburg Mortgage Investment Co., 171 Pac. 23; and all cases decided since statehood.

By applying this rule for the test of usury in a contract to the facts in the instant case, we find this loan was for \$1,100 advanced to the defendant in error by the lender and running for 10 years at 10 per cent. Figuring the interest on said sum for 10 years, the interest would amount to \$1,100. Under the contract in the instant case, the provisions as to interest, if the contract had been carried out, would have made the total charge

paid by the defendant in error for the loan of said money, \$906.20, or \$193.80 less than the amount that could be legally collected. So the contract could not be held to be usurious in its incipency.

This test is also adopted in the recent case of *Deming Inv. Co. v. Reed*, handed down by this court, decision by Justice Johnson, dated February 25, 1919, and found in 179 Pac. 35, which test is set forth in the third syllabus as follows:

"That, conceding the \$224 deducted to be interest paid, and the items of \$48 and \$53, aggregating the \$101 sued for, to be also interest paid, all interest paid and charged for the entire time the loan had to run, had the contract been performed, did not exceed the lawful rate."

It is contended, however, and held by the trial court, that the exaction of \$483.40, the amount paid in the settlement of the loan of \$1,100 for the period of 2 years 3 months and 3 days, and being almost 20 per cent., constituted usury and entitled the plaintiff below, defendant in error, under the usury statutes of this state, to recover double the amount or \$866.80. The contract provided that, in the event the borrower desired to make settlement at any interest-paying period, he could do so by giving 60 days' notice and paying \$100 or any multiple thereof.

In the instant case the borrower desired to liquidate the entire loan, and he was required to pay the principal, \$1,100, the accrued interest coupons, and interest from maturity to date of settlement, and two commission notes and interest for 10 additional days, making a total interest charge of \$443.40. This transaction in liquidation of this note is a penalty charged and going to the lender for the liquidation of the loan and note, notwithstanding the fact that the amount paid is in excess of what the amount would have been at the legal rate of the amount of the loan for the time actually detained by the borrower.

It is laid down as the rule in this state, and following the general trend of authority, that such a transaction does not constitute usury. The following is quoted from *Garland v. Union Trust Co.*, heretofore cited, and bearing upon this question and holding that such a transaction constitutes a penalty, and not usury:

"But before passing this \$50,000 mortgage it might be well to add that, because plaintiff, under the contract, by the exercise of its option accelerating the maturity of the loan, was entitled to demand and receive more than the amount of the loan, with legal interest to the time the loan was called, it does not follow that the plea of usury should prevail. On this point 29 Am. & Eng. Enc. of Law, 508, says: 'A provision by way of penalty accelerating the maturity of a loan on default in payments by the borrower will not necessarily render the loan usurious, though through the exercise of such option the lender may be entitled

at law to demand the return of more than the amount lent with legal interest. Thus, where in consideration of a loan an obligation is taken for an amount as principal greater than the amount of the loan, but the interest stipulated therefor is less than the highest legal rate, so that if the contract is carried out according to its terms no more than the principal with legal interest will be paid, a provision that upon default in the payment of the interest the entire principal shall become due at the option of the lender will not render the transaction necessarily usurious, though upon such default and the exercise by the lender of his option more than the amount lent with legal interest to the time when the loan is called will be payable. And the same rule has been applied where installment notes were given for the principal and interest for the full term of the loan.'

"In *Goodale v. Wallace et al.*, 19 S. D. 405, 103 N. W. 651, 117 Am. St. Rep. 962, 9 Ann. Cas. 545, the court said: 'It is further contended by the appellants that, as there was a stipulation in the mortgage that if the mortgagors should fail to pay any portion of the above-mentioned sum, either principal or interest, promptly at the times they should become due, the whole sum, both principal and interest, should at once become due and collectable, therefore the contract was clearly usurious, as the whole amount of the principal of the notes would become due and payable upon default in the payment of the first note; but this contention is untenable, for the reason that such stipulation is in the nature of a penalty from which the mortgagors could relieve themselves by a prompt payment of the notes when due. Webb on Usury, § 120; 2 Am. & Eng. Ency. Law, p. 468. The author, in speaking of this class of cases, says: 'So, if the provision for the payment of excessive interest is dependent on contingency which the borrower may avoid by paying the debt, with legal interest, the loan will not be deemed usurious.' State v. Elliott, 61 Kan. 518, 59 Pac. 1047; Tholen v. Duffy, 7 Kan. 405. A similar clause is frequently inserted in mortgages, but the stipulation has never been held as constituting a contract for the payment of usurious interest, so far as our researches extend.'

"There is no authority holding the contrary, so far as we know. By this we do not mean to intimate that plaintiff, had it sued therefor, which it did not, was entitled to recover in this action on the interest coupons not due at the time the trustee accelerated the maturity of the principal debt and foreclosed therefor. On the contrary, on this point we mean to say that recovery upon those coupons could not be had for the reason that the moment the principal debt and interest accrued up to the time to which the maturity of the debt was accelerated are paid, the remaining undue interest coupons are discharged. This is in keeping with authority (*Dugan et al. v. Lewis et al.*, 79 Tex. 246, 14 S. W. 1024, 12 L. R. A. 93, 23 Am. St. Rep. 332; *R. R. Co. v. Mer. Trust Co.*, 94 Ga. 306, 21 S. E. 701; *Goodale v. Wallace*, supra; *Moore et al. v. Cameron et al.*, 93 N. C. 51), and is plaintiff's theory of the case. It is also carried into the judgment of the court, who permitted a recovery for the principal debt only, together with interest thereon at 6 per cent., from December 1, 1912,

or the time when the first two notes fell due, up to the date of the judgment. There was no error in this, so far as the question of usury is concerned, and the judgment must stand, provided, of course, the court did not err in the amount of interest due on the loan.

"But, say defendants, this contract is usurious because it provides for interest on the principal sum at 6 per cent. per annum before maturity, or from June 1, 1912, until paid, and, if not paid at maturity, 10 per cent. thereafter, with annual rests until paid. And it is contended by counsel for defendants, not that this increased rate of interest is a penalty and unenforceable, but that it renders the contract usurious because, they say, this increase of 4 per cent. was for the 'detention' of money in contravention of the statute, supra. Not so. Being an increase to the maximum legal rate only, the contract was a valid contract for the payment of interest. 39 Cyc. 953, denominates such excess of interest as a penalty, but adds:

"Whether such penalty for the nonperformance of the contract is enforceable or not, all authorities are agreed that the contract is not usurious, but remains a valid and enforceable obligation against the debtor."

The rule that we deduce and that is adopted in this state is that, if the contract was not usurious in its inception, the same is not invalidated and does not subject the lender to the penalty of usury by a subsequent transaction in liquidation of the loan contract, although the amount paid under the liquidation transaction may amount to more than the interest accrued at the legal contract rate for the period of time the money was held by the borrower.

The rule that paying additional money by the lender for and in consideration of accelerating the loan, even though the amount paid may exceed the legal rate at the time the money is used, does not constitute usury, is set out in the fourth syllabus in the case of *Deming Inv. Co. v. Reed et ux.*, heretofore cited:

"Further, that because the mortgagee under the contract by the exercise of his option accelerating the maturity of the loan was entitled to demand more than the amount of the loan with legal interest to the time the loan is called does not make the transaction usurious."

This rule seems to be sustained by all the authorities.

In the case of *Nichols v. Fearson*, 7 Pet. 103, 8 L. Ed. 623, the principle is stated in this language:

"There are two cardinal rules in the doctrine of usury which we think must be regarded as the common place to which all reasoning and adjudication upon the subject should be referred: The first is that to constitute usury there must be a loan in contemplation by the parties; and the second, that the contract which in its inception is unaffected by usury can never be invalidated by any subsequent usurious transaction."

The reason for this rule is stated in the case of *Smithwick v. Whitley*, 152 N. C. 366, 67 S. E. 914, 28 L. R. A. (N. S.) 113, 20 Ann. Cas. 1348, in the following language:

"Extracting payment of the legal interest which will accrue prior to the maturity of a debt as a condition to accepting payment of the principal and releasing purchase-money notes secured by mortgage on real estate does not constitute usury."

"If defendant had a good investment, he had a right to hold on to it, and, if plaintiff desired to be released from his lawful and binding contract to pay interest until maturity of the debt, defendant had a right to exact payment * * * as compensation for such release. Defendant had as much right to sell his solvent debt at a premium to the plaintiff as to any one else. The defendant was called upon to surrender a perfectly good investment, untainted with usury, and not for an extension of credit or forbearance on an obligation the debtor could not meet. The transaction * * * is the very reverse of the loan, and extension of credit or a forbearance, without which there can be no usury. It put an end to credit, instead of giving it."

To the same effect is the case of *Elred v. Hart*, 87 Ark. 534, 113 S. W. 213, and also the case of *Hamilton v. Kentucky Savings Bank & Trust Co.*, 159 Ky. 680, 167 S. W. 898, L. R. A. 1915B, 498.

There seems to be in the brief of the plaintiff below, defendant in error herein, and also in the findings of the court, a contention about what is called a new contract based upon the fact that, since the interest was not figured for the full interest-bearing period, but only for 10 days, this, being a variation from the terms of the loan, would make it a new contract. We cannot see where the defendant in error can object to this, since it costs him less than if the terms of the contract had been exacted. But, even if it is conceded that it constitutes a new contract, this would make no difference, since, whether the transaction accelerating the loan was consummated under the terms of the old contract or a new contract, neither one would be a contract for the forbearance or detention of money, but would be the converse thereof; a contract ending the forbearance and loaning of money. This conclusion is stated elsewhere in this opinion.

The holding in this case is that the trial court committed error in his conclusion of law and in directing judgment for the plaintiff below, defendant in error herein.

This cause is therefore reversed and remanded, with directions to dismiss petition of the plaintiff below, defendant in error herein, and at his cost and with prejudice.

HARRISON, C. J., and KANE, JOHNSON, and MILLER, JJ., concur.

CARDER et al. v. BLACKWELL OIL & GAS CO. (No. 10274.)

(Supreme Court of Oklahoma. Sept. 27, 1921.
Rehearing Denied Oct. 25, 1921.)

(Syllabus by the Court.)

1. Contracts \Leftrightarrow 147(1, 3), 169—Intention controls; party's intention must be deduced from entire agreement; surrounding circumstances may be considered in case of ambiguity.

In the construction of a contract the intentions of the parties must be deduced from the entire agreement, not from any part or parts of it, and where a contract has several stipulations, and the intention of the contracting parties is not expressed by any single clause or stipulation, but by every part and provision in it, all must be considered together and so construed as to be consistent with every party, and give every clause and part a proper meaning, if possible.

In arriving at the meaning of a contract, we must bear in mind that the primary object of all rules of interpretation and construction is to arrive at and give effect to the mutual intent of the parties as expressed in the contract, and that, where an ambiguity arises for any reason in a contract, the true intention of the parties, if it can be ascertained from the contract, prevails over verbal inaccuracies, inapt expressions, and the dry words of the stipulation. We must also bear in mind that it is the duty of the court to place itself, as far as possible, in the position of the parties at the time the contract was entered into, and then to consider the instrument itself as having been drawn and the purposes which it is intended to express, in the light of the circumstances thus surrounding the transaction, and, from a consideration of all these elements, to determine upon what sense or meaning of the terms used the minds of the contracting parties actually met.

2. Mines and minerals \Leftrightarrow 78(1)—Leases will be construed so as to permit development.

Ordinarily oil and gas leases are executed for the purpose of exploring and operating for oil and gas, and where their terms will permit it, under the rules of law, such leases will be construed so as to permit development and prevent delay and unproductiveness.

3. Mines and minerals \Leftrightarrow 73—Second oil lease construed as supplanting prior lease as to terms and conditions.

Where parties enter into a lease contract pertaining to oil and gas, where a prior lease had existed between the parties, and the second lease states that this lease shall take the place of and stand in lieu of said prior lease, and where the plain and specific provisions of the second lease by the plain intentment of their language express the purposes of the parties, the conditions and stipulations of the second contract shall control, and this is especially so if the second contract, when viewed in the light and under the circumstances under which the parties entered into the same, bears out the conclusion that it was the purpose of the parties that the conditions of the second contract should control.

4. Mines and minerals \Leftrightarrow 78(2)—Equity may cancel lease as to undeveloped part of land and permit continuance to developed part.

A court of equity has the power to conform its decrees to the varying circumstances of each particular case, and if the evidence shows that a part of the leased premises under an oil and gas lease has been developed, and by contract provision the rights of the lessee are protected in such development, and that other portions of said lease have not been developed in compliance with the contract terms, the court may cancel the lease as to the undeveloped portion and permit the lessee to continue to operate the developed part thereof.

Kane, J., dissenting.

Appeal from District Court, Kay County; W. M. Bowles, Judge.

Suit by James A. Carder and another against the Blackwell Oil & Gas Company. Judgment for the defendant, and plaintiffs appeal. Reversed and remanded, with directions to enter judgment for the plaintiffs canceling an oil and gas lease and quieting title in the plaintiffs as to the defendants, and with further direction to reserve to defendant a right to use and occupancy for operating gas well.

C. L. Pinkham, Claude Duval, and W. S. Cline, all of Newkirk, for plaintiffs in error

H. S. Gurley, of Blackwell, and A. G. C. Bierer, of Guthrie, for defendant in error.

BLTING, J. This suit was commenced in the district court of Kay county, state of Oklahoma, by James A. Carder and Ida Carder against the Blackwell Oil & Gas Company, a corporation. The plaintiffs below are the plaintiffs in error in this suit and the defendant below is the defendant in error in this appeal. We will hereafter refer to them as plaintiffs and defendant.

Plaintiffs filed suit for the purpose of canceling an oil and gas lease on the lands of the plaintiffs for a breach of the following provision of said contract:

"To have and to hold the above-described premises and all the rights and privileges therein granted unto said Blackwell Oil & Gas Company, its successors and assigns, for the term of three years from this date and so much longer as oil or gas is found or produced on such premises in paying or commercial quantities"

—and the further provision:

"It is hereby agreed that the party of the second part shall drill one additional well for gas on said premises prior to the 1st day of March, 1915, and on the failure to drill said well prior to said date then the party of the second part shall pay on said date to party of the first part the sum of \$100.00 and the sum of \$100.00 for each year thereafter which the drilling of said well is delayed, and upon the drilling of said well the payments shall cease, and if said well is a commercial well, that is

to say, if it produces gas in paying and commercial quantities, then the payments for said well shall be made for the same as such under the other covenants and agreements of this lease."

The date of said lease is the 9th day of November, 1914. Then it is alleged that the lessee has not bored such additional well; alleged further that they refused to accept the payments of rentals provided for in said lease for the last payment next before expiration of the three-year term of the lease, and that the lessors and plaintiffs refused to accept further gas from the well of the defendant; gave notice of intention to forfeit the lease unless the defendant got production during the term in an additional well; and then prayed that the said lease be canceled and set aside and held for naught, and that title be quieted in plaintiffs in and to the land.

The plaintiffs in their petition alleged further that on the 28th day of June, 1909, the plaintiffs made, executed and delivered to the Blackwell Brick, Tile & Gas Company an oil and gas mining lease on the premises described in the lease dated November 9, 1914, and that afterwards the said first-named lease was assigned to the Blackwell Oil & Gas Company by the Blackwell Brick, Tile & Gas Company; that prior to the date of the lease of the 9th of November, 1914, the defendant had drilled a gas well on said premises, and that the plaintiffs, being dissatisfied over the actions of the defendant in regard to development, filed a suit against the defendant to require further development, and that, in order to compromise the differences between the parties, the parties in said suit entered into a new lease, being the lease heretofore referred to and dated the 9th day of November, 1914, and for and in consideration of said lease the suit to require production was dismissed.

The plaintiffs were also paid \$100 cash, and the stipulations and terms as to development were embodied in the lease that we have heretofore stated. The former lease had a term running for 20 years, while in the second lease the term was reduced to 8 years. Copies of the first and second lease were attached to the petition of the plaintiffs in the instant suit, and to said petition the defendant demurred, and the demurrer was overruled; whereupon the defendant filed his answer, admitting the allegations of the plaintiffs in their petition, and, to meet the contention of the plaintiffs that they had failed to comply with the conditions as to production, allege the following:

"Defendant has fully complied with the covenants, promises, and agreements contained in said oil and gas mining lease made obligatory upon the lessee and said oil and gas mining lease is an executed contract.

"The natural gas which is now being produced on said leased premises by the defendant

and which was being found and being produced on the 9th day of November, 1917, and at all times since, was and is being found and produced by the defendant, the Blackwell Oil & Gas Company, on said leased premises, under the terms and conditions of said oil and gas mining lease which was made and executed on the 9th of November, 1914, and thereby said oil and gas mining lease has been continued in force and effect, and the same is now in full force and effect and a legal, binding, valid, and subsisting oil and gas mining lease between the parties to said lease."

The cause went to trial, the plaintiffs introduced their evidence, and defendant demurred to the plaintiff's evidence, and the trial court sustained said demurrer. Plaintiff filed a motion for a new trial, the same was overruled, and notice of appeal was given, and the cause was appealed to this court.

The contentions of the parties herein are narrowed down to one proposition: Did the failure of the defendant, which failure is admitted, to develop another gas well upon said premises under the developing provisions of the second contract within the term of three years, constitute a forfeiture of said contract, or did the well, as contended by the defendant, that had been brought in under the old contract, answer for and constitute, under the provisions of the new contract as to production, an executed contract. In other words, the contention of the plaintiff is that the second contract abrogates the provisions of the old contract and constituted an entirely new contractual relation between the parties.

The defendant contends that the two contracts are to be taken together and supplement each other, and that the old production under the old contract answered for the production required under the new contract.

The following provision of the second contract makes reference to the first contract and also makes reference to the well drilled under the old contract:

"It is hereby expressly recited that the party of the second part now holds a gas and oil lease on said premises by virtue of a lease and grant executed and delivered by James O. Carder and Ida Carder, husband and wife, unto the Blackwell Brick, Tile & Gas Company, a corporation of Blackwell, Okla., of the date of the 7th day of August, 1909, and which was filed for record on the 9th day of August, 1909, at the hour of 9:40 o'clock a. m., and recorded in Book 7, Miscellaneous Records, page 407, in the office of the register of deeds of Kay county, Okla., and which said gas and oil lease has been duly and legally sold, assigned and transferred to the Blackwell Oil & Gas Company, and said corporation is now the owner and holder of said oil and gas lease and all the rights granted under said lease; that under and by virtue of said lease one well for gas has been drilled on said premises and the rental payment for said well has been paid up to and including

the 1st day of March, 1915; that as a part of the consideration of this lease it is hereby expressly agreed between the parties hereto that said gas well shall be and remain the property of the party of the second part, and the party of the second part shall retain the ownership of all of its said property now located on said land, and that this lease shall take the place of and stand in lieu of said prior lease."

We think that the plain and manifest purpose of this provision was for the benefit of the defendant company and to protect them in their property rights in the well produced under the first contract, and by its plain terms expresses no other purpose, and the plaintiffs in their petition so interpreted and recognized this fact and in their prayer by asking the court to recognize this provision and set aside sufficient quantity of said land as is reasonably necessary to permit the use and operation of said well. In this we think they did right.

The following provision makes reference to the prior suit to require production, and, as we think, expresses the purposes of entering into the second contract:

"Also it is hereby expressly recited that an action is now pending in the district court of Kay county, state of Oklahoma, wherein the parties of the first part are plaintiffs and the said Blackwell Oil & Gas Company, a corporation, is defendant, in which said action plaintiff seeks further development of said premises and other relief, as prayed for in said petition of plaintiff. Now it is agreed in consideration of the covenants and promises in this contract contained that said action aforesaid shall be dismissed with prejudice at the cost of the defendant, and said action is hereby fully settled by the terms of this lease, and as a part of said settlement the sum of \$100 shall be paid to the parties of the first part by the party of the second part, the receipt whereof is hereby expressly acknowledged by said parties of the first part."

The above provision is plain to this court, and its purpose is manifest, and, referring to the former suit as being one to require further production, it then states the reason for the dismissal in the following language:

"Now it is agreed in consideration of the covenants and promises in this contract contained that said action aforesaid shall be dismissed with prejudice at the cost of the defendant, and that said action is hereby fully settled by the terms of this lease."

What covenants and promises do they refer to in the above-quoted language? It must be the covenants and promises looking to future development and production as provided in the second lease, and that the purposes sought in the former suit are provided by the terms of the second lease, and the second lease answers in lieu of a judgment requiring future development as asked for in the former suit.

We think that the trial court committed

error in sustaining the demurrer to the plaintiffs' evidence, and, under the state of this record, as shown by the contracts and pleadings and the admissions therein and the uncontradicted evidence, that the plaintiffs were entitled to have judgment canceling said lease and the relief prayed for in their petition.

The new contract by its plain language states that it takes the place of and stands in lieu of the prior lease. If it takes the place of and stands in lieu of the prior lease, then whatever terms that it embraces would constitute new and future obligations. If this proposition is true, then we cannot understand how it can be contended that the executed parts of the prior contract should count in making the terms of the new contract executed, and, even if doubt would be expressed as to whether such is the correct conclusion, we think that the circumstances under which the second contract was entered into indicated that the new contract is a contract for future production.

There had been a suit commenced by the plaintiffs to require additional production, and as a result of the new contract, the suit to require production was dismissed, and special reference to the said suit and the reason for such dismissal is made in the last-quoted portion of said second lease. When any doubt arises relative to the interpretation of contracts and the force and effect to be given to the same, we have a right to take into consideration the surrounding circumstances and to place ourselves in the position of the parties at the time of entering into the contract.

[1] The defendant in its brief suggests that there is no uncertainty in the contracts, and hence contends that no rules of interpretation are needed. We will agree with their contention that the terms of the second contract are plain. The only uncertainty that arises comes from the effort of the defendant itself to bring into the consideration of this question what was done under the old contract, and to so interpret the reference in the second contract to the first contract in such a manner as to acquit the defendant of a breach under the new contract. This we hold to be untenable.

The following is from the syllabus in the case of Withington v. Gypsey Oil Co., 172 Pac. 634:

"Where the meaning of the language of a contract is doubtful and the same is fairly susceptible of two constructions, that construction must be preferred which makes it fair and such as prudent men would naturally execute in preference to a construction that would make it inequitable, or such as reasonable men would not be likely to enter into.

"The intention of the parties must be deduced from the entire agreement, not from any part or parts of it, and where a contract has several stipulations, the intention of the contract-

ing parties is not expressed by any single clause or stipulation, but by every part and provision in it, which must all be considered together, and so construed as to be consistent with every other part."

The following is from the opinion in the last-cited case:

"In arriving at their meaning, we must bear in mind that the primary object of all rules of interpretation and construction is to arrive at and give effect to the mutual intent of the parties, as expressed in the contract, and that, where a contract is ambiguous, the true intention of the parties, if it can be ascertained from the contract, prevails over verbal inaccuracies, inapt expressions, and the dry words of the stipulation. We must also bear in mind that it is the duty of the court to place itself, as far as possible, in the position of the parties at the time the contract was entered into; then to consider the instrument itself as drawn, its purposes and the circumstances surrounding the transaction; and, from a consideration of all these elements, to determine upon what sense or meaning of the terms used their minds actually met."

The same rule that applies to interpretation of the provisions of deeds would apply to the interpretation of leases. The following is section 217, 18 O. J. pp. 261, 262:

"Where the language of a deed is ambiguous, the intention of the parties may be ascertained by a consideration of the surrounding circumstances existing at the time of its execution. For this purpose the court will place itself as nearly as possible in the position of the parties when the instrument was executed. But the object of the admission and consideration of evidence of surrounding circumstances is to aid the court in construing the language of the deed and ascertaining the grantor's intent therefrom, and the surrounding circumstances will not be permitted to place a construction upon the deed inconsistent with the words used so as to add to or detract from or alter the intent. Hence, where the language of the deed is plain, certain, and unambiguous, the surrounding facts and circumstances will not be considered. Where the language of the deed is ambiguous, the court may consider its origin and the sources of its derivation, all the attendant surrounding circumstances or the existing state of facts, the situation of the parties and of the property or the condition or state of things granted at the time, the state of the country, the relationship of the parties, the state of the law at the date of the deed, previous agreements which the deed is to carry into effect, the object to be subserved, the person by whom the deed is drawn, and generally all sources of inquiry naturally suggested by the description, or which may have acted upon the minds of the parties, are open to inquiry within the limits of the rules relating to parol evidence in such cases. In this connection it may be noted that a number of facts all pointing the same way may have an effect which no one of them would have had alone. The deed, however, must receive its construction as of its date and the date of its delivery, and not in the light of subsequent events. Hence a grantor cannot by creating practical

difficulties after he has made a grant that is free from them defeat the grant or influence its legal construction."

There is no question involved in this case of implied forfeiture. This is admitted by both parties to the suit, and the whole question devolves upon the interpretation of the contract; and the defendant admits that, if the production under the first contract does not answer for and in lieu of new production, under the law and the facts they have forfeited their second lease. The last portion of one of the provisions of the second contract reads as follows:

" * * * No implied covenant or covenants of development for gas shall obtain, but the express covenants contained in this lease relating to development for gas shall be final and exclusive between the parties hereto."

This provision seems to recognize that there was an expressed covenant for development and constitutes a second recognition in the contract itself. There is another recognition in the second contract of the provision as to production in the following provision:

"It is hereby expressly stipulated that no gas well now located on adjoining lands to the premises herein leased shall be required to be offset on the premises here leased, otherwise than by the drilling of the one additional well or the payments made in lieu thereof as provided in this lease."

It is true, as is argued by defendant in its brief, that plaintiffs for their contract received \$100 cash and the provision as to the putting down of a second well or the payment of \$100 in lieu thereof, which is more than they procured under the old contract, but it must be borne in mind that a suit under the old contract had been begun to require additional development. And as a result of the dismissal of said suit this second contract was produced, in which is embraced a development provision which, standing alone and without reference to the prior contract and a completed gas well completed during the life of the first contract, would require production within the term of three years, or there would be a forfeiture of the second contract. And, whether the defendant admits this or not, the same is true, and requires no citation of authority. We think this proposition is admitted by defendant in its brief.

If this provision in the second contract as to production is not a new obligation requiring future production and that the old well executed the provision as to the future development, why was the development provision embodied in the second contract at all? This is a natural inquiry.

[2] The defendant in its brief admits that under the provisions of the second contract it could not defer development as long as it

wished and without end, by paying the rental provided. Then it must follow that future development was contemplated. The express terms of the second contract clearly and manifestly express that purpose. The presumption is that all oil and gas leases are made in contemplation of production.

In the case of *New State Oil & Gas Co. v. Dunn et al.*, 75 Okl. 141, 182 Pac. 514, the following language is used:

"Ordinarily oil and gas leases are executed for the purpose of exploring and operating for oil and gas, and where its terms will permit it, under the rules of law, such lease will be construed so as to promote development and prevent delay and unproductiveness."

[3] Our conclusions are that the terms of the second contract are the ones that were operative and controlling and bound the defendant to develop and bring additional production, and that the defendant has failed to procure production within the term as required, and that it has therefore forfeited said contract, the same being a condition subsequent, and under the admitted facts of this record they have failed to comply, and said lease is held to be forfeited.

[4] The plaintiffs in their prayer ask for judgment canceling said lease except what was sufficient to protect and operate the well produced under the first lease. This seems to be within the power of this court or the trial court. The following is a portion of the language used by Justice Rainey in the case of *Pelham Petroleum Co. v. W. L. North*, 78 Okl. 39, 188 Pac. 1069:

"A court of equity has the power to conform its decrees to the varying circumstances of each particular case, and, if the evidence shows that a part of the leased premises under an oil and gas lease have been properly developed with reasonable diligence by the lessee, and other parts have not, the court may cancel the lease as to the undeveloped portion and permit the lessee to continue to operate the developed part thereof."

To the same effect is the case of *Coffinberry v. Sun Oil Co.*, 68 Ohio St. 488, 67 N. E. 1069.

The judgment of the trial court is therefore reversed and remanded, with directions to enter judgment for the plaintiffs canceling said lease and quieting title in the plaintiffs as to the defendants, and with the further direction to reserve to the defendant a right to the use and occupancy for the purpose of operating the gas well on said premises that is reasonably necessary for the practical operation of the same.

HARRISON, C. J., PITCHFORD, V. C. J., and JOHNSON, MILLER, KENNAMER, and NICHOLSON, JJ., concur.
KANE, J., dissenting.

COLBERT v. PATTERSON. (No. 10217.)

(Supreme Court of Oklahoma. Sept. 13, 1921.
Rehearing Denied Oct. 25, 1921.)

(Syllabus by the Court.)

1. Indians \Leftrightarrow 13—Allotment by Commissioner of Indian Affairs commission and secretary of interior will not be disturbed unless for gross error or fraud.

The Commissioner to the Five Civilized Tribes, the Commission of Indian Affairs, and the Secretary of the Interior are primarily vested with the duty of allotting lands to members of the Five Civilized Tribes, who show themselves entitled thereto, and their action in making such allotments will not be disturbed by the courts, unless it clearly appears that such officers have committed some material error of law, or that misrepresentation and fraud were practiced upon them, or that they were chargeable with fraud, or committed such gross error in their findings of fact that such findings practically amount to fraud.

2. Public lands \Leftrightarrow 106(1)—Courts will not disturb decision of Department of Interior in absence of fraud or error of law.

The courts will not disturb the decision of the Department of the Interior in a contest proceeding based purely upon findings of fact from the evidence submitted, where no fraud or error of law is shown.

3. Indians \Leftrightarrow 13—Commission to the Five Civilized Tribes was a quasi judicial body, and has power to determine allotments between contestants.

The Commission to the Five Civilized Tribes was a quasi judicial body, and had power, as between claimants for the same land, to determine to which it should be allotted, and its findings of fact, if there is evidence to support them, are binding upon the courts, and in the absence of fraud or error of law the only inquiry the court can make is, Was there any evidence upon which to base such findings?

Error from District Court, Pittsburg County; R. W. Higgins, Judge.

Action by Willie Patterson against Jim Colbert. Judgment for plaintiff, and defendant appeals. Affirmed.

J. S. Arnote, of McAlester, for plaintiff in error.

I. P. Keith, of McAlester, for defendant in error.

NICHOLSON, J. This is an action in ejectment, brought by the defendant in error, as plaintiff below, against the plaintiff in error, as defendant below, in the district court of Pittsburg county. The parties will be hereafter referred to as they appeared in the trial court.

It is alleged in the petition that the plaintiff is the owner of the north half of the northeast quarter of section 10, township 5 north, range 16 east, lying and situate in

Pittsburg county, Okl., by virtue of an allotment patent issued to him and dated the 5th day of December, 1907; that plaintiff is a Choctaw freedman and a citizen of the Choctaw Nation; that he is entitled to the possession of said land; and that the defendant unlawfully keeps him out of the possession thereof, and prayed judgment for the possession of said land.

The defendant answered, denying all the allegations of said petition except such as were expressly admitted, and admitted that the land was allotted and patented to the plaintiff, but averred that at the time the land was allotted to the plaintiff defendant was in possession of the same and entitled to have the same allotted to him; that he contested the right of said plaintiff to said land, but that the Commissioner to the Five Civilized Tribes through an erroneous and gross misconception and mistake of the facts and of the law decided the contest against him and in favor of the plaintiff, and patent was issued to said plaintiff; that as a matter of law said patent was illegally issued to said plaintiff, and plaintiff holds the record title to said lands in trust for said defendant, and prayed that the plaintiff take nothing, and that the court decree that said plaintiff held the title to said lands in trust for said defendant, and that he be required to convey the same to said defendant, and in the event of his failure so to do that the court decree the legal title to said land in the defendant, and that plaintiff and those claiming under him be enjoined from asserting any right, title, claim, or interest in or to said land, or any part thereof, and afterwards filed an amendment to this answer by which he attached to said answer as exhibits copies of the record in said contest proceedings. The trial court rendered judgment for the plaintiff, from which the defendant appeals, and urges that the Commissioner to the Five Civilized Tribes, in awarding the land in controversy to the plaintiff and in not awarding it to the defendant, did so in error of law, and in gross error of the facts.

The finding and proceedings of the Commissioner to the Five Civilized Tribes in the contest proceeding is attached to the answer, and is as follows:

"Finding and Decision.

"After an investigation of the record in the possession of this office, and due consideration of the pleadings and evidence in this case, it appears as follows:

"Statement of Records.

"That Jim Colbert, the contestant, is a freedman of the Chickasaw Nation; that Willie Patterson, the minor contestee, is a freedman of the Choctaw Nation; and that each is entitled to an allotment of the lands of the Choctaw and Chickasaw Nations.

"That on April 7, 1905, Netta Meggs appeared at the Choctaw land office and made application

for the land in controversy herein for her minor son, Willie Patterson, and the same was, by the Commissioners to the Five Civilized Tribes, set apart to the said Willie Patterson, as a portion of his allotment selection.

"That on October 5, 1905, Jim Colbert appeared at the Choctaw land office and made application to have the land in controversy herein set apart to himself, as a portion of his allotment, and the same having been theretofore selected, as herein stated, the said Jim Colbert was so notified by the Commissioner, and his application for said land was therefore refused.

"That on October 5, 1905, Jim Colbert, the contestant, filed herein his complaint duly verified.

"That on October 7, 1905, this cause was set for trial on November 22, 1905, at 9 o'clock a. m. and notice of contest and summons issued to contestee.

"That on November 22, 1905, return of notice of contest and summons was filed, service on the minor contestee, Willie Patterson, on October 13, 1905, by delivering a copy thereof to Netta Meggs, his mother and natural guardian, who had said minor in charge.

"That on November 22, 1905, this cause was called for trial. Contestant appeared in person; contestee appeared by his mother, Netta Meggs. Both parties announced ready, whereupon a hearing was had and concluded, and the cause taken under advisement.

"Findings of Fact and Conclusion.

"It appears from the evidence in this case that one John Gates (or Gaides) was at one time, prior to the contestee's filing herein, the owner, and in possession of the improvements upon the land in controversy, consisting of a house, and about 6 acres of cultivated land under fence, situated upon the west 40 of the 80 acres in controversy. In January, 1905, this was the only cultivated land and improvements upon any of the land in controversy, and it is not claimed that Gates (or Gaides) was ever in possession of any of the east 40, or had any improvements thereon.

"Contestant's claim is that in January, 1905, this Gates (or Gaides) made a contract of sale with contestant, whereby the house and improvements, then on the land in controversy, were transferred to contestant.

"The evidence offered in behalf of this contention is the testimony of the contestant himself; that of one William Phœbus; a bill of sale (Exhibit B) to contestant, signed by 'John Gaides,' dated October 2, 1905, and conveying a house and 6 acres of cultivated land on the south half of the northeast quarter of section 10, township 5 north, range 16 east, which is the 80 acres immediately south of the land in controversy; and an affidavit (Exhibit A) signed by 'John Gates' called in the evidence, and admitted as a contract, but bearing date November 17, 1905, and being nothing more than an affidavit to the effect that on January 17, 1905, the said John Gates had sold to contestant all the improvements, consisting of 6 acres in cultivation, one two-room house, and fences on the land in controversy.

"All of this evidence as to the sale is very unsatisfactory. That of the witness Phœbus relates to a conversation had with Gates (or Gaides), in February, 1905, in which Gates

told witness that he had sold the land in controversy to the contestant, and is therefore hearsay in its nature. The bill of sale does not describe the land in controversy, has been once altered, and, in any event, is no evidence that there was an actual sale in January, 1905. It is material and necessary that the sale should be shown before the date of the contestee's filing, and also that contestant actually went into possession, because it does not appear from the records of this office that John Gates (or Gaides) was a citizen or freedman of the Choctaw, or Chickasaw Nation, or entitled to hold lands therein. If the said Gates (or Gaides) is a citizen, as testified upon the trial, he must be enrolled under another name, and the same evidence which would justify the Commissioner in treating the case as though he were a citizen shows that prior to the date of the pretended sale to contestant in January, 1905, the said Gates had taken his full allotment in the Chickasaw Nation. If a citizen, he was therefore an excessive holder, after so selecting his allotment, and the evidence as to the sale and the actual possession of contestant before contestee's filing must be as satisfactory as though Gates were a noncitizen.

"The affidavit of John Gates, introduced in evidence, was not admissible as a contract, for obviously it is not such; nor in default of an explanation of Gate's absence from the trial should it be given any weight as evidence.

"It was testified by contestant that he never personally went into possession of the west 40 acres where the improvements sold by Gates were located. The contestant testified that he bought from Gates in January; that it was agreed that Gates might stay on the land until October and take off the crop that he had on the 6 acres, and that before that time the contestant was to pay him, and the bill of sale was to be made in October; that in April contestant finished paying for the improvements, and on October 2, 1905, the bill of sale was executed, but that one of Gates' children was then sick, and Gates did not want to move for a month, and contestant let him stay on; and that he was still there (on the west 40) at the time of the trial on November 22, 1905.

"The only competent evidence as to the sale in January, 1905, is the testimony of the contestant himself. This is not only not corroborated by any competent evidence, but almost all of that introduced in his behalf rather tends to refute his testimony as to the sale. Even the act of contestant in going upon the east 40 in April or May, and building a log house and cow lot there, is hardly consistent with his present claim that he was then the owner and would, on October 1st, come into possession of a house with stables and other improvements near the center of the west 40, and on the only piece of cultivated ground in the entire 80 acres in controversy.

"The burden of proof in these contests is always upon the contestant to show that his right in the land had vested prior to contestee's filing, and in cases where the transfer is claimed from a noncitizen, or from a citizen who has completed his allotment and is an excess holder, the Commissioner will closely scrutinize the evidence as to the transfer and the date thereof. And, where, as in this case, the testimony is only of a verbal contract, the knowledge of which is locked in the breasts of two men, when

one of them, for no apparent reason, fails to appear and testify; when no physical change in possession can be shown, and there is no evidence of any such change as could possibly be notice to any one of the rights of any persons other than the actual occupant; when there is no writing, evidencing a contract of sale at the date relied upon, or explaining the continued possession of the noncitizen, or excessive holder, and when the character of testimony, other than the bare assertion of the contestant, is not only consistent with the hypothesis that the sale, if there was any, was subsequent to the contestee's filing, but rather corroborative of that hypothesis, the Commissioner cannot hold that the contestant has satisfactorily sustained the burden of proof cast upon him.

"The Commissioner is therefore of the opinion that the contestant has not shown that he purchased the improvements prior to the contestee's filing, and is therefore of the opinion that the land in controversy, at least as to the west 40 acres, being in the possession of Gates, who was either a noncitizen, or an excess holder who had completed his allotment selection, was public domain and subject to selection by the contestee.

"The contestant's claim as to the east 40, of which Gates never had possession, must be further examined, because contestant claims that he personally went into possession of, and made improvements on, this 40. If he did so prior to contestee's filing the contestant's rights would be superior to the rights of the contestee as to the east 40, independent of any transfer of the land to him.

"It does not seem that the Commissioner would be justified, even from the evidence of the contestant himself, in finding that there was such possession at the time stated. It appears that there was such possession at the time stated. It appears that the only improvement ever put on this east 40 was a one-story log house, with a cow lot. It does not appear from the evidence where on the 40 these were located. In one place, contestant testified that from January, 1905, he was working upon the east 40 for himself. He did not, however, say what he did, and later in the testimony, in response to the question, 'You said (you built the improvements) in January?' answered, 'Well, me and my wife was there; I commenced on it some time in April or May, and I think I finished it up about the last of July.' And he testified that he moved onto the land in controversy in July. Previous to that time he had been living in the immediate vicinity on the Daniel Barnes place.

"The contestant's witness, Phœbus, stated that the improvements were put on the east 40 'during the spring some time'; that he 'saw Mr. Colbert there at work building a house; I don't remember the dates.'

The Commissioner is not satisfied that contestant has sustained the burden of proof in establishing that he had possession of, or made any improvements on, the east 40 prior to April 7, 1905, the date of the contestee's filing.

"The mother of the minor contestee filed upon the land as public domain. She testified that she was taken over the land, and did not see any improvements, but could not say positively that there were none. She claimed that when she went out to see the land before the

filing the contestant marked a plat for her, and told her to file on the two 40's marked, as there were no improvements thereon, and that she filed on the 40's marked by contestant. She did not produce the plat. Contestant admits that he marked a plat, but says that he marked the land in the northwest corner of section 10, adjoining the land in controversy, and on which there were no improvements.

"The testimony of the two witnesses on this point is in direct contradiction and if the other testimony in the case showed that the contestant's rights had already vested, the Commissioner might not be inclined to hold that contestee had proven a consent by contestant that contestee might file on the land, or that he had established an estoppel against contestant. But in view of the conclusions of the Commissioner on the other phases of the case, a decision on this point is unnecessary.

"The Commissioner is therefore of the opinion that the land in controversy should be allowed to remain a portion of the allotment selection of the minor contestee.

"Judgment.

"It is therefore ordered and adjudged that the north half of the northeast quarter of section 10, township 5 north, range 16 east, of the Indian Meridian, containing 80 acres and being the land in controversy in Choctaw allotment contest No. 1214, be and remain a portion of the allotment selection of Willie Patterson, the minor contestee therein; and that the records of the Choctaw land office be made to conform in all things to this decision."

By section 29 of the Atoka Agreement (30 Stat. at L. p. 495) it is provided:

" * * * That each member of the Choctaw and Chickasaw Tribes, including Choctaw and Chickasaw freedmen, shall, where it is possible, have the right to take his allotment of land, the improvements on which belong to him, and such improvements shall not be estimated in the value of his allotment. * * *"

And by section 11 of the Supplemental Choctaw and Chickasaw Treaty approved July 1, 1902, 32 Stat. at L. 641, pertaining to the allotment of lands to members of the tribes and freedmen, it is provided:

" * * * Which lands may be selected by each allottee so as to include his improvements. * * *"

The object and purpose of these provisions in the treaties was to permit the allottee to retain the home he had builded and occupied upon the unallotted lands, and by section 25 of the Supplemental Treaty, supra, allottees might appear before the Commissioner to the Five Civilized Tribes at the land office in the nation in which his land was located and make application for his allotment and for allotments for members of his family and other persons for whom he was lawfully authorized to apply for allotments, and if he should not have selected his allotment within 12 months after the date of the opening of said land offices in said nation, then the Commission to the Five Civilized Tribes

might immediately proceed to select an allotment, including the homestead for such person, said allotment and homestead to be selected as the Commission might deem for the best interest of said person, and the same should be of the same force and effect as if such selection had been made by such citizen or freedman in person.

Defendant did not appear at the land office and make application for the land in controversy within the time provided, and thereafter the Commission allotted other lands to him, the patent to which he returned to the Commission, and retained possession of the lands in controversy.

[1] It appears from the record in the trial court that the officers of the Interior Department removed the defendant from the land in controversy on at least two occasions, but each time he returned and has kept the plaintiff out of possession. In *Higgins v. Waters*, 60 Okl. 209, 159 Pac. 1129, this court held:

"The Commissioner to the Five Civilized Tribes, the Commissioner of Indian Affairs, and the Secretary of the Interior are primarily vested with the duty of allotting lands in the Indian Nation to the members of said tribes who show themselves entitled thereto, and the action of said Commissioners or the Secretary of the Interior in making such allotments will not be reviewed or questioned in the courts unless it clearly appears that they have committed some material error of law, or that misrepresentation and fraud were practiced upon them, or that they, themselves, were chargeable with fraudulent acts, and that as a result thereof the patent was issued to the wrong party." *Rector v. Gibbon*, 111 U. S. 276, 4 Sup. Ct. 605, 28 L. Ed. 427; *James v. Germania Iron Co.*, 107 Fed. 597, 48 C. C. A. 476; *Garrett v. Walcott et al.*, 25 Okl. 574, 106 Pac. 848; *Bell v. Mitchell*, 39 Okl. 544, 135 Pac. 1136, Ann. Cas. 1915D, 780.

[2] But the court will not disturb the decision of the Department of the Interior based purely upon findings of fact from the evidence submitted, where no fraud or error of law is shown. *Higgins v. Waters*, supra; *Garrett v. Walcott et al.*, supra; *Robinson v. Owen et al.*, 30 Okl. 484, 119 Pac. 995; *Al-luwee Oil Co. v. Shuffin et al.*, 32 Okl. 808, 124 Pac. 15; *Summers v. Barks et al.*, 36 Okl. 337, 127 Pac. 402; *Johnson et al. v. Riddle*, 41 Okl. 759, 139 Pac. 1143; *Jones et al. v. Fearnow et al.*, 53 Okl. 822, 156 Pac. 309.

We have examined the record, and have read the evidence adduced at the hearing of the contest, and can find nothing indicating fraud on the part of the plaintiff, neither do we find that the Commissioner to the Five Civilized Tribes erred as a matter of law, or committed such gross error in his finding of fact that such finding practically amounts to fraud. The findings and conclusions of the Commissioner show that he recognized the rights of the defendant to have the land allotted to him, if he was in fact the owner of the improvements thereon prior to or at

the time the land was allotted to the plaintiff, but the Commissioner held as follows:

"The Commissioner is therefore of the opinion that the contestant has not shown that he purchased the improvements prior to the contestee's filing, and is therefore of the opinion that the land in controversy, at least as to the west 40 acres, being in the possession of Gates, who was either a noncitizen, or an excess holder who had completed his allotment selection, was public domain and subject to selection by the contestee.

"The Commissioner is not satisfied that contestant has sustained the burden of proof in establishing that he had possession of, or made any improvements on, the east 40 prior to April 7, 1905, the date of the contestee's filing."

[3] It is not within the province of this court to weigh the evidence adduced on the hearing of the contest. The Commission to the Five Civilized Tribes was a quasi judicial body, and had power, as between claimants for the same land, to determine to which it should be allotted, and its findings of fact are as binding upon the courts as a verdict of a jury in their own tribunal, and the only inquiry the court can make is, Was there any evidence upon which to base such findings? *Jordan v. Smith*, 12 Okl. 703, 73 Pac. 308; *Paine v. Foster et al.*, 9 Okl. 213, 53 Pac. 109; *Harnage v. Martin*, 40 Okl. 341, 136 Pac. 154; *Bozarth v. Mitchell*, 59 Okl. 60, 157 Pac. 1051; *Higgins v. Waters*, supra. The courts are not vested with a supervisory power over the acts of the officers of the Interior Department on mere questions of fact presented for their determination. As was said in *Quinby v. Conlan*, 104 U. S. 420, 26 L. Ed. 800:

"It would lead to endless litigation, and be fruitful of evil, if a supervisory power were vested in the courts over the action of the numerous officers of the Land Department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied the parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have been practiced, necessarily affecting their judgment, that the courts can, in a proper proceeding, interfere and refuse to give effect to their action."

We cannot say that there was no evidence upon which to base the findings of the Commissioner, neither can we say that the Commissioner was not justified in doubting the evidence of the defendant in regard to the purchase by him of the improvements prior to the time the land was allotted to the plaintiff, but, on the contrary, from this evidence the inference might reasonably be drawn that the purchase of the improvements, if made, was made after the land had been allotted to the plaintiff, and, if this be true, the defendant was not entitled to the land.

The defendant did not appeal from the decision of the Commissioner to the Five Civilized Tribes to the Secretary of the Interior, as he had a right to do, but, without exhausting his remedy before the Interior Department, sought the aid of a court of equity in an effort to avoid the decision of the Commissioner. As to whether or not it was necessary for him to exhaust his remedies before the Interior Department before resorting to the courts we express no opinion, inasmuch as the decision of this question is not necessary to a final determination herein. Failing to detect any reversible error in the record, the judgment of the trial court is affirmed.

HARRISON, O. J., and JOHNSON, McNEILL, ELTING, and KENNAMER, JJ., concur.

CHICAGO, R. I. & P. RY. CO. v. STATE et al. (No. 12182)

(Supreme Court of Oklahoma. Oct. 4, 1921.)

(Syllabus by the Court.)

1. Railroads ⇐225—Farm within term "other industry."

Under section 38 of article 9 of the Constitution of Oklahoma, a farm may come within the term "other industry."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Other.]

2. Railroads ⇐225—Order for industrial switch must be justified by amount of business.

Under said section of the Constitution the Corporation Commission is not justified in issuing an order to require a railway company to maintain a switch for the benefit of any person, firm, or corporation owning or operating any coal, lead, iron, or zinc mine, or any sawmill, grain elevator, or other industry, unless it appears from the showing made that the amount of business produced by such mine, sawmill, elevator, or other industry is sufficient to justify the same.

3. Public Service Commissions ⇐33 — Presumption of justness of orders limited to facts found or established by evidence.

The prima facie presumption of the reasonableness, justness, and correctness of an order of the Corporation Commission, obtaining by reason of section 22, art. 9, of the Constitution, applies only to the facts found by the Commission, or established by evidence upon which the Commission failed to make a finding; and, where a fact material to the reasonableness, justness, and correctness of an order is lacking in the finding of facts made by the Commission, and is not supplied by the evidence, the presumption obtaining by reason of said section does not apply, and on review in this court such order cannot be sustained.

(201 P.)

4. Railroads \Rightarrow 225 — Order for industrial switch held not sustained by evidence.

The evidence in this case examined, and held, it fails to show that the amount of business which would be produced is sufficient to justify maintaining the switch.

5. Railroads \Rightarrow 225—Individual held to have no equity justifying continuance of switch.

When a person seeking to have a switch put in by a railway company for his benefit accepts the terms of a letter in writing that he will pay a certain amount of the expense incurred in installing such switch, under the terms of the letter, which clearly states that the switch is temporary and shall be removed in six months, no equity arises in his favor to compel the railway company to continue to maintain such switch after the expiration of the time for which it was installed, because of the expenditure of money made by such person.

Appeal from Corporation Commission.

Complaint by the State and Fred A. Chapman against the Chicago, Rock Island & Pacific Railway Company before the Corporation Commission to require installation and replacement of a switch, in which the commission made such an order against the Railway Company, which appeals. Order of Corporation Commission vacated and set aside.

C. O. Blake, W. R. Bleakmore, R. A. Tolbert, Roy S. Lewis, and E. P. Kelly, all of El Reno, for plaintiff in error.

E. S. Ratliff, E. C. Patton, and A. I. Thompson, all of Oklahoma City, for defendants in error.

MILLER, J. A complaint was filed by Fred A. Chapman against the Chicago, Rock Island & Pacific Railway Company before the Corporation Commission, asking that the railway company be required to install or replace a switch between Mannsville and Russett, Okl. A hearing was had before the Corporation Commission, and it made an order requiring the railway company to replace the switch. The railway company appealed from the ruling of the Corporation Commission, and appears here as appellant. It assigns several specifications of error, which it will not be necessary to set out in full. The complaint and order reads as follows:

"Cause No. 3992.

"The complainant says:

"1. (State name, address and occupation) Fred A. Chapman.

"2. That the above-named defendant is a common carrier in the state of Oklahoma, and that as such is subject to the laws of the state of Oklahoma relating to railway and transportation companies.

"3. (Grounds of Complaint) That said Chicago, Rock Island & Pacific Railway Company, on or about the 1st day of July, without notice to affiant, undertook and started work of re-

moving certain spur track known as Chapman spur, between the towns of Mannsville and Russett, Okl., on the Chapman farm; said switch or spur being about 340 feet in length and being used for shipping of cordwood and farm products; said spur and track having partly been constructed by this complainant, and complainant having paid said Chicago, Rock Island & Pacific Railway Company the sum of \$350 for installing same at that location; that said spur at said location is necessary to the complainant and others in that vicinity for purpose of loading cordwood and other commodities of said vicinity:

"Wherefore the complainant prays that the aforesaid defendant be required to answer the charges herein and after due hearing and investigation an order be made commanding and for such other and further order as the Commission may deem necessary and just.

"Dated at Oklahoma City this 2d day of July, 1920. Fred A. Chapman, Complainant.

"Cause No. 3992. Order No. 1818.

"On the 2d day of July, 1920, complainant filed his complaint with this Commission, in which he alleges that the respondent railway company was removing and tearing away a certain spur track, known as Chapman spur, located between the stations of Russett and Mannsville, Okl., at mile post No. 95.

"That said spur was located and installed at said point in January, 1920. That complainant furnished men and teams and graded the road-bed for said spur, which required some 15 days' work, with six or eight teams and several men, and that it paid the actual cost of laying said track, to wit, the sum of \$350. That said spur was necessary and essential to petitioner and his renters and neighbors for loading out cordwood, alfalfa hay, sweet potatoes, and other farm products of the vicinity.

"Respondent defends by alleging that said spur was located and installed under the terms of a written contract as an emergency, and was to remain only for a period of six months, at which time same was to be removed.

"At the hearing, on the 12th day of July, 1920, all parties being present and represented by counsel, the evidence submitted shows that the spur was installed by the company under the terms of a written contract for a period of six months; that complainant owns some 4,000 or 5,000 acres of land at and near said spur, 1,500 acres of which is in cultivation; that he has cleared within the past year some 150 acres of timber land, and is now clearing and proposes to clear 1,600 acres more, the wood from which he proposes to ship out, loading same at said spur; that the shipment of wood has already amounted to some 600 or 700 cords, with about 200 cords now ready for shipment; that there was moved in and out of said spur of various farm products some 50 cars annually.

"The testimony shows that the wood now being cleared from said lands would never reach a market other than over this spur, as cost of haulage by wagon over the roads to either Russett or Mannsville is prohibitive. The evidence shows that it costs \$5 per cord to transport same by wagon to either railway stations. The railway company's testimony was

that said spur would interfere with operation of its trains in handling the shipments loaded at said spur, and that the handling of cars loaded at said spur would add to the expense as well as the hazard of the operation of its trains.

"From all the testimony at hand, the Commission finds that said spur was located and installed under the contract between the complainant and respondent, under the terms of which same was to be removed at the expiration of six months, but further finds that the locating and removing of an equipment of this nature is not altogether a matter of private contract, and that if reasonable necessity exists for said spur remaining at such location, the company would have no authority to remove same without the approval of this Commission; that said spur is located at a point 2.4 miles from Mannsville station, and 3 miles from Russett station. That the dirt road from said spur, and the point from which the wood and farm products from said spur and neighborhood to either railway station, is in such shape and condition as to not permit of successful and economical use of hauling heavy loads; that the grade at the point where said spur is located is 0; that while the necessity for said spur is not so great from the standpoint of fuel supply as at the time of its installation, yet in all probability there will be demands for the wood during the coming winter. That the complainant paid the costs of laying and grading said spur, and in a manner complied with the requirements set forth by the provisions of section 33, article 9, of the Constitution of the state of Oklahoma; that there is sufficient demand and necessity for said spur to justify the railway company in allowing same to remain.

"It is therefore the order of the Commission, it being advised in the premises, that respondent, the Chicago, Rock Island & Pacific Railway Company, immediately reinstall and rebuild what is known as the Chapman spur, located 2.4 miles from Mannsville and 3 miles from Russett, on the Ardmore branch of the Chicago, Rock Island & Pacific and the spur to remain in service until further ordered by this Commission.

"Done at Oklahoma City this 7th day of December, 1920.

"[Seal.]

"Corporation Commission of Oklahoma,

"Art L. Walker, Chairman,

"Campbell Russell, Comm'r.

"Attest: P. E. Glenn, Act. Sec'y."

The evidence shows the switch was installed by the railway company upon the acceptance by Chapman of the terms of a letter, which is as follows:

"Subject: Tracks—MP 95-14 and 95-15—
Fred A. Chapman.

"Haileyville, Okl., Dec. 5, 1919.

"File 376—A.

"Mr. Fred A. Chapman, Ardmore, Oklahoma—Dear Sir: We are authorized to construct the temporary spur between MP 95-14 and 95-15 or at about that location on our Ardmore branch to permit you to load out the 1,200 to 1,500 cords of wood which you now have on the ground at or near that place, provided you deposit with us a certified check in the amount of \$350.00, which is the amount we estimate it will cost for labor to construct

this siding and remove it again after the loading has been completed.

"It is of course understood that if the expense should exceed that amount you will also pay the difference. On the other hand if all of this money is not required for constructing and later removing this spur the difference will be refunded to you.

"It is further understood that this track is purely temporary, and is to be removed after the present supply of wood has been loaded out, and in any case not later than June 1, 1920. This track to be of sufficient length to hold ten cars and that you will promptly load the cars when placed thereon.

"It is further understood that the rate on this wood shall be the regular tariff rate from the nearest station.

"As evidence of your agreement to these conditions, please sign two copies of this letter, deliver them to our agent with the certified check referred to and retain the third copy of this letter.

"We are prepared to act promptly in the construction of this track.

"Yours truly,

"[Signed] D. Van Hecke, Superintendent."

At the hearing, which was had July 12, 1920, Mr. Chapman was the only person who testified on behalf of the complainant, and his testimony in substance is as follows: He owns between 4,000 and 5,000 acres of land extending from one-half mile east of Russett to one-half mile west of Chapman switch. He has owned this land two or three years. The headquarters and feed grounds of this tract of land are near where Chapman switch was located. He had about 200 cords of wood at the switch, and estimates he will ship from 18 to 20 carloads of hay; from 15 to 30 carloads of sweet potatoes; he expects to have from 700 to 1,000 acres of corn, which he estimates will make from 40 bushels to 75 bushels per acre, and will ship 8 or 10 carloads of corn; he will raise small grain, if he has the switch, and this would make from 4 to 6 carloads; he will ship out from 500 to 1,000 head of cattle, and will ship from 5 to 15 carloads of hogs a year. Taking this year as an example, he would ship in 10 to 12 carloads of building material a year, and he estimates that with the spur track or switch in the total number of cars shipped would not be less than 50 or not very far from 100, and by using the rough estimate he had made it would be 200 cars.

D. Van Hecke testified in behalf of the railway company as follows:

"I am the superintendent of the Rock Island Railroads at Haileyville, Okl., and was located there during the time this application for the track was made and its construction, etc. My first information regarding it was contained in a telegram from our agent at Ardmore on December 2, 1919, which stated that Mr. Chapman had asked him what steps he could take to get a switch put in between two certain mile-posts, saying that he would pay all expenses, and that all he wanted was a section man to

put in the switch and supervise the other work; that he would furnish men to do the work in two or three days. I replied to that, advising him to put his proposition in writing to the traffic department representative, Pat Purtell (?) located at Oklahoma City. Then, through a personal call from Mr. Chapman, I learned more in detail as to just what he wanted and why he wanted it, and it was represented that, as a result of the coal miners' strike from November 1st to December 15th, there was a great shortage of fuel in the country, and that they were unable to catch up on the supply of coal, and that there was a very strong demand for wood; that he had between 1,200 and 1,500 cords of wood on hand which I say that I knew he had considerable wood on hand, but that was his figures, and I advised Mr. Warner (?), or manager at El Reno, who was the superior officer to me, to whom those things are referred by me, that Mr. Chapman wanted a permanent siding established, that I told him I didn't favor a permanent siding there, as it was only about 3 miles to a station; that he was willing to pay the expenses of putting down and taking up a temporary siding to permit him to ship this wood as an alternative against having a work train or a train to remain out there with the cars while they were being loaded. I said there would be close to 100 carloads basing it on the amount of wood Mr. Chapman advised me he had; that it would go to Ardmore, Tishomingo, Oklahoma City, and Western Oklahoma points, and that quick action was necessary. I received a reply from Mr. Warner December 3d, saying that I should secure written agreement with Fred A. Chapman, that he will pay the entire expense of laying temporary track and taking same up, and he will agree that track was only to lay in places not to exceed six months from date constructed, you may proceed with the work, etc. That information was communicated to Mr. Chapman through our agent at Ardmore. The engineering department provided me with an estimate of the expense of constructing and taking up that track, which was \$346.50. As a result of the reply received through the agent at Ardmore, which I presume he obtained from Mr. Chapman, this written agreement that has been referred to was prepared, and Mr. Chapman signed and returned two copies of it, with a certified check for the \$350, and the track was constructed. There was shipped from that track 20 carloads of wood, and there was shipped into that track during the time that it was there 5 carloads of freight, 1 of iron, 1 of spuds and 3 of posts. Before taking up the track recently, I wrote to Mr. Chapman, asking him if he had completed the shipments for which the track was constructed, and then received quite a lengthy letter from him, protesting against its removal and outlining at considerable length the necessity for its remaining there permanently, which was the first I had ever heard or known of any intention or understanding or idea that that should be a permanent track. Again, before finally taking it up, I received instructions from our officials to do so, which action was exactly in accord with the agreement which had been entered into. I will say furthermore, as stated in the first part of my statement, that Mr. Chapman indicated that he desired a permanent track there. I told him I didn't favor it, and it was against our policy,

and gave him several reasons for it: First, the fact that it was very near a station on either side; second, the fact that it was not only expensive, but dangerous from an operating standpoint, to stop trains out in the country between stations, as it was necessary for men to go and protect them by a flag, and that this siding was on a hillside in any direction; that it would be difficult for a heavy train to start from there, and that our water stations were a long way apart, and for trains to stop for any considerable length of time it might be necessary to run for water, all of which would increase the hazard and expense of operation. Furthermore, that it was a spur track, and that we had to make a flying switch of these cars, setting them in or taking them up. I think Mr. Chapman will agree we were very diligent to furnish cars after the track was constructed. I told the conductors that we wanted that moved as quickly as possible, and, furthermore, that there was an urgent demand for this wood, and we were serving the purpose of the consumers by getting it out of there as quickly as possible."

The evidence further shows that complainant had been trying approximately two years to get a switch installed at this point, and had failed. Some one suggested to him that he use the emergency method on account of the shortage of fuel, and if he got it installed temporarily it would eventually become permanent. He did not get this information from any one with authority to speak for the railway company. The terms contained in the letter which he accepted were plain and unambiguous. It stated positively that the switch was to be only temporary; that it would be removed in six months. He paid out his money on this express agreement; therefore, he is not in a position to complain about the expense he incurred in installing it.

Notwithstanding the right of the Corporation Commission to ignore contracts in fixing rates, etc., we still maintain a wholesome respect for these obligations when fairly made, and the public is not injured by such contracts.

Section 10, art. 1, of the Constitution of the United States reads in part, "No state shall * * * pass any * * * law impairing the obligation of contracts." We believe that is a wholesome provision; the framers of that provision were wise even beyond their day and generation. A just application of that provision by all Commissions and courts will have a salutary effect on the integrity of the citizenship and stability of commercial relations.

[1] Mr. Chapman contends that under section 33, art. 9. of the Constitution he is entitled to this switch. The section reads as follows:

"Any person, firm, or corporation owning or operating any coal, lead, iron, or zinc mine, or any sawmill, grain elevator, or other industry, whenever the Commission shall reasonably determine that the amount of business is sufficient

to justify the same, near or within a reasonable distance of any track, may, at the expense of such person, firm, or corporation, build and keep in repair a switch leading from such railroad to such mine, sawmill, elevator or other industry; such railroad company shall be required to furnish the switch stand and frog and other necessary material for making connection, with such side track or spur under such reasonable terms, conditions and regulations as the said Commission may prescribe, and shall make connection therewith. The party owning such mine, sawmill, elevator or other industry shall pay the actual cost thereof. If any railroad company, after proper demand therefor is made, shall refuse to furnish said material for making said connection and put the same in place, or after the building of such switch, shall fail or refuse to operate the same, such railroad company failing and refusing for a reasonable time, shall forfeit and pay to the party or corporation aggrieved, the sum of five hundred dollars for each and every offense, to be recovered by civil action in any court of competent jurisdiction; and every day of such refusal on the part of the railroad company to operate such switch as aforesaid, after such demand is made shall be deemed a separate offense. Bunn's Ed. § 246."

Mr. Chapman insists that a farm comes within the class designated as "other industry." Webster's New International Dictionary defines "industry" as follows:

"Any department or branch of art, occupation, or business; esp., one which employs much labor and capital and is a distinct branch of trade; as, the sugar industry; the iron industry; the cotton industry; agriculture industries."

Under this definition farming or agricultural pursuits are an industry. If an industry it is a different or "other industry" than those already specifically named. However, it may not always be defined in the abstract, but depends partly on the degree. Agriculture is a distinct branch of the industries of this state. In the aggregate a large amount of labor and capital is employed. The framers of the Constitution used it in the relative rather than in the abstract.

The Supreme Court of Montana, in the case of Carver Mercantile Co. v. Hulme, 7 Mont. 566, 19 Pac. 213, held:

"'Industry' is defined by lexicographers to be 'habitual diligence in any employment, either bodily or mental;' and 'industrial,' as consisting in or pertaining to industry. These definitions are surely as applicable to the sale of goods, which is the chief business of a merchant, as to the transportation of the goods, which is the chief business of the express carrier. They are alike 'industrial,' and if the Legislature could authorize the formation of a corporation for one of these purposes, it could do for the other."

The United States Circuit Court for the District of Oregon, Wells Fargo & Co. v.

Northern Pac. Ry. Co., 23 Fed. 469, 10 Sawy. 441, held:

"Rev. St. § 1889, provides that the legislative assemblies of the several territories shall not grant private charters or special privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits, etc.; and it was objected that Wells Fargo & Co., a corporation organized by a special act of the territory of Colorado, and authorized to engage in the express business, could not come into Washington Territory to do business there, because it was not a corporation engaged in an industrial pursuit, or at least not engaged in such an industrial pursuit as mining or manufacturing; and hence the Legislature of Colorado had no authority, under such act of Congress, to grant to such corporation a charter. 'Industrial' is a very large word, and although it is associated with the words 'mining' and 'manufacturing,' it would be contrary to the manifest purpose of Congress to so restrain it as that the pursuit must be literally, or almost literally, a mining one or a manufacturing one. The express business is an industrial pursuit, and one which the territorial Legislature could provide for the formation of corporations to engage in." See Words and Phrases, First Series, vol. 4, p. 3570.

In the case of Agua Fria Copper Co. v. Bashford-Burmister Co., 4 Ariz. 203, 35 Pac. 983, the Supreme Court of the State of Arizona held:

"But it is evident that the territorial act is not in conflict with said section 1889, Rev. St. U. S. The term 'industrial pursuit,' for which the Legislature may authorize corporations to be formed, is a very broad expression. For instance, it was decided by Judge Deady in Wells Fargo & Co. v. Northern Pac. R. Co., 23 Fed. 469, that the express business was 'an industrial pursuit,' within the meaning of that term. Just why the sale of goods, mining supplies, etc., should be less 'industrial' than the express business would, in our opinion, be difficult to maintain."

[2] A railway company could not be required to install a switch for a coal, lead, iron, or zinc mine until the Corporation Commission shall first determine that the amount of business produced at such mine is sufficient to justify the same. To come within the class of "other industry" as used in this section of the Constitution, a farm would have to meet the same requirements as a mine. It must produce a sufficient amount of business to justify the same.

In the case of St. Louis & S. F. R. Co. v. Zalondek et al., 28 Okl. 746, 115 Pac. 867, this court held:

"Section 33, article 9, of the Constitution of Oklahoma was intended to provide special facilities for such industry or plant, and not for the general public. * * * Whenever the amount of business reasonably to be afforded a railway line by a gin plant is sufficient, after a switch or spur track has been constructed from

said railroad to such plant at the expense of its owner, to justify the same, said railway company may be required to furnish switch stand and frog and other necessary material for making connections with such side track or spur under such reasonable terms, conditions and regulations as the Corporation Commission may prescribe."

[3] In the case of *St. Louis & S. F. R. Co. v. Newell et al.*, 25 Okl. 502, 108 Pac. 818, in a very able opinion by Hayes, J., this court laid down the following rules in the syllabus:

"The prima facie presumption of the reasonableness, justness, and correctness of an order of the Corporation Commission, obtaining by reason of section 22, art. 9, of the Constitution, applies only to the facts found by the Commission, or established by evidence upon which the Commission failed to make a finding; and, where a fact material to the reasonableness, justness, and correctness of an order is lacking in the finding of facts made by the Commission, and is not supplied by the evidence, the presumption obtaining by reason of said section does not apply, and on review in this court such order cannot be sustained.

"An order of the Corporation Commission, requiring a railroad company to install telegraph service at one of its stations for the sole purpose of bulletining its passenger trains, made without any findings of fact or evidence as to the extent of the passenger traffic at said station, or the amount or approximate amount of the receipts therefrom, held, error, where it was shown that such additional service would require an increase in the expenses of the company for maintenance of the station of from 75 to 100 per cent."

[4, 5] The only findings of fact by the Corporation Commission are that the spur was installed under the contract by the terms of which it was to be removed at the expiration of six months; that the spur was located $2\frac{1}{4}$ miles from Mannsville and 3 miles from Russett; that the dirt road from said spur to either railway station above mentioned is in bad condition; that the grade at the point where said spur is located is 0; that the complainant paid the cost of laying and grading said spur; that there is sufficient demand and necessity for said spur to justify the railway company to allow the same to remain.

These findings of fact are all supported by the evidence except the last one. The evidence failed to disclose the amount of tonnage or the amount of money received by the railway company for the 25 cars of freight that were handled at this switch. It is probable that the railway company would not have installed the switch had it known only 20 cars of wood would have been loaded. Mr. Chapman obtained this concession from the

railway company on his representation that he had from 1,200 to 1,500 cords of wood. That is the amount set out in the letter which he signed accepting its terms. He said in his testimony the average carload of wood is 16 cords. According to the representation he made to the company to obtain this concession, he would have had approximately 90 cars of wood, whereas he had only 20 cars of wood. This would be approximately 360 cords. His evidence at the hearing is that they were then cutting wood, and had approximately 200 cords cut. This indicates he had shipped out practically all of the wood he had on hand when the switch was installed. His evidence of the number of cars he would ship out is all speculative, conjectural, and much of it highly improbable. He estimates the number of bushels of corn he would raise, the amount of hay he would put up, the number of hogs and cattle he would feed, and the number of cars it would require to ship out these various commodities. In feeding the number of hogs and cattle he estimates, he would use practically all of the corn and hay he estimated he would raise, and there would be none of that to ship out. His land extends from the switch on the east to one-half mile beyond Russett. Part of his products would be grown nearer Russett than the switch. The sandy roads he testified to would not be any serious inconvenience in shipping out his cattle from either Russett or Mannsville.

Viewed in its most favorable light, we do not think the evidence is sufficient to sustain the order of the Corporation Commission. It does not meet the requirement laid down in *St. Louis & S. F. R. Co. v. Newell*, supra.

It has been a year since the testimony was taken, and more than six months since the order was made by the Corporation Commission. If complainant's estimate of the amount of freight he expected to ship has materialized he can ask the Corporation Commission to make a further investigation, and then show how many cars complainant has actually shipped, either in or out of Russett or Mannsville from July 1, 1920, until the date of the hearing, and what the tonnage and freight charges amounted to. If the amount is sufficient to justify the installing of the switch, the Corporation Commission can then make its order under section 33 of article 9 of the Constitution.

The order of the Corporation Commission is hereby vacated and set aside.

All the Justices concur, except PITCHFORD, V. C. J., and KANE, J., not participating.

LAYLAND v. STATE. (No. A-3669.)

(Criminal Court of Appeals of Oklahoma.
Oct. 22, 1921.)

(Syllabus by Editorial Staff.)

Criminal law §1069(8)—**Appeal from misdemeanor conviction dismissed for want of jurisdiction, because not filed within 120 days.**

Under Rev. Laws 1910, § 5991, requiring appeal in misdemeanor cases within 60 days, and providing for court's extension for another 60 days, where a petition in error and case-made have not been filed within 120 days, the Criminal Court of Appeals is without jurisdiction, and the appeal must be dismissed.

Appeal from County Court, Johnston County; C. M. Crowell, Judge.

Will Layland was convicted of the crime of pointing a weapon at another, and appeals. Appeal dismissed.

T. G. Ramsey, of Wapanucka, and J. S. Ratliff, of Tishomingo, for plaintiff in error.
The Attorney General, for the State.

PER CURIAM. This is an attempted appeal from a judgment of conviction rendered against the defendant in the county court of Johnston county on the 6th day of August, 1919, wherein the defendant was convicted of the offense of pointing a weapon at another and sentenced to serve 3 months in the county jail and to pay a fine of \$50.

The petition in error and case-made were not filed in this court until the 9th day of December, 1919, more than 120 days after the rendition of the judgment. Section 5991, Rev. Laws 1910, provides:

"In misdemeanor cases the appeal must be taken within sixty days after the judgment is rendered: Provided, however, that the trial court or judge may, for good cause shown, extend the time in which such appeal may be taken not exceeding sixty days."

Petition in error and case-made not having been filed in this court within the 120 days within which an appeal may be taken in misdemeanor cases, where proper extension of time is granted by the trial judge beyond the 60 days, it is apparent that this court has not acquired jurisdiction of this appeal, and the same must be dismissed.

It is therefore ordered that the appeal be dismissed.

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In re JEWELL. (No. 4859.)

(Supreme Court of Montana. Oct. 3, 1921.)

Attorney and client §58—**Attorney suspended from office for 90 days for misappropriation.**

An attorney who misappropriated money and made reparation was disbarred for 90 days,

where court believed that ends of justice did not require extreme penalty of permanent disbarment.

Original proceeding to disbar John Jacob Jewell as an attorney and counselor at law. Suspension ordered.

L. A. Foot, of Chateau, for the State.

BRANTLY, C. J. This is an original proceeding against John Jacob Jewell, an attorney and counselor at law of the courts of Montana, to procure his disbarment. Upon issues joined upon the complaint by the answer of the accused, John McKenzie, Esq., was appointed referee to take the testimony and report his findings and recommendations. His report and recommendations heretofore submitted are now before the court for adoption or rejection. The malpractice or misconduct of his profession of which the accused stands charged consisted in his retention of, and failure to account for and pay over to J. C. Hauck, a client, and the person entitled thereto, the sum of \$2,745.19 from April 7, 1918, to February 15, 1919. The referee found that the accused had misappropriated this sum as charged.

At the hearing in this court the accused did not question the correctness of the finding of the referee, but submitted himself thereon for judgment. Indeed, by a reading of the testimony we find that, at the hearing before the referee, the accused made no evasion or denial of the charge, but frankly admitted his delinquency. It further appears that, though he failed to remit to Hauck when the money came into his hands, he at no time concealed the fact that he had collected it. When called upon by Hauck to account for it, he stated to him that he had misappropriated it, and offered to make reparation. He thereupon made reparation which Hauck deemed entirely satisfactory. It further appears that after he made reparation, Hauck employed him as heretofore.

It is not necessary to enter into a discussion of the facts. We may remark, however, that we are inclined to believe that, though the conduct of the accused was wholly inexcusable, the circumstances were such as to lead the members of this court to believe that the ends of justice do not require the extreme penalty of permanent disbarment, but that they will be served if the accused be suspended from his office for a definite time. The facts disclosed by the evidence as a whole present a case similar in many of its aspects to that of *In re Burke*, 55 Mont. 303, 176 Pac. 421. The referee recommends this disposition of the matter. In view of all the circumstances, we think we may adopt his recommendation.

It is therefore ordered that John Jacob Jewell be suspended from his office as at-

torney and counselor at law for the period of 90 days from this date. At the expiration of that time, he may be reinstated as attorney and counselor at law upon paying to the clerk of this court the costs incurred herein, and presenting to this court satisfactory proof of his good moral character in the meantime.

STATE v. DUCOLON. (No. 4819.)

(Supreme Court of Montana. Sept. 26, 1921.)

1. Criminal law \S 564(2)—Incumbent upon state to prove venue beyond reasonable doubt.

Where information for receiving stolen property charged that defendant received or came into possession of the property in a certain county, it became incumbent upon the state to prove the venue as thus laid by evidence which established the fact beyond a reasonable doubt.

2. Criminal law \S 563, 564(3) — Venue and corpus delicti may be established by circumstantial evidence.

In prosecutions for receiving stolen property, the venue and the corpus delicti may be established by circumstantial evidence, but the criminatory circumstances proved must be consistent with each other, and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis.

3. Criminal law \S 564(2) — Venue must be established beyond reasonable doubt.

In a prosecution for receiving stolen property, the fact that the crime was committed in county where alleged must be established beyond a reasonable doubt, and a conviction could not be based upon evidence which was merely stronger in support of contention that property was received in the county charged than that it was received in another county.

Appeal from District Court, Meagher County; E. H. Goodman, Judge.

Arthur Ducolon was convicted of receiving stolen property, and appeals. Reversed and remanded.

Matt F. Canning, of Butte, for appellant.

W. D. Rankin, Atty. Gen., and L. A. Foot, Asst. Atty. Gen., for the State.

HOLLOWAY, J. The defendant was convicted of the crime of receiving stolen property knowing the same to have been stolen, and appealed from the judgment and from an order denying his motion for a new trial.

The principal contention made is that the evidence is insufficient to sustain the conviction. In 1916, Maggie J. Jenkins owned the White Cabin ranch, in Meagher county, and owned and kept on the ranch some 76 head of

cattle, including 10 unbranded yearlings. She employed W. D. Brodock to feed and care for these cattle from early in January to about April 8, 1916. Mrs. Jenkins lived with her husband on another ranch about 4 miles distant, and when, on March 13, she visited the White Cabin ranch, she observed that her cattle were then all present. About April 8 Brodock quit the employment and left the ranch. On April 13, when Mrs. Jenkins again visited her ranch, she discovered that some 20 of her cattle, including the 10 yearlings, were missing. Investigation disclosed that the missing cattle had been driven through a gate in the inclosure where the cattle had been confined, and taken away. The tracks were followed to the ranch of the defendant, in Meagher county, where the surrounding circumstances indicated that the cattle had been branded. The tracks were then followed to the Hole in the Rock ranch, in Cascade county, where these 10 yearlings, each bearing a recent brand, were found on April 19, 1916, by the sheriff of Meagher county, his deputy, and John W. Jenkins, the husband of the prosecuting witness. The defendant was there present also, and, in response to an inquiry by the sheriff, claimed that he owned the 10 yearlings in question. When he was thereafter immediately arrested, he apparently became confused or scared, and asserted that W. D. Brodock was interested in the cattle with him. When confronted by Jenkins, who up to that time had remained in the background, defendant disclaimed any ownership of or interest whatever in these yearlings. The Hole in the Rock ranch was owned by Oliver Brodock, but was then under lease to W. D. Brodock, his son. So far as disclosed by the record, the Ducolon ranch was unoccupied. The defendant was at the Hole in the Rock ranch under some tentative arrangement with W. D. Brodock for a partnership, but which did not materialize as the ranch was sold by its owner.

[1] The foregoing is a fair summary of the evidence so far as it relates to the defendant's connection with the cattle in question. W. D. Brodock was charged with stealing the 10 yearlings, was tried and convicted, and the judgment affirmed by this court. *State v. Brodock*, 53 Mont. 463, 164 Pac. 658. The information before us charges that this defendant received or came into possession of these cattle in Meagher county, and it became incumbent upon the state to prove the venue, as thus laid, by evidence which established the fact beyond a reasonable doubt (*State v. Keeland*, 39 Mont. 506, 104 Pac. 513), for the rule is settled that, when property is received with knowledge that it has been stolen, and with the criminal intent defined by the statute, the crime is complete and the venue fixed (*State v. Pray*, 30 Nev. 206, 94 Pac. 218).

[2] There is not any direct evidence that

defendant received or came into possession of the cattle in Meagher county, or that he was in Meagher county at any time after March 13, when the cattle were present at the White Cabin ranch, until April 19, when he was returned there by the sheriff under arrest. It is true that in cases of this character the venue, and as well the corpus delicti, may be established by circumstantial evidence, but the rule is settled in this jurisdiction that—

"Where a conviction is sought upon circumstantial evidence, the criminatory circumstances proved must be consistent with each other, and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis." *State v. Woods*, 54 Mont. 193, 169 Pac. 39.

Whatever else may be said of the evidence before us, it fails to measure up to this standard.

[3] In his brief, the Attorney General suggests that the evidence is stronger in support of the contention that defendant received the cattle in Meagher county than that he received them in Cascade county. If this much be granted for the sake of argument, it does not aid the state's case. The fact that the crime was committed in Meagher county must be established beyond a reasonable doubt; that is, by evidence which excludes the idea that it was committed in Cascade county. The doctrine of bare preponderance of evidence has no place in the practice of criminal cases.

The other questions raised need not be considered, for, in the absence of evidence establishing the venue as laid in the information, the trial court was without jurisdiction to render this judgment.

The judgment and order are reversed, and the cause is remanded to the district court of Meagher county for a new trial.

Reversed and remanded.

BRANTLY, C. J., and REYNOLDS and COOPER, JJ., concur.

GALEN, J., being absent, takes no part in the foregoing decision.

MAJORS v. LEWIS AND CLARK COUNTY et al. (No. 4433.)

(Supreme Court of Montana. Oct. 3, 1921.)

1. Prisons \Leftrightarrow 18(1)—County entitled only to funds for "support" and "subsistence" of federal prisoners, not for upkeep of jail.

Under Rev. St. U. S. § 5547 (U. S. Comp. St. §§ 10548), requiring the Attorney General to contract with the authorities having control of prisoners in county jails for the imprisonment, "subsistence," and proper employment

of federal prisoners committed thereto, and Pol. Code 1895, § 3026 (Rev. Codes, § 9763), requiring the sheriff to receive and keep in the county jail any prisoners committed thereto by federal authorities, "provision being made by the United States" for their "support," the federal government is obligated to pay only for their "support" or "subsistence," which are synonymous terms, the state, by enacting such law, having abandoned its claim, under the territorial act of 1872 (Comp. St. 1887, div. 5, § 1275), to \$10 per month for the use and upkeep of the jail so that the county, as a political subdivision of the state, subject to legislative supervision and control, is bound by the statute to furnish its jail without compensation for the accommodation of the general government.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Support.]

2. Prisons \Leftrightarrow 17, 18(4) — Sheriff entitled to all moneys received from United States for support of federal prisoners in county jail.

Under Rev. St. U. S. § 5539 (U. S. Comp. St. § 10523), placing federal prisoners in county jails under the exclusive control of the officers in charge pursuant to state law (Rev. Codes, §§ 9010, 9759, and section 9764), the sheriff is the party with whom the United States Attorney General should contract, under Rev. St. U. S. § 5547 (U. S. Comp. St. § 10548), for subsistence of prisoners, so that, under a contract therefor with the United States, all the funds received inured to the benefit of the sheriff, though the contract was made in the name of the county; Rev. Codes, § 3138, providing a fee of 50 cents per day, relating only to the "board" of prisoners confined by state authority, and not to "support" or "subsistence" of federal prisoners within Rev. Codes, § 9763, and Rev. St. U. S. § 5547.

Appeal from District Court, Lewis and Clark County.

Action by Edward J. Majors against the County of Lewis and Clark and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

McIntire & Murphy, of Helena, for appellant.

L. A. Foot, Asst. Atty. Gen., for respondents.

HOLLOWAY, J. This action was brought to recover money alleged to have been received by the defendant to the plaintiff's use.

The complaint sets forth that from January, 1917, to January, 1919, plaintiff was sheriff of Lewis and Clark county; that during his term there were confined in the Lewis and Clark county jail a large number of persons committed thereto by judgments or orders of the federal authorities for this district; the total number of days during

which such persons were so confined amounted to 7,886; that by agreement the United States paid for the subsistence of such persons 75 cents per day, amounting to \$5,914.50; that this amount was received by the defendant county and was the reasonable compensation for the services rendered and the actual amount expended by plaintiff therefor; that the county has paid to plaintiff only \$3,942, or at the rate of 50 cents per day per person so confined, and has retained the balance, the equivalent of 25 cents per day, and has refused to pay the same or any part thereof to plaintiff. The prayer is for \$1,971.50. A general demurrer was sustained to this complaint, judgment entered dismissing the action, and plaintiff appealed.

The trial court proceeded upon the theory—indicated in a memorandum opinion—that, since the statutes of this state then in force limited the compensation of the sheriff for board of prisoners to 50 cents per day per prisoner, plaintiff could not recover more than that amount.

The one question presented for determination is: To whom does the money paid by the United States for the subsistence of federal prisoners belong? It is beyond controversy that the United States cannot compel any state or territory to care for federal prisoners, and that the consent of the state or territory, as the case may be, to do so for the accommodation of the federal government, is necessary. By joint resolution of the first Congress, September 23, 1789 (1 Stat. 96), the several states were requested to consent to the use of their common jails for the detention of federal prisoners and to require their proper officers to receive, support, and safely keep such prisoners until discharged in due course of law, the United States to pay for the support of such prisoners and also pay 50 cents per month for each prisoner so confined therein for the use and upkeep of every such jail so used.

So far as our information goes, every state has acceded to the request expressed in the joint resolution above to the extent that federal prisoners may be confined and cared for in local jails. By an act approved January 12, 1872 (Comp. Stat. div. 5, § 1275), the territory of Montana expressed its consent, but undertook to define the terms upon which the privilege might be exercised, viz. that the United States should pay for the support of such prisoners and the legal fees of the jailers, and also \$10 per month to the county whose jail was so used, for the use and upkeep of the jail.

[1] Whatever may be said of the legislative policy expressed in these early statutes, the attempt by either the federal government or the territorial Legislature to prescribe specific compensation for the use of local

jails was abandoned. Section 5547, U. S. Revised Statutes (U. S. Comp. St. § 10548), provides:

"The Attorney General shall contract with the managers or proper authorities having control of such prisoners, for the imprisonment, subsistence and proper employment of them."

Section 3026, Political Code 1895, provided:

"The sheriff must receive, and keep in the county jail, any prisoner committed thereto by process or order issued under the authority of the United States, until he is discharged according to law, as if he had been committed under process issued under the authority of this state; provision being made by the United States for the support of such prisoner."

The provisions of section 3026 have been in effect continuously since their enactment and are now found in section 9763, Revised Codes.

This state might have refused to permit its jails to be used for the incarceration of federal prisoners unless compensation was made therefor, but it saw fit, as it had the right to do, to relinquish the claim asserted in the territorial statute above, and to limit its demand to the single item included in section 9763, viz. provision for the support of such prisoners, and since Lewis and Clark county is but a political subdivision of the state and subject to legislative supervision and control (*Hersey v. Neilson*, 47 Mont. 132, 131 Pac. 30, Ann. Cas. 1914C, 963), it is bound by the statute, and cannot complain that it is required to furnish the use of its jail, without compensation, for the accommodation of the general government.

[2] It is perfectly apparent from this brief history that the term "support" is employed in section 9763 as synonymous with the term "subsistence" employed in section 5547, U. S. Revised Statutes. Indeed, the two terms are synonymous according to all standard reference works. Neither argument nor authorities can fortify the conclusion which is compelled, that it was the intention of the United States and this state that, by contract, the former should pay for the support or subsistence only of federal prisoners confined in a county jail. The statute (section 5547) above requires that such contract shall be made by the Attorney General for the United States, on the one part, with the person or body having the management and control of such prisoners, on the other. By this process of elimination the controversy before us is reduced to an answer to the inquiry:

To whom is reference made in the phrase "the managers or proper authorities having control of such prisoners"? It cannot be con-

tended that there is any subtle meaning concealed in the language employed. The terms are in common use and generally understood, but any possible controversy over the construction of the phrase is obviated by express legislative declaration. Section 5539, U. S. Revised Statutes (U. S. Comp. St. § 10523), provides that, whenever any federal prisoner is confined in a county jail, he shall be under the exclusive control of the officer having charge of such jail pursuant to the law of the state in which the jail is situated. Section 3010, Revised Codes, imposes upon the sheriff the duty to "take charge of and keep the county jail and the prisoners therein." Section 9759, Revised Codes, provides that "the common jails in the several counties of this state are kept by the sheriffs of the counties in which they are respectively situated," etc. Section 9764, Revised Codes, provides that a sheriff to whose custody a federal prisoner is committed is answerable for his safe-keeping in the courts of the United States, according to the laws thereof. Under like statutory provisions, this court declared that the sheriff has the custody of the jail of his county and the prisoners therein. He is to keep the prisoners, and he is personally liable for their escape if it occurs. *Lloyd v. Board of Commissioners*, 15 Mont. 433, 39 Pac. 457.

From these considerations it follows as of course that the sheriff is the proper party with whom the contract is to be made for the subsistence of persons committed to the jail by federal authority, and this is the conclusion reached by the courts which have been called upon to construe statutes similar to our own. In *re Kays* (D. C.) 35 Fed. 288; *Avery v. Pima County*, 7 Ariz. 28, 60 Pac. 702. It is altogether immaterial that in this instance the contract was made in the name of Lewis and Clark county. It inured to the benefit of the plaintiff. The funds received from the United States were not in any sense public funds and had no place in the county treasury. They were received to the use of the plaintiff, to whom they belonged under the contract and upon whom the burden was imposed to provide subsistence for the person so incarcerated.

The trial court fell into error in assuming that section 3138, Revised Codes, relates to the support of persons confined in a county jail by the federal authority. That section has to do only with the board of such prisoners as are confined by state authority. No one could contend seriously that the term "board" used therein means the same as the term "support," employed in section 9763, Revised Codes, or the term "subsistence," used in section 5547, U. S. Revised Statutes.

The complaint states a cause of action, and the court erred in sustaining the demurrer.

The judgment is reversed, and the cause

remanded for further proceedings not inconsistent with the views herein expressed.
Reversed and remanded.

BRANTLY, C. J., and COOPER, REYNOLDS, and GALEN, JJ., concur.

STATE v. McILWAIN. (No. 4831.)

(Supreme Court of Montana. Oct. 3, 1921.)

Criminal law § 1159(4)—Conviction of rape based upon improbable story reversed, and case dismissed.

A conviction of rape will be reversed and prosecution dismissed where the testimony of the prosecutrix was so wholly unworthy of credit that it ought not to be accepted as true by any reasonable person.

Reynolds, J., dissenting in part.

Appeal from District Court, Blaine County; Frank E. Carelton, Judge.

Robert James McIlwain was convicted of rape, and appeals. Reversed and remanded, with directions to dismiss.

David J. Ryan and Freeman & Thelen, all of Great Falls, for appellant.

W. D. Rankin, Atty. Gen., and L. A. Foot, Asst. Atty. Gen., for the State.

BRANTLY, C. J. The defendant was convicted of the crime of rape committed upon a girl under the age of 18 years. He has appealed from an order denying his motion for a new trial. He relies for reversal upon several assignments of error; the principal one being that the verdict is contrary to the evidence. As we have concluded that the court erred in overruling the motion on this ground, it will not be necessary for us to consider any of the other assignments.

We shall not set out the details of the story told by the prosecutrix, because they are so revolting and disgusting that they would serve only to offend the sensibilities of the intelligent reader. It will be sufficient to say that, taken as a whole, the story is, in our opinion, so wholly unworthy of credit that, standing alone, it ought not to be accepted as true by any reasonable person.

Besides the testimony of other witnesses tending to impeach the prosecutrix and to show that the defendant could not have committed the act charged, because there was no opportunity for him to do so, Dr. O'Malley, called in as a medical expert, who had made physical examination of the prosecutrix within 48 hours after the time when the act was alleged to have been committed, expressed the opinion that, in the light of what he observed at the time he made his examination, her story as to what occurred

(201 P.)

was impossible under any circumstances. What was said by this court in *State v. McMillan*, 20 Mont. 407, 51 Pac. 827, a case of the character similar to this, is in point and is entirely applicable to this case:

"It is the well-settled general rule of law, especially in this jurisdiction, that a verdict will not be disturbed when there is simply a conflict in the evidence, where there is evidence sufficient to support the verdict. But this record does not present simply a conflict in the evidence. It is insisted that the uncorroborated evidence of the prosecutrix, upon which the conviction was had, is so unreasonable, unsatisfactory, and contradictory as to unavoidably leave in the mind of any impartial person a reasonable doubt, when considered from a legal standpoint.

"When the testimony is flatly and positively contradicted, there may be said to be a conflict in the evidence. But when the testimony is not only flatly contradicted, but appears to be unnatural, improbable, and unreasonable as to render belief impossible, it is more than a simple conflict, and must necessarily leave in the mind of an impartial, deliberate, and intelligent person a reasonable doubt.

"Viewing evidence from a legal standpoint, we are of the opinion that we have just this kind of a case presented by this appeal."

We are therefore of the opinion that not only should the order be reversed, but that the cause should be remanded to the lower court, with directions to dismiss it and discharge the defendant.

It is so ordered.

COOPER and GALEN, JJ., concur.

HOLLOWAY, J. The story told by the prosecuting witness is so inherently improbable that it is unworthy of credence. For this reason alone I concur in the reversal of the order.

REYNOLDS, J. I concur in the reversal of the order, but think the case should be sent back for a new trial by reason of prejudicial error in the exclusion of evidence. I cannot concur in the majority opinion to the effect that the story of the complaining witness is so unnatural and improbable that there was nothing substantial to be passed upon by the jury. I am satisfied that one feature of her narrative as to what took place cannot be believed; but the undisputed facts show corroboration of her statements by a general laxity of conduct on the part of all concerned and by the fact that she was the only one of the party of six who registered for a room in the hotel on the night in question, while her evidence showed opportunity for the commission of the criminal act and, in general, was a reasonable and consistent statement of alleged events. It is not within the province of this court to hold that no substantial foundation exists for the verdict, unless her story is so in-

herently improbable, or is so nullified by contradictions, that no fair-minded person can believe its substance. Even though she was guilty of falsehood in a part of her testimony, it does not necessarily follow that the crime was not committed, or that she, as a matter of law, ought to be held unworthy of credit. These are questions for the jury. *State v. Gaimos*, 53 Mont. 118, 162 Pac. 596. In my opinion, the portion of her story which the members of this court conceive to be unquestionably false might be accepted by the jury as false, and still, from other substantial evidence left in the record, the jury, in judging of her credibility, might well have found that the essential elements of the crime were established.

SHAFFROTH v. THE TRIBUNE. (No. 4440.)

(Supreme Court of Montana. Oct. 3, 1921.)

Libel and slander § 19, 21—Words in libelous article must be susceptible of but one meaning.

Words used in an alleged libelous article must be susceptible of but one meaning to constitute libel per se, and the libelous matter may not be segregated from other parts and construed alone, and F. S. could not recover from a newspaper for publishing an item that G. S. had pleaded guilty to grand larceny and was awaiting sentence, by reason of the fact that the name of F. S. was used in the heading.

Commissioners' Opinion.

Appeal from District Court, Cascade County; H. H. Ewing, Judge.

Action by Fred Shaffroth against The Tribune. Judgment for defendant, and plaintiff appeals. Affirmed.

E. A. Smith, of Great Falls, for appellant.

Freeman & Thelen and Norris & Hurd, all of Great Falls, for respondent.

JACKSON, C. Fred Shaffroth sued The Tribune, a Great Falls newspaper, for libel, alleging the libelous matter to be as follows:

"He Pleads Guilty to Grand Larceny

"Fred Shaffroth Admits Theft of Piece of Machinery from Great Northern.

"George Shaffroth is now awaiting sentence for grand larceny, to which charge he yesterday entered a plea of guilty in the district court before Judge H. H. Ewing. Shaffroth was arraigned upon an information which charged him with the theft on Nov. 10 of an Avery tractor magneto, valued at \$90, the property of the Avery Company, which was taken from the possession of the Great Northern Railway. He appeared without counsel and waiving all his rights to time he entered a plea of guilty and was remanded to the custody of the sheriff to be brought up later for sentence."

To the amended complaint the trial court sustained a general demurrer, and some time thereafter rendered judgment for the defendant, plaintiff standing on the amended complaint. From the judgment plaintiff appeals. The error predicated will be disposed of in an analysis of the complaint.

Reading the article alleged to be libelous, and viewing it in the light most favorable to plaintiff's contention, produce but mental confusion as to the name of the accused. Taking the entire statement "as a stranger might look at it without the aid of the knowledge possessed by the parties concerned" can leave no doubt but that the accused who admitted the theft is George Shaffroth, and not Fred.

It is well-settled law that the words used in the alleged libelous article must be susceptible of but one meaning to constitute libel per se, and that the libelous matter may not be segregated from other parts and construed alone. *Paxton v. Woodward*, 31 Mont. 195, 78 Pac. 215, 107 Am. St. Rep. 416, 3 Ann. Cas. 546; *Brown v. Independent Pub. Co.*, 48 Mont. 374, 138 Pac. 258.

The latter case is determinative of the question involved here. The complaint does not state facts sufficient to constitute a cause of action.

For the reasons herein contained, we recommend that the judgment appealed from be affirmed.

POORMAN, C. C., and SPENCER, C. concur.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

STATE v. RIGGS. (No. 4839.)

(Supreme Court of Montana. Oct. 10, 1921.)

1. Homicide \S 228(1)—Rule as to proof of corpus delicti stated.

Under Rev. Codes, \S 8298, forbidding conviction of murder or manslaughter unless the death and the fact of the killing by defendant as alleged are established as independent acts, the former by direct proof and the latter beyond reasonable doubt, proof of the corpus delicti involves establishment of the fact that a murder has been committed, but it proves neither the identity of the person alleged to have been killed, nor the killing by the person accused.

2. Homicide \S 236(1)—Criminal agency must be established.

To sustain conviction of murder, proof of criminal agency is as indispensable as proof of death, and where it is shown by the evidence on one side that death may have been accidental, or may have been the result of natural

causes, or due to suicide, and on the other side that it was through criminal agency, a conviction cannot be sustained.

3. Homicide \S 236(1)—Evidence held insufficient to show cause of death.

Evidence held insufficient to sustain a conviction of murder, in that it did not show the criminal agency involved, or the manner in which the death of deceased was accomplished.

4. Criminal law \S 308—Act attributable to criminal or innocent cause presumed innocent.

Where an act may be attributed to a criminal or an innocent cause, it will be attributed to the innocent cause.

5. Criminal law \S 552(1)—"Direct evidence" and "circumstantial evidence" distinguished.

In "direct evidence," witnesses testify directly of their own knowledge of the main fact or facts to be proven, while "circumstantial evidence" is the proof of certain facts and circumstances in a given case from which the jury may infer other connecting facts which usually and reasonably follow according to the common experiences of mankind.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Circumstantial Evidence; Direct Evidence.]

6. Criminal law \S 552(2) — Quantum of circumstantial evidence stated.

Where conviction is sought on circumstantial evidence, the criminatory circumstances must be consistent with each other, and point so clearly to the guilt of accused as to be inconsistent with any other rational hypothesis.

7. Criminal law \S 1159(2)—Appellate court limited in reviewing evidence.

The Supreme Court is limited on its review of evidence to the examination of the record to determine whether there is any substantial evidence to justify the verdict.

Brantly, C. J., and Reynolds, J., dissenting.

Appeal from District Court, Yellowstone County; Charles A. Taylor, Judge.

George T. Riggs was convicted of murder in the first degree, and appeals. Reversed and remanded, with order to dismiss.

H. C. Crippen, and Nichols & Wilson, all of Billings, for appellant.

L. A. Foot, Asst. Atty. Gen., for the State.

GALEN, J. On the night of March 22, 1918, Matie Riggs, wife of the defendant, was found dead on the kitchen floor of her home. Resulting therefrom, the defendant was charged by information filed in Yellowstone county with the crime of murder in the first degree. This is the second time this case has been considered by this court on appeal. On the first appeal, which was taken from a judgment imposing the death penalty, and from an order denying motion for a new trial, the cause was by controlling opinion remanded for new trial, because of in-

sufficiency of the evidence. *State v. Riggs*, 56 Mont. 393, 185 Pac. 165. From a perusal of the facts recited in the former decision, it would appear that the evidence adduced on the second trial was not materially different from the first. The second trial resulted in a verdict of guilty of murder in the first degree, wherein defendant's punishment was fixed at life imprisonment. The case is now before us as a result of the second trial and the verdict and judgment rendered and entered therein, the appeal being from the judgment and order denying defendant's motion for a new trial.

Ten errors are specified as reason for reversal, but in our view only one is necessary for consideration in order to make complete and satisfactory disposition of the appeal, namely: Is the evidence sufficient to sustain the verdict and judgment?

It appears that the defendant and his wife intermarried at Billings, Montana, in 1901, the wife at that time having an infant child, a girl, named Opal. Nine children were born of the marriage, seven of whom were living at the time of the wife's death. At that time Opal, defendant's stepdaughter, was 18 years of age, and of the living children of the marriage, Grace was 15, Chester 13, Bertha 12, Ida 5, Calvin 3, Eddie and Roy being younger than Chester, and older than Calvin. At the time of her death, the wife was 39 years of age, and apparently in good physical condition, and the defendant was 47. The defendant, his wife and children, including Opal, were living, and for 7 years had lived, on a 40-acre unit of the "Huntley Reclamation Project" about six miles from the town of Huntley, in Yellowstone county. Their place of abode consisted of a two-story frame house of three rooms. There they lived until the eventful night in March, 1918, and by thrift and industry had accumulated considerable property, the wife at all times doing her full part about the home and farm. On the ground floor there were two rooms, one of which was used as a kitchen and dining room combined, and the other as a living room wherein the wife of the defendant had her bed and slept. The second story comprised one large bedroom, 19 feet 4½ inches east to west, by 17 feet 4½ inches north to south, located immediately over the living room, in which second story room the defendant and the children slept in four separate beds. The second story was reached by a stairway 3 feet 1 inch in width, running up the west inside wall of the living room, entrance to which stairway was through a doorway located in the southwest corner of the living room. This door was used to shut off the stairway and the sleeping quarters upstairs from the ground floor rooms. At the foot of the stairway and immediately opposite the entrance thereto, was a window in the west side wall of the house, 24 inches wide and 54 inches high. There was no closure of

the stairway on the second floor. The two-story portion of the house was covered by a gable roof, the kitchen being in a lean-to on the south. The kitchen was connected with the living room by a panel door. There were two windows in the bedroom upstairs, one on the east end and the other on the west, both being of the same dimensions, 24 inches by 54 inches, the west window being located directly over the stairway. Such east window was almost directly over a similar window in the living room. Hog wire was attached to the east side of the house up to the second story window, and had been there in place for a long while, used for the training of vines. The dimensions of the kitchen were east to west 19 feet 3 inches and north to south 11 feet 9 inches. In the southwest corner of the kitchen the pantry was located, a room 4 feet 9 inches long by 6 feet 7 inches in width. The range for cooking purposes was in the kitchen at the northeast corner of the pantry, and the nearest point of such range from the door leading into the living room was 7 feet 3 inches. To the southeast corner of the kitchen there was a dining table and a bench used to sit at the table when eating. Immediately to the rear of the range, to the west and north of the pantry, was a cupboard in the kitchen, and by it to the north, on the west side of the kitchen there was a wash bench. On the wash bench was a one gallon coal oil can, partially filled used to kindle fires and fill the lamps. It was in the place where generally kept. There was an oil lamp on the kitchen table. The east second story bedroom window was 12 feet 2 inches from the ground. Several matches were found strewn over the top of the range.

The defendant usually slept alone in a bed in the second story bedroom, located in the southeast corner of the room, furthest removed from the top of the stairway. Not infrequently he would take the youngest child, Calvin, to bed with him, although most of the time Calvin would sleep downstairs with his mother. The night in question the defendant slept in the bed usually occupied by him, and took Calvin to bed with him. Opal slept in a bed with Eddie on the south side of the room, just west of the bed occupied by the defendant; Grace, Bertha, and Ida occupied a bed on the north side of the room, near the top of the stairway, in the northwest corner thereof, and Chester and Roy slept in a bed in the northeast corner of the room. The bed in which the wife slept was a standard size double bed in the southeast corner of the living room, directly across that room from the stairway entrance, a distance of 11 feet 2 inches, and the head of the bed nearest the door leading into the kitchen was 20 inches. From the knob side of the stairway door to the center of the door leading to the kitchen was a distance of 6 feet 9 inches. There was a well containing

water with pump attached, on the west side of the house 16 feet therefrom, and at a distance of 31 feet south of the kitchen, the root house, facing west, was located.

The wife was insured for \$1,000, and the house and contents were insured for like amount. The defendant had been negotiating with a neighbor, Looney Stockton, to buy the latter's farm adjoining that owned by the defendant, for the sum of \$4,000. On the day before Mrs. Riggs' death, the defendant told Stockton he would buy the latter's farm, provided he (the defendant) could get the money, and on that day the defendant told Stockton he would endeavor to secure a loan on both places, and on the same day the defendant had spoken to S. E. Dove, a banker at Huntley, about getting the money. He also proposed trying to obtain a federal loan, and requested Mr. Stockton to go down to Osborn to see Mr. Bowman about securing the amount required on the security of both farms.

The defendant and his wife had quarreled from time to time, principally over the disciplining of Opal, the oldest child, the defendant's stepdaughter. At the time of her death, the deceased was clothed in a suit of fleece lined cotton underwear, and over that an outing flannel nightgown, fleeced on both sides, and both garments were highly inflammable. She was found lying dead and badly burned about the body, on the bare floor of the kitchen between the cooking stove and the dining table. There was evidence of three quarrels between the defendant and his wife, widely separated in point of time, but only Mrs. Smith and Opal, both witnesses being hostile to the defendant, remember about any quarrel of any seriousness, and there is no evidence of any threat of any character ever being made by the defendant against his wife. Neither Grace nor Chester know anything of any serious quarrels between their mother and father, and they did not seem to attach any importance to any disagreement between them. All agree that on the evening of the tragedy they were friendly and everything about the house was peaceful. There had been no quarrel between the defendant and his wife for more than a month prior to that time. After supper the evening chores were done outside of the house by the defendant, Opal, and Chester. Upon the completion thereof, they all returned into the house. At that time, which was about 8 o'clock in the evening, the mother and the little child, Calvin, had retired, Calvin being in the bed in the living room with his mother. It was the custom of the mother to retire quite early. The smaller children, as usual, undressed in the kitchen and their clothing was left there, either on the floor or on a chair, and some thereof was partially burned that night. The defendant sat by the kitchen table reading a paper, and

some of the children were working at their school lessons, Grace, Chester, Bertha, Eddie, and Roy being at that time attending school. Chester was working on the dining room table at arithmetic, and was the last to go to bed that night. He retired about one-half hour later than his father—after 9 o'clock. The defendant retired about 8:30. Opal says she was asleep when her father and Chester came to bed. As was his custom, the defendant that night took his shoes off in the kitchen, and left them there before going upstairs to bed, and Chester also took off his shoes before retiring and left them in the kitchen. Chester, for the state, testified:

"Papa woke me during the night. He hollered at me and told me he believed there was smoke in the house. I don't know whether I made any reply. I was sleepy, and I might have said something. I might have said I didn't believe I smelled smoke, or something like that. My father didn't immediately get up, but he didn't stay in bed very long after that. He then said he believed there was smoke in the house, and got up and went down stairs. He went down the same stairs I came up. I don't know how far down he went. I don't think he called for any one as he went down. He didn't say anything to anybody as he was going or while he was down there at that time. He came back up and told us the house was on fire, and that we would have to get out the east window, that there was so much smoke down there we couldn't get out that way. He then opened up the window. It opens to the inside and is on hinges. He also took off the screen that was on it. During this time I got up and dressed. I didn't see Calvin around there any place up stairs after my father had told me that the house was on fire. After my father got the window open, I got down on some hog wire that was tacked up to the side of the house, to the bottom of the bedroom window. I went out of the window first and Gracie came out next. I don't remember who came out of the east window next.

"After I got down out of the window, I went down around back of the cellar to get the ladder. I got it and brought it around and threw it down on the side of the house, because papa told me I didn't need it. I don't know what papa was doing at that time. He was up stairs when he told me to throw the ladder down, that he didn't need it. I don't think any bedding had been thrown out; that was thrown out right after I brought the ladder out. Papa threw the bedding out. He would throw out some of the bedding and then he handed out some of the children. Gracie took them about halfway, and then handed them to me, until they were all taken out from up stairs. The last of the children who came out from up stairs was Opal. Papa came out next. He told me to take the bedding down to the cellar, and that was done. It was taken to the cellar for the little kids to stay on till morning. It was thrown in there and made a bed out of. After my father got out of the upstairs window, he went down cellar. He just came down and asked how the little kids were, and then went back up. I don't know who was in the cellar when my father

came down. Most of the children were down there.

"While my father was throwing out the bedding, besides getting the ladder, I went around and looked in the south window of the kitchen. When I looked in at that window, I saw the fire. It wasn't a very large fire; it wasn't very high; it wasn't up to the window. It wasn't very far from the window where I was looking in—about the width of the door into the pantry. I looked into the window just before I went around to get the ladder. All of the articles which had been thrown down from up stairs were carried around to the cellar at the time my father got down. Besides bedclothing, he threw down the top till of his trunk. I don't know who carried that around, but it had been carried around when my father got down. I am sure of that. I don't know who carried Calvin around that evening.

"After my father had gone down in the cellar to oversee the bedding down of the children, he came back and told me to go and get Mr. Moyer to come over. I then went over to Mr. Moyer's place, which is about a quarter of a mile east from our place. It was between 5 and 10 minutes after I had gotten down from up stairs that my father told me to go over to Mr. Moyer's. It was approximately between 10 and 20 minutes that it took me to go over to Mr. Moyer's, get him, and return. When we came back, Gracie and Opal were out by the house. Just before we got through the fence, I saw my father in the road, going south. When Mr. Moyer got to the house, he said we might just as well try and put out the fire, and Gracie and Opal handed him some water and he got inside the house and took it in and put it on the fire. He used four buckets of water in putting out the fire. They wasn't clear full. He went in the window marked 'west living room window' on State's Exhibit C; also marked 'stairway window' on State's Exhibit D. I helped in putting out the fire. I went out to the granary and got another bucket and pumped it full of water. After Mr. Moyer had put out the fire, he came outside. He came out through the window that he went in at. After Mr. Moyer came out, we didn't do anything until papa came. It wasn't very long before papa came back. After he came back, we waited around a little bit, and then pretty soon he sent me up to Stockton's. I don't think any of us entered the house before I went to Stockton's. My father sent me to Mr. Stockton's because he wanted him to go into Huntley and call up the coroner. I got Mr. Stockton. We didn't return together; I came back first.

"When Mr. Stockton and I came back, papa and Mr. Moyer and the rest of the children were at our place. I don't know what was done, if anything, after I came back. I don't know whether any of them went into the house then. I don't know whether Mr. Moyer went into the house. I went into the house that night, after the fire, when Mr. Stockton was down there. I think Mr. Moyer went in first after Mr. Stockton came, and unlocked the two doors—east and west kitchen doors. That is the room in which my mother was lying. I went into the room then; also papa and Opal. I think my papa was saying: 'My God! My God!' or something like that. I saw my mother there that night after the fire, lying on the floor, between the stove and table. She was dead at the time

I saw her lying there. She was burned. That is the same place where I saw the fire burning at the time I looked in at the kitchen window. After I saw my mother lying there, dead, Mr. Moyer handed me my shoes, and I went outdoors and put them on. I spent the night down in the cellar. The next morning I went up to Mr. Stockton's and stayed until noon that day. I wasn't at home at the time the coroner came down. I had my breakfast and dinner that day at Mr. Stockton's. I didn't see my mother any more after the night that I saw her there on the kitchen floor. Mr. Stockton or Mr. Moyer didn't come down into the cellar after I went down, after the fire was out. My father came down there. He didn't sleep that night. He was just around down in the cellar, and once in a while he would ask how the little kids was. At the time that I started over to Mr. Moyer's, my father hadn't gone to any of the windows of the house, so far as I know, and had not attempted in any way to rescue her. I knew at that time that my mother was not out. The next morning after the fire I went up to Mr. Stockton's and stayed until after dinner."

And on cross-examination he testified:

"The baby, Calvin, didn't always sleep down stairs with my mother. When he didn't sleep there, he slept up with papa. This night of the 22d of March wasn't the first time that my father had taken Calvin up to bed with him. He did that frequently. There wasn't anything unusual in the fact that my father took his shoes off and left them down stairs that night. That is where he always pulled them off."

At the time when Chester was returning to the house with Mr. Moyer, when he saw his father going down the road, it appears that the defendant was on his way to Stockton's farm, about one-half mile distant; that the defendant was in his stocking feet, and actually went to Mr. Stockton's, knocked on the door, and hollered, "My house is on fire!" and left immediately without giving his name.

Opal's testimony respecting defendant's first waking up and suggesting there was a fire and then going down the stairs to the door leading into the living room and returning back to the bedroom upstairs, and getting the children all out of the house through the east second story window, is substantially the same as Chester's. Further she testified:

"After he had gotten down on the ground, he loafed around there a while. He didn't do anything until he sent Chester over to Mr. Moyer's, and then he busted in the window. Just before he sent Chester over to Moyer's he went to the cellar, to see if the children were all right, and helped make a bed down for them. Chester was around there some place. I would judge it was about 20 minutes after my father got down from upstairs before he started Chester over to Moyer's, and during that time he had just been standing around and seeing about the children. After he had started Chester over to Moyer's, he broke in the window with the axe that was out by the coal pile. He didn't do that right afterwards. He never went to any of the windows to see

anything about the fire or my mother, and he never called for her while he was standing around there during that 20 minutes. He and I did not have any conversations there on the outside while we were standing around, before Mr. Moyer came back, about trying to get my mother out. I didn't say anything to him at all about getting my mother out. I presume it was about 10 minutes after Chester had gone to Moyer's that my father went and got the axe and broke out the window. He went to the coal pile to get the axe. I suppose he went first right straight to the window with the axe—I couldn't say. I don't recall where I was at the time. It was the west window, the stairway window, that he broke out. That window leads into the stairway. That is the stairway up which I had gone to go to bed that night, and the stairway down which my father had come to look at the fire. That is the only stairway in the house. He got inside there and called mother. He called her 'Matie.' That is the first time that he had called her that night. He broke the door too—the inner door, inside the stairway. That is the door marked 'stairway door', on state's Exhibit D. He hit that with the axe, and then he came back out. He broke the door up close to the knob. He didn't break it clear down. He said the smoke was so dense he couldn't go on any farther, and he just came outside and loafed around till Mr. Moyer came. It was just a few minutes after he broke this window out before Mr. Moyer came. He started out, just before Mr. Moyer came, for Stockton's. He did not make any other effort, than just breaking in this west window and that door to get my mother out. After my father came out of that window, or about the time he came out, he said if my mother was in there, she was dead already. I believe that was when he made that remark. He didn't say whether or not he would be able to get her out.

"I was present when Mr. Moyer and Chester came back. Mr. Moyer took and grabbed a bucket of water and went inside and poured it on the fire. Grace and Chester were there at that time. Mr. Moyer went into the house by the stairway window, the one that is broke there. That is the same window that my father had just knocked out. That leads into the stairway. He opened up the door and went through into mother's bedroom to where the fire was. He went right through what is marked 'living room' on 'state's Exhibit C,' and on down into the kitchen. Grace and I drew water for Mr. Moyer. Mr. Moyer used three buckets of water in putting out the fire. About three trips were made by Grace and myself. Mr. Moyer didn't go out of the house during the time while he was putting out the fire, from the time he went in with the first bucket. He came to the stair door—the stair door that had been struck by my father.

"After Mr. Moyer had put out the fire, he came and opened up one of the doors and lit a light inside. At that time, my father was on the outside. He hadn't returned yet from Mr. Stockton's. It was just a few minutes afterwards. Mr. Moyer opened up one of the kitchen doors after he was inside of the kitchen. He opened it from the inside. That was the west door, and it is near the window that was broken out by my father. My father returned just a few minutes afterward, and Mr. Stockton was with him. Soon after that, Mr. Van-

dersea and Mr. Wymer came. After my father had returned, I went into the house; also Chester, Mr. Riggs, and Mr. Stockton. I didn't notice what my father did at that time. He made the remark, 'My God! My God!' several times. I never noticed whether he came up to examine or look at my mother. My mother was lying between the table and stove on the floor, and she was burned from her head down to her knees, nothing but just a cinder, and from her knees on down to her feet was burned in big blisters. I didn't do anything after I went in. I wasn't in there very long, about five minutes. Nothing took place then, only everybody was taken out of the house, and the doctor was sent for. Mr. Stockton went after the doctor. After that, I went down to the cellar, where the other children was. My father went down in the cellar then after that time. It was about 10 or 15 minutes after that that he came down. I didn't have any conversation with him down there at that time about my mother and her death. He said something about the insurance, —that he had some insurance, \$1,000, and that would help out some; that it was too bad about her death. I had known prior to that time that she was insured. I don't know when Mr. Stockton came back with the doctor. I wasn't up there at that time. I didn't go back there to the kitchen that night."

And on the cross-examination she testified:

"I didn't do much of anything. I just talked to the children and looked in at the fire. I saw it was blazing up, but I didn't do anything. I never suggested to my father that he do anything, and I didn't say anything to the children about it. I wasn't excited. Nobody was much excited. Everybody was cool and calm—not as much excited as they should have been in case of fire. I should have been more excited, as my mother was involved in the fire, but the fact remains I wasn't excited, and none of the rest of the family were excited. There wasn't very much attention paid to it at all. No; there wasn't anything else happening, except that our home was burning up and my mother was burning to death. Yes; Mr. Moyer was sent for, and after that, he broke in the window. All he did was to bust in the window. I never called to my mother at all."

Mr. Moyer, Mr. Stockton, and other witnesses for the state who were there that night testified that they smelt the odor of coal oil, and some of the jurors who served on the first trial of the case testified that they smelt the odor of coal oil on the pieces of the nightgown and underwear then introduced in evidence in the trial of the case. Dr. Kettlecamp, for the defense, who was called and arrived on the scene shortly after the fire, testified, however:

"When I got there I went into the kitchen. I found the body of Mrs. Riggs there, and made a partial examination at that time. I was there about 30 minutes. I can't say that I smelled the odor of kerosene, burned kerosene at that time. The odor of burned flesh was so strong in the room and was so predominant, I don't recall having smelled kerosene."

Several witnesses, both doctors and chemists, testified in defense that a chemical analysis of the pieces of the nightgown and underwear would demonstrate conclusively the presence of kerosene, but no evidence of any such analysis having been made was introduced either by the prosecution or the defense, and Dr. Armstrong for the defense testified:

"If I thought that there was an odor of kerosene on the body, and wanted to be positive as to whether or not kerosene had been used, I would turn the clothing over to a chemist and have an analysis made. That would determine positively. I wouldn't put much reliance on my sense of smell in a case of life or death. I would say that if coal oil had been used on this body, it could have been readily detected by the odor of the body when the autopsy was performed. Where petroleum is used upon a body and burned, the body has a characteristic odor for days, and some of the residue or burned tissues of the body could be taken to a chemist and it could be positively ascertained whether or not kerosene had been used."

And Dr. Graham, who attended the autopsy, states positively that there was no smell of kerosene about the body. The autopsy disclosed among other things, the following: The height of the deceased was 4 feet 8 inches. Her body was badly burned, except the lower extremities from the knees down, and a strip of skin from the seventh cervicle to the third lumbar vertebra, varying from 4 to 6 inches in width. The hair was coiled at the back of the head; the hairpins were in the coil of hair. The eyelids were closed; the tongue protruded between the clenched teeth; and there was a suggestion of smoke in the lungs. Both cavities of the heart were empty and contracted. The blood was bright red in appearance and quite fluid. The brain was very soft and friable; the calvarium was intact and did not present any signs of fracture. The aponeurosis and under surface of the scalp did not present any signs of contusion. There was a clot of burned blood in the left temporal fossa, where the outer flesh had been burned away to the temporal bone. Both cavities of the heart were empty and contracted, and nothing was found pathologically in the heart; it being normal in size and shape. Dr. Allard, who performed the autopsy and the only medical witness for the state, on direct examination as to the cause of death, said:

"I found the organs of the body in a normal condition. The axillary space of the body is under the arms. The seventh cervicle is that portion of the backbone which is most prominent, on the ordinary individual, right at the top part of the thorax, between the shoulders. The lumbar region is the small of the back. The hair was burned away, excepting the coil at the back of the head. The skin on the face and head was badly scorched. It was burned, but not burned through, except in the temporal regions, and on both sides of the head, it was

burned to the bone. The ears were burned away. The teeth were locked on the tongue. There was no diseased condition in the heart. Everything was normal, and there was no diseased condition anywhere that could have caused death. When I say the brain was soft and friable I mean it was easily broken. The parietal lobes of the brain are the most superior portions of the brain. By the calvarium, I mean the skull. The aponeurosis is the dense connective tissue membrane which is right over the skull. In order to put the brain in the condition found in the autopsy, it would take a considerable amount of heat. I have an opinion as to the cause of death. I believe the woman died of suffocation, while in an unconscious condition, caused by some violence. The violence was applied to her head in the left temporal region.

"Q. Doctor, can you account for a woman's body lying on the floor burning, on boards, for the deep burning in the gluteal folds, from simply the floor or boards burning on the side, the depth that you found those burns; can you account for the depth from that mere fact? A. No, sir.

"Q. If I would assume that coal oil had been poured upon the body, then tell the jury whether you can account for it? A. I would say that such a burn would be possible. If coal oil were poured upon a body lying upon its back, it would naturally run down in that region. I have had some experience in treating burns, and have read some concerning treatment. After I made the autopsy, I went back the next day and dissected the neck. I did that because I was trying to find some signs of strangulation, to account for certain conditions found here in the lungs. I presume suffocation caused the tongue to protrude. It is caused by the person trying to get air. There would be several reasons why she couldn't get air. It might be a simple choking or something inside the throat; it might be due to some external means cutting off the supply of air, such as strangulation or holding the hand over the mouth, or something like that, or, in case of fire, the smoke would cut off the supply of oxygen. There was no evidence of any physical strangulation. I examined the blood vessels in the abdomen, and they were apparently normal. The bright red fluid blood was quite general through the body. The heart was contracted for the same reason that your [her] other muscles were contracted, due to heat, application of heat. The condition of the blood, as to its color, was probably due to carbon monoxide in the blood. It would have to be inhaled by the person and go through the lungs. Carbon monoxide is a chemical combination, the result of imperfect combustion. Well, for instance, in a furnace, where your coal has been smoldering, due to coal dust, there is no flame there to change your carbon monoxide to carbon dioxide, and it is heavily saturated with carbon monoxide, which is poisonous to a human being, or animals in general. I don't know if that answers your question or not. I lost track of your question. The generation of carbon monoxide gas is the combustion of material having a large amount of carbon, such as coal or oil, wood, to a less extent. I don't think that a great deal of carbon monoxide could come from the burning of mere clothing.

"Q. In order, Doctor, to have burned the head in the condition that you found it at the time, the hairs all burned off, and taking into consideration the brain in the condition in which you found it, would that ordinarily be expected from a body simply lying on the floor, from fire, the boards catching fire? A. No, sir. If coal oil were used, you would have a different condition there. I couldn't find any fracture of the skull in the temporal region, but it is not necessary to have a fracture for the purpose of causing an injury which results in a blood clot. In the temporal region, everything was burned down to the skull."

Further, he testified:

"The flexing of the hands and arms was due to fire, heat. I don't recall finding any soot in the lungs. The appearance of soot in the lungs is the general post mortem finding where there is suffocation from flame and smoke. I think the contracted condition of the heart was caused in the same way as the contraction of the other muscles. I believe the heat was intense enough to contract the heart. Ordinarily, where death is due from suffocation, or from any form of asphyxia, the cavities of the heart are congested and full of blood, especially on the right side, and this blood is dark blood. The only reason I have for saying now why the heart was in the condition in which it was found is the heat; also because I believe that carbon monoxide poisoning was experienced. The blood is often bright red from burns of any character. I don't know whether you find it that way when there is no carbon monoxide present. I wouldn't want to say whether it might not be bright red without carbon monoxide. I don't know."

And he admitted that at the former trial he said:

"That death resulted here likely from some violence, such as a blow on the side of the head in the region of the left temporal bone, and that, following this, either from direct strangulation or strangulation from smoke, the death resulted."

He also admitted that at the coroner's inquest he testified:

"That death was caused by the inhalation of some very heavy irritant volatile gas."

Further he admitted that he stated to counsel for the defendant and to several physicians that there was no sign of physical violence upon the body of the deceased, and he does not deny that he told Drs. Armstrong, Barrett, and Graham, just a few days before the first trial and some months after the autopsy, that he had no idea what caused the woman's death except burning. All of the doctors mentioned gave testimony for the defense to the effect that Dr. Allard had made substantially such statement to them.

The evidence on the part of the defendant as to the cause of death was given by Drs. Armstrong, Barrett, Wernham, and Graham, the last named of whom helped perform the autopsy. All four of these witnesses expressed opinion that the cause of death

was due to burning, and it is noteworthy that although the names of Drs. Graham and Barrett were indorsed on the information as witnesses for the state; they were not called by the prosecution. They all testified that the burning could reasonably have been accidental. On this subject Doctor Armstrong testified:

"Q. Assuming, Doctor, that the following facts exist and are true, and they be so found by the jury in this case, to wit, that the body of a well-developed female is found on the kitchen floor of her home, with the head, face, neck, thorax, and abdomen badly charred from burning, that the said adult female, at the time of such burning, and of her death, was clothed in a suit of underwear, the same being fleece lined, and over said suit of underwear she had on an outing flannel nightgown, and that said clothing, or especially the outing flannel nightgown, is highly inflammable, could death have reasonably occurred if such clothing had caught fire accidentally and from the fire so caused alone? A. Yes, I think so. Death was sudden, and came from a shock caused by the burns. I would consider that she breathed just a few seconds. I can't discover any other reasonable cause of death except one due to shock. The contracted heart indicates that death was due to shock, and the lungs, being only slightly congested, would indicate that. If the deceased had lived for an appreciable length of time, there would have been a strong odor of smoke in the lungs and the air tract would have been intensely congested and full of mucous, and it would have been sooty."

Dr. Barrett, answering the same question, testified:

"Yes, sir. Considering the findings as detailed in the hypothetical question, I would say the person lived a very short time. What I mean by 'short time' is that death, for all practical purposes, was almost instantaneous."

Dr. Wernham, answering the question, testified: "Yes, sir."

And Dr. Graham, testifying of his own knowledge, said:

"Knowing how she was clothed, I would say that if she had caught fire accidentally, death could have occurred from the catching afire alone, and without any other cause."

The state's theory is that the deceased was unconscious at the time she was burned, that that unconsciousness was brought about by a criminal act, and that act was the act of the defendant. It was thought the deceased was chloroformed and then placed upon the kitchen floor, and that idea apparently prevailed with the state until the report made by the chemist at Bozeman. But how did the deceased become unconscious? She must have been unconscious or the state had no case, for the body was still intact when found and an autopsy had been performed? She certainly would not allow the defendant to burn her if she had her

senses. It was beyond the range of probability that she lay down and then touched a match to her own garments. Whether conscious or unconscious, she would have writhed from pain when the fire struck her body. There had to be a state of unconsciousness or there was no case. However, the evidence shows that Dr. Allard, at the autopsy and afterward, had told a number of people, including members of his own profession, that—

"There was no sign of physical violence upon the body, and that he could not account for the death of the deceased except by burning."

At the trial he spoke of strangulation, but admitted that there was no evidence of direct strangulation. At first he said that death was due to the inhalation of some very heavy irritant volatile gas. This was at the time of the autopsy. He said nothing then of physical injury. He had just examined the body; everything was fresh in his mind. After that, all would be memory. The conversation with the doctors took place two months after the autopsy, and just before the other trial. Yet he said nothing to them of a blood clot or of strangulation, or anything that would indicate that he had an idea as to how the woman met her death. He admitted that at the time of the autopsy he paid no attention to the blood clot. Further, Dr. Armstrong said that he talked with Dr. Allard a great many times concerning the matter, between the autopsy and the 9th day of May, 1918, and that Allard never said anything concerning a blood clot. At the former trial, apparently it was not clearly brought out as to the kind of clot this was, but on the second trial it clearly appears that it was not a blood clot typical of violence. Even Allard admits this, and Graham, who was present and helped perform the autopsy, says that it was not a typical blood clot indicating violence, and that he thought it was simply a little clot caused by the heat.

As derived from the opinion of expert witnesses, there were a number of features which seemed to negative the theory of the state as to defendant's guilt, for instance: There was just a trace of smoke in the lungs; the heart was contracted, and there was no coagulated blood therein; the blood in the body was red and fluid. It would appear as though the deceased just gasped and fell over dead. She didn't move; the eyelids were closed; the tongue was protruding; she caught the tongue between the teeth as she gasped. There was only one other way for the tongue to get out in the manner indicated, and that was by strangulation, and from the evidence there was no strangulation in this case. The contracted heart was admitted by all to mean death by shock. Had she been knocked unconscious, she would have moved violently when fire was applied

to her body until she died, and her tongue would have fallen back in the mouth rather than protruded. Then there was a box of matches tipped over on the stove as though a hand had reached out in the dark and spilled them. Monoxide gas could not easily have been produced under the conditions, and at any rate not in sufficient quantity to produce death. If she were dead when the fire started, she could not have inhaled any gas, for there was neither respiration to carry the gas into the body nor circulation to carry it through the body. If the defendant was guilty of violence on the person of the deceased, when and where did he administer it?

The state rested its case on the assumption that a blow was administered to the deceased in the region of the middle fossa, on the left side. There was no fracture of the skull there; there was no rupture of the meningeal artery, and it is not disputed—the state having put in no rebuttal—that there could not, in all probability, be a blood clot in that position produced by a blow in that vicinity unless the skull had been fractured, and there positively could not be a clot unless the artery, or some of its branches, had been ruptured.

There is no evidence to show, in any way, that a blow was administered to the deceased. No instrument was found with which such a blow might have been delivered; no evidence of injury to the defendant's hands, no fracture of the skull, and not even a contusion of the scalp. The eyes were normal, the pupils evenly dilated, and the clot itself does not indicate violence. Moreover, the testimony of the witness Maddox is undisputed. That witness says it is not probable that the defendant could have struck the deceased with his fist and caused unconsciousness, but that if he did hit her so powerful a blow on the bony structure of the skull, there would be an injury to his hand which would be noticeable.

The autopsy shows:

"There is a clot of burned blood in the left temporal fossa, where the outer flesh has been burned away to the temporal bone."

This we now know is untrue, the witness Allard admitting that it is not a statement of the facts. He and Dr. Graham and a witness named Schlosser all say that there was a little frothy, bubbly clot, about as big as a dime or a nickel, on the inside of the skull, and Dr. Allard said:

"If she fell, and fell on the back of her head, a clot of blood might have been produced anywhere in the front of the head. I don't know whether the blow was struck in the immediate vicinity of the middle fossa or not. If the blood vessels in that vicinity are ruptured, the skull is usually fractured, and I could not find any fracture here."

Further, he stated:

"In order to have a blood clot there, there would have to be a rupture of a blood vessel in that region. There could not be a clot there without a rupture of the artery or some of the veins in that vicinity. I did not find any rupture of the artery. * * * It was not a normal clot, such as you would expect."

And again, he stated:

"The clot probably produced unconsciousness."

There is no testimony even touching a criminal agency in this case, other than that of Dr. Allard. Without a state of unconsciousness produced by a criminal agency, there is no evidence whatever upon which a conviction can stand. Yet, there is no evidence in the record that the supposed clot on the inside of the skull of the deceased produced unconsciousness. This witness said: "Probably." Moreover, the medical witnesses for the defense all state in their judgment that, even though there was a clot of this character, it probably would not produce unconsciousness.

In view of this, what reliance can be placed on Dr. Allard's testimony that there was violence applied in the region of the middle fossa? Not only would reasonable men be in doubt as to a state of unconsciousness, but if they had to decide upon such evidence, they would have to come to the conclusion that there was not a state of unconsciousness. This, however, is simply from the state's evidence alone. Drs. Armstrong, Barrett, Wernham, and Graham all testify that if the deceased had been unconscious, she would have moved violently upon the floor until death came, and they give their reasons for such belief, and those reasons are sound and irrefutable, and they gave illustrations from their own practice where one who is unconscious responds immediately to pain, and all testify that it is only a state where an anæsthetic is given that the person would not respond to pain. Moreover, the state's evidence shows conclusively that the deceased did not move from where she lay on the floor, after getting there. She was not unconscious, but dead, immediately after her body came in contact with the floor.

The fact that the defendant did not make more of an effort to save his wife creates only a suspicion, and that is overcome by his sending Chester to Moyer's for aid; by his breaking in the window of the house, and attempting to make an entry and calling to his wife; by his going to Stockton's for assistance; by reason of the fact that the deceased was on the bare floor of the kitchen and not in bed; by his telegraphing to her mother and sending for a doctor and the coroner; and the further fact that he did nothing to accelerate the fire so as to cover the crime, were he guilty of crime. It may

also well be remarked, it is surprising and beyond comprehension, why Opal and the others over the age of discretion, paid so little attention to their mother, under the circumstances. This is the great mystery. None of them thought of mother. No explanation is made or attempted to be made in the evidence; we can make none.

Men do not ordinarily call witnesses to the result of their criminal acts. "His conduct in leaving his wife in the burning building and running away to alarm the neighborhood may not unfairly be attributed to his lack of moral fiber or physical courage, in the abject fear which overcame him when he discovered that the fire could not be extinguished." *State v. Bass*, 251 Mo. 130, 157 S. W. 789.

If a conviction may be had upon inferences or conjectures, then why is Opal not equally as guilty as her stepfather? Her conduct the night of the fire is just as unexplainable as his, and her opportunity for commission of the crime just as favorable. Admittedly she expressed no anxiety or concern for her mother, while, though belated, he did in fact try to enter the house and called to his wife. The strange thing is that none of the children, young or old, seemed to have any thought or care for their mother at the time of the conflagration, although it appears that she was a good mother to them. The entire case is shrouded in mystery, and the conduct of the father and all of the children seems most unnatural.

We are committed to the doctrine that—

"A defendant may not be convicted on conjectures, however shrewd, on suspicions, however justified, on probabilities, however strong, but only upon evidence which establishes guilt beyond reasonable doubt; that is, upon proof such as to logically compel the conviction that the charge is true." *State v. McCarthy*, 38 Mont. 226, 92 Pac. 521; *State v. Postal Tel. Co.*, 53 Mont. 107, 161 Pac. 953; *State v. Taylor*, 51 Mont. 387, 153 Pac. 275; *State v. Sieff*, 54 Mont. 165, 168 Pac. 524; *State v. Mullins*, 55 Mont. 95, 173 Pac. 788; *State v. Brower*, 55 Mont. 349, 177 Pac. 241; *State v. Riggs*, supra; *State v. Schrack*, 60 Mont. —, 198 Pac. 137; *People v. Ahrling*, 279 Ill. 70, 116 N. E. 764.

[1] Our statute (section 8298 of the Revised Codes) provides:

"No person can be convicted of murder or manslaughter unless the death of the person, alleged to have been killed, and the fact of the killing by the defendant as alleged, are established as independent acts; the former by direct proof and the latter beyond a reasonable doubt."

In construing this statute this court has held, and it is our view, that in prosecutions for murder, proof of the corpus delicti involves the establishment of the fact that a murder has been committed, but it proves neither the identity of the person alleged

to have been killed nor the killing by the person accused. *State v. Calder*, 23 Mont. 504, 59 Pac. 903; *State v. Nordall*, 38 Mont. 327, 99 Pac. 960; *State v. Pepo*, 23 Mont. 473, 59 Pac. 721.

[2] The general rule in homicide is that the criminal agency—cause of the death—may always be shown by circumstantial evidence. But in order to sustain a conviction, proof of the criminal agency is as indispensable as the proof of death. The fact of death is not sufficient; it must affirmatively appear that the death was not accidental; that it was not due to natural causes, and that it was due to the act of the defendant. Where it is shown by the evidence on one side, as in the case under consideration, that death may have been accidental, or it may have been the result of natural causes, or due to suicide, and on the other side that it was through criminal agency, a conviction cannot be sustained. Proof of death cannot rest in the disjunctive. It must affirmatively appear that death resulted from criminal agency. *Wharton's Criminal Evid.* vol. 1 (10th Ed.) p. 649.

[3] The court in instruction No. 29 correctly told the jury they "should be convinced by the evidence beyond a reasonable doubt of the criminal agency involved in the commission of the crime charged; that is, of the manner in which the death of the deceased was accomplished." The evidence falls far short of meeting the requirements of this instruction as to the law, in that it does not appear as to how the death of the deceased was accomplished. And where the circumstances relied on to prove that death was caused by the criminal act of a person, other than the deceased, are consistent with the theory that death was produced by natural causes, there is failure of proof. *Dreesen v. State*, 38 Neb. 375, 56 N. W. 1024.

[4] Where an act may be attributed to a criminal or an innocent cause, it will be attributed to the innocent cause rather than the criminal one. *People v. Ahrling*, 279 Ill. 70, 116 N. E. 764.

The evidence is entirely circumstantial, and in our opinion is not adequate to support the verdict; the testimony not being sufficiently strong and convincing to exclude every rational hypothesis other than the defendant's guilt.

Section 7853 of the Revised Codes provides as follows:

"Indirect evidence is that which tends to establish the fact in dispute by proving another, and which, though true, does not of itself conclusively establish that fact, but which affords an inference or presumption of its existence. For example, a witness proves an admission of the party to the fact in dispute. This proves a fact from which the fact in dispute is inferred."

[5] Direct evidence differs from circumstantial, in this, that in the former witness-

es testify directly of their own knowledge of the main fact or facts to be proven, while the latter is the proof of certain facts and circumstances in a given case from which the jury may infer other connected facts which usually and reasonably follow according to the common experience of mankind (*State v. Avery*, 113 Mo. 475, 21 S. W. 193), or, as it is stated in *Beason v. State*, 43 Tex. Cr. App. 442, 67 S. W. 96, 69 L. R. A. 193:

"The distinction between circumstantial evidence and direct evidence is that in the first instance the facts apply directly to the *factum probandum*, while circumstantial evidence is proof of a minor fact, which by indirection logically and rationally demonstrates the *factum probandum*."

Circumstantial evidence is divided into two classes: (1) Certain, or that from which the conclusion necessarily follows; and (2) uncertain, or that from which the conclusion does not necessarily follow, but is probable only, and is obtained by process of reasoning. *Greenleaf on Evid.* (14th Ed.) § 13a; *Gannon v. People*, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147.

The relative advantages of circumstantial and direct testimony are pointed out by Chief Justice Shaw in the leading case of *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 52 Am. Dec. 711, in the following words:

"Each of these modes of proof has its advantages and disadvantages; it is not easy to compare their relative value. The advantage of positive evidence is that it is the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done; and the only question is whether he is entitled to belief. The disadvantage is that the witness may be false and corrupt, and that the case may not afford the means of detecting his falsehood."

The court then discussed circumstantial evidence, saying:

"The advantages are, that, as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are that a jury has not only to weigh the evidence of facts, but to draw just conclusions from them; in doing which they may be led by prejudice or partiality, or by want of due deliberation and sobriety of judgment, to make hasty and false deductions, a source of error not existing in the consideration of positive evidence."

While all evidence is more or less circumstantial, there is a difference between facts of a particular nature, giving rise to presumptions, and evidence which is direct, consisting in the positive testimony of witnesses, to events and occurrences, and the difference is material according to the degree

of exactness, the relevancy, weight of circumstances, and the credibility of the witnesses.

[6] But where a conviction is sought solely upon circumstantial evidence, the criminal circumstances proved must be consistent with each other, and point so clearly to the guilt of the accused as to be inconsistent with any other rational hypothesis. *State v. Woods*, 54 Mont. 193, 169 Pac. 39; *State v. Sultor*, 43 Mont. 31, 114 Pac. 112, Ann. Cas. 1912C, 230; *State v. Slothower*, 56 Mont. 230, 182 Pac. 270; *People v. Ahrling*, supra.

The nature of circumstantial evidence being such that a certain conclusion or state of facts is sought to be inferred from the establishment of other facts, it is necessary, not only that the guilt of the accused be consistent with those facts, but they must exclude every reasonable hypothesis other than his guilt; or, as it is sometimes expressed, they must be susceptible of explanation upon no reasonable hypothesis consistent with the innocence of the accused. The reason for this is that as long as the circumstances are capable of two or more explanations, one consistent and the other inconsistent with his innocence, the evidence does not fill the test of moral certainty, and is therefore insufficient to convict.

The same degree of certainty is required to warrant a conviction on circumstantial evidence as when the evidence is direct, and the jury are required in all criminal cases to be satisfied beyond a reasonable doubt of the guilt of defendant. *State v. Ryan*, 12 Mont. 297, 30 Pac. 78.

In the decision on the former appeal of this case, Mr. Justice Holloway well said:

"The evidence is not only intrinsically deficient, but its legal insufficiency is emphasized by the facts which it fails to prove or tends to prove. So far as disclosed by the record, the theory upon which the state proceeded was that Mrs. Riggs had been dealt a violent blow on the side of the head sufficient to render her unconscious; that her body was then moved from the front room, where she had been sleeping, to the kitchen, laid upon the floor, her clothing saturated with kerosene, a fire started, and that she was suffocated by the smoke. There is not even a scintilla of evidence to support any other theory. There is not any evidence of a telltale bludgeon with which the blow was struck; no evidence that defendant's hand showed signs that he had struck her with his fist; no evidence of blood or the odor of kerosene on his clothing; nothing to indicate that he had been near a fire; no evidence of a struggle or outcry; no evidence of any motive on the part of the defendant. There was no contusion on the head of the deceased, and no evidence upon the undersurface of the scalp that a blow had been administered. Although defendant slept in the second story bedroom with eight children, including Opal, the stepdaughter, aged 18, and a witness most unfriendly to defendant, there is not a suggestion that

any one heard him leave his bed or the room from the time he retired at 8:30 until the fire was discovered.

"The evidence does not exclude the theory of accidental burning and death from shock. Granting, for the sake of argument, that the facts and circumstances raise conjectures, suspicions, and probabilities inconsistent with the theory of defendant's innocence—and I insist that they do not do more—* * * the verdict in this case can rest only upon mere suspicion, born and nurtured in the abhorrence which the jury must have felt for a man so brutal in his conduct toward his wife and so cowardly that he would not incur greater risk to save her from their burning house."

The evidence is wholly insufficient, not only to fix the crime upon the defendant, but to show beyond a reasonable doubt that there was a criminal agency employed. It amounts to no evidence at all.

[7] We are not unmindful that we are limited on our review to an examination of the record to determine whether there is any substantial evidence to justify the verdict. *State v. Pota*, 56 Mont. 537, 185 Pac. 1114. But where the evidence is unsubstantial, or is wholly lacking in material particulars, or where it is meager, fragmentary, disconnected, and speculative, as in this case, it is insufficient; and when a conviction results, based on such testimony, this court will not hesitate to set aside the verdict. In our opinion the verdict in this case was the result of passion and prejudice, aroused by that which the defendant did not do, rather than what he did do, on the night of the tragedy, the wanton disregard of the defendant for the safety of his wife under the circumstances. It is far better that a guilty man should go unpunished, than that an innocent person suffer punishment based on such evidence.

For the reasons stated the cause is reversed and remanded, and it is ordered that the case be dismissed, and the defendant discharged.

Reversed.

COOPER and HOLLOWAY, JJ., concur.

BRANTLY, C. J., and REYNOLDS, J. (dissenting). The evidence is unsatisfactory, so much so, that, as members of the jury to which it was submitted, we should have been unwilling to agree to a verdict of guilty. Even so, the legitimate function of this court is that of review to ascertain whether the evidence as it appears in the dead record is sufficient to furnish a substantial basis for an inference of guilt and not to determine its weight. This is exclusively the function of the jury.

After an examination of the evidence, due allowance being made for the fact that the jury observed the witnesses and heard them testify, we are impelled to the conclusion

that the verdict should not be disturbed. There is substantial evidence, the probative value and force of which has not, in our opinion, been taken into account by the majority of the court. It seems to us that this, taken together with all the other evidence, tends to establish, to the exclusion of every other rational hypothesis, not only that the decedent was killed by violent means, but also that she was killed by the defendant.

It will serve no useful purpose to set out and analyze the evidence. We are content, therefore, to go no further than to record our dissent.

RYAN v. DISTRICT NO. 1 OF POWELL COUNTY. (No 4453.)

(Supreme Court of Montana. Oct. 10, 1921.)

Appeal and error §1011(1)—Findings on conflicting evidence not disturbed.

Finding of the trial court on conflicting evidence, but substantially supported thereby, that plaintiff, a school-teacher, was discharged, and did not abandon her employment, will not be disturbed by the court on appeal.

Appeal from District Court, Powell County; George B. Winston, Judge.

Action by Mary B. Ryan against District No. 1 of Powell County. Judgment for plaintiff, and defendant appeals. Affirmed.

W. E. Keeley, of Deer Lodge, for appellant.
S. P. Wilson, of Deer Lodge, for respondent.

SPENCER, C. On March 3, 1919, plaintiff obtained judgment against the defendant for \$400, together with interest thereon from June 1, 1918, and \$11.70 costs. Defendant's motion for a new trial was denied, and appeal is from the order denying the motion and from the judgment.

The complaint alleges, in substance, the execution of a written contract on June 14, 1917, by plaintiff and defendant, whereby the plaintiff agreed to teach school in district No. 1 of Powell county for a period of 9½ months beginning September 3, 1917, for a stipulated wage of \$780, or \$80 per month; that plaintiff entered upon her employment in accordance with the contract, and discharged all the

duties required of her until February 12, 1918, when defendant discharged her, and refused to permit her longer to continue her employment under the contract; that she fulfilled all the terms of the contract required of her, and complied in all respects with the laws of the state and rules of the school board, and that her discharge by the defendant was arbitrary, wrongful, unlawful, and without cause; and that plaintiff in no wise acquiesced in the discharge, and that at all times during the period of said contract she held herself in readiness to perform. The complaint then alleges \$400 as the amount due under the contract, demand, and refusal of payment.

The answer admits the execution and acceptance of the contract by both plaintiff and defendant and the performance of its terms by plaintiff until February 11, 1918, and denies all other allegations. For affirmative defenses the defendant urges abandonment of the contract by plaintiff's resignation, and rescission by mutual agreement of the parties and settlement of the claim sued upon by tender of warrant for \$84 by defendant, and acceptance thereof by the plaintiff, all of which affirmative defenses were put in issue by reply.

A jury was expressly waived by both parties, and trial had to the court. The proceedings at the trial disclose that the only issue to be determined was whether the plaintiff voluntarily resigned and abandoned her contract, or was discharged in violation of its terms. The court resolved all doubt in favor of the plaintiff and ordered judgment accordingly. The evidence offered by the respective parties is not harmonious, nor from the standpoint of either is it entirely satisfactory. In general, it presents a conflict. The court, exercising its functions as both court and jury, found the facts in favor of the plaintiff. We think there is substantial evidence to support the finding, and hence it is not for this court to substitute its judgment for that of the court which tried the case.

We find no merit in any of the assignments of error, and therefore recommend that the judgment and order appealed from be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

EBELING v. BANKERS' CASUALTY CO.
(No. 4457.)

(Supreme Court of Montana. Oct. 10, 1921.)

Insurance §531—Injury while watching engine repairer held received while doing "any" act pertaining to more dangerous occupation.

Where a decedent was insured as a "proprietor and meat cutter in shop," a higher class than "tender in transit," by policy providing that, if insured was injured "while doing any act or thing pertaining to any occupation" differing from the classification, he shall be paid only such portion as his premium would have purchased at such more hazardous occupation, decedent's beneficiary was entitled only to the lesser amount, where he was killed while watching the repair of an engine while on a train in which he was engaged as a "tender in transit" of a shipment of live stock; the word "any" meaning one indifferently out of an unlimited number; and it being immaterial that the act of the decedent alone was harmless, if the thing being done by him at the time of the injury pertained to a more hazardous occupation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Any.]

Appeal from District Court, Big Horn County; Charles A. Taylor, Judge.

Action by Jessie W. Ebeling against the Bankers' Casualty Company. From an order denying new trial, defendant appeals. Modified and affirmed.

Nichols & Wilson, of Billings, for appellant.

T. H. Burke, of Hardin, for respondent.

HOLLOWAY, J. William O. Ebeling was insured under a policy which classified occupations according to their respective hazards, and designated the amount of insurance which a given premium paid in advance would purchase upon the life of one engaged in any of the different occupations so classified. Ebeling's occupation was given as a "proprietor and meat cutter in shop," and was included in class D. The occupation of "tender in transit" of live stock was included in class X. The annual premium paid by Ebeling would purchase insurance to the amount of \$1,100 upon the life of one engaged in a class D occupation, whereas it would purchase but \$275 upon the life of one engaged in a class X occupation. The policy contained the following provision:

"In the event that the insured is injured or contracts sickness after having changed his occupation to one classified by the company as more hazardous than that stated in the policy, or while he is doing any act or thing pertaining to any occupation so classified, except ordinary duties about his residence or while engaged in recreation, in which event the company will pay only such portion of the indem-

nities provided in the policy as the premium paid would have purchased at the rate, but within the limit so fixed by the company for such more hazardous occupation."

About August 30, 1917, Ebeling engaged as a tender in transit of a shipment of live stock from Little Horn, Mont., to Omaha, Neb. When the train reached Owen, Wyo., on August 31, the locomotive became disabled and the train stopped. Ebeling and the other stock tenders went from the caboose toward the forward end of the train to give attention to a steer that was down in one of the cars and assist it to its feet. When that work was accomplished, they went to the locomotive and stood about watching the trainmen in the work of repair, and while they were so engaged a cylinder head was blown out, striking Ebeling and inflicting injuries from which he died. Plaintiff, the beneficiary named in the policy, brought this action to recover \$1,100. The defendant company tendered \$275, but the tender was refused. The trial resulted in a verdict and judgment for the amount claimed by the plaintiff, and the defendant appealed therefrom and from an order denying a new trial.

There is not any conflict in the evidence, and for all practical purposes this appeal may be considered as though the case had been submitted upon an agreed statement of facts. The only question for determination is: Was the insured, at the time of his injury, doing any act or thing pertaining to the more hazardous occupation, tender in transit? If he was, the amount of recovery must be reduced to \$275. If he was not, the judgment must be affirmed. There is not any conflict of authority respecting the general rules of law applicable to a case of this character, but some conflict growing out of the application of well-settled rules to the facts, and this conflict or confusion arises from the proper construction of the provision in policies which diminishes liability in the event that the injury occurs while the insured is doing any act or thing pertaining to an occupation classified as more hazardous than the one for which the insured was accepted. The earlier accident policies provided only for diminished liability in the event the insured, at the time of his injury, had changed his occupation to one classified as more hazardous, and the courts held generally that the term "changed" was employed in the sense of substitution, that the performance of an isolated act pertaining to a more hazardous occupation did not constitute a change of occupation, and that the insurance company could not claim the right to have the indemnity diminished by reason of the fact that the insured was injured while in the performance of such isolated act. The leading cases so holding are *Stone's Adm'r v. U. S. Casualty Co.*, 34 N. J.

Law, 371; *Insurance Co. v. Burroughs*, 69 Pa. 43, 8 Am. Rep. 212; *Baldwin v. Fraternal Accident Association*, 21 Misc. Rep. 124, 46 N. Y. Supp. 1016; *Id.*, 29 App. Div. 627, 52 N. Y. Supp. 1136, affirmed 159 N. Y. 561, 54 N. E. 1089; *Berliner v. Traveler's Insurance Co.*, 121 Cal. 458, 53 Pac. 918, 41 L. R. A. 467, 66 Am. St. Rep. 49.

Later the courts held that, if the act being done at the time the injury was received was one which fairly pertained to the regular employment of the insured, it could not be held that he had changed his occupation by reason of the fact that the act pertained, also, to a more hazardous employment. *Thorne v. Casualty Co.*, 106 Me. 274, 76 Atl. 1106. Finally the courts were called on to consider policies containing the provisions quoted above, and in *Smith v. Massachusetts Bonding & Insurance Co.*, 179 N. C. 489, 102 S. E. 887, it was held that, if the act being done by the insured at the time of his injury was one pertaining directly to his own occupation, the liability of the insuring company would not be diminished by reason of the fact that the act pertained also to a more hazardous undertaking. In *Holiday v. American Mutual Acc. Ass'n*, 103 Iowa, 178, 72 N. W. 448, 64 Am. St. Rep. 170, and in *Zantow v. Old Line Acc. Ins. Co.*, 104 Neb. 655, 178 N. W. 507, recovery was permitted in each instance for the face of the policy, under circumstances not different materially from those involved in the present inquiry, and those two cases are the only ones disclosed by our research which would warrant recovery in this case for the larger amount.

We are unable, however, to appreciate the reasoning in either case, or to approve the method by which the conclusion was reached. In effect, the Iowa court read out of the policy the provision for diminished liability in the event the insured is injured while doing any act or thing pertaining to a more hazardous occupation, or failed to distinguish between a policy containing such provision and one which omits it. It is our judgment that courts are not constituted to make new contracts for parties or to alter existing ones. Their function is to construe and enforce contracts as they are made, so long as they do not contravene public policy or violate express provisions of the law. The Nebraska court construed the provision to apply only in the event the act or thing pertains peculiarly to a more hazardous occupation, thereby restricting materially its operation or effect.

It would appear reasonable that if the parties intended that the only act or thing, the doing of which would operate to diminish liability in case of injury, should be one pertaining peculiarly or exclusively to the more hazardous occupation, they would have employed some apt term to indicate such purpose, and the fact that they did not do

so leads naturally to the conclusion that they intended just what the terms they did employ fairly signify. This policy makes the character of the occupation to which the act pertains, and not the character of the act itself, determine the extent of liability. It does not provide for a diminished liability only in the event the insured is injured while doing an extrahazardous act or thing pertaining to a different occupation, but does provide for diminished liability if, at the time of the injury, the insured is doing *any* act or thing pertaining to a more hazardous occupation. The adjective "any" means one indifferently out of an unlimited number (*Webster's International Dictionary*), and, therefore, if the act or thing being done by the insured at the time of the injury pertains to a more hazardous occupation, it is wholly immaterial that such act itself, if standing alone, would be harmless, or fraught with no danger whatever. By no possible process of reasoning can the language employed be tortured into any other meaning, and, since the parties so expressed themselves, they must abide the consequences. From the time this shipment was started on its journey until it reached its destination, the live stock composing it were in transit, and Ebeling was a caretaker or tender in transit. *Loesch v. Union Casualty & Surety Co.*, 176 Mo. 654, 75 S. W. 621. It may be conceded that the isolated act of tending this particular shipment did not constitute a change of occupation within the meaning of the policy, but if it did not constitute an act or thing pertaining to the occupation of a tender in transit, it is only because the terms employed are utterly incomprehensible.

But the meaning of the contract is not obscure; on the contrary, it is too plain to admit of doubt. We are not alone in this conclusion. The decided weight of authority sustains our view. In each of the following cases: *Thomas v. Mason's Fraternal Acc. Ass'n*, 64 App. Div. 22, 71 N. Y. Supp. 692, *Lane v. General Acc. Ins. Co.* (Tex. Civ. App.) 113 S. W. 324, and *Green v. National Casualty Co.*, 87 Wash. 237, 151 Pac. 509—the insured was injured while hunting, an occupation classified as more hazardous than the one for which he was accepted, and in each instance it was held that, though the insured had not changed his occupation, he was doing an act or thing pertaining to the more hazardous employment, and therefore the recovery should be limited to the amount which the premium would purchase upon the life of one engaged in such more hazardous undertaking. In *Montgomery v. Continental Casualty Co.*, 131 La. 475, 59 South. 907, the insured, a draftsman with office and traveling duties only, was injured while doing the work of a machinist, an occupation classified as more hazardous, and the ded-

sion was in harmony with the views expressed in the cases last cited above.

The order denying a new trial is affirmed. For the reasons given, the cause is remanded to the district court, with directions to modify the judgment by reducing the amount thereof to \$275 as of the date of the original judgment, and, when so modified, it will stand affirmed. The appellant will recover its costs of this appeal.

Modified and affirmed.

BRANTLY, C. J., and REYNOLDS,
COOPER, and GALEN, JJ., concur.

STATE ex rel. GOODWIN v. DISHMON et al.
(No. 4498.)

(Supreme Court of Montana. Oct. 10, 1921.)

New trial \S 2—Motion for not authorized in search warrant proceeding under Prohibition Enforcement Act.

A motion for new trial is not authorized in search warrant proceeding under Prohibition Enforcement Act.

Appeal from District Court, Missoula County; R. Lee McCulloch, Judge.

Search warrant proceeding under the Prohibition Enforcement Act by the State, on the relation of one Goodwin, against Ora Dishmon and others. From a final judgment and from an order denying a motion for new trial, defendants appeal. Appeal from order denying motion for new trial dismissed, and final judgment reversed.

Harry H. Parson, of Missoula, for appellants.

Leonard Goodwin, of Plains, Fred R. Angevine, of Missoula, James D. Taylor, of Hamilton, and L. A. Foot, Asst. Atty. Gen., for respondent.

PER CURIAM. This case is a search warrant proceeding, instituted in the district court of Missoula county under the provisions of the Prohibition Enforcement Act (Laws 1917, c. 143). It came before this court on appeal by defendants and claimants from the final judgment rendered by the court, after a hearing upon the return by the sheriff of the warrant declaring forfeited a quantity of whisky seized thereunder and ordering it destroyed, and an attempted appeal from an order denying a motion for a new trial.

The appeal from the order denying the motion is dismissed, for the reason that a motion for a new trial in such proceedings is not authorized. The appeal from the judgment presents the same question as that presented in the cases of State ex rel. Samlin

v. District Court of Custer County et al., 59 Mont. 600, 198 Pac. 362, and State ex rel. Hogue v. O'Brien et al., 60 Mont. —, 198 Pac. 1117. Upon the authority of these cases, the judgment is reversed, and the district court is directed to dismiss the proceeding, and order the sheriff to return the whisky and articles seized to the defendants and claimants.

Reversed.

MUNGER v. NELSON. (No. 4451.)

(Supreme Court of Montana. Oct. 10, 1921.)

1. Judgment \S 106(8)—Default may be entered for failure to reply to counterclaim.

Under Rev. Codes, §§ 6515, 6560, 6562, a default may be entered for failure to reply to a counterclaim.

2. Judgment \S 107—On motion for default judgment on counterclaim, court may disregard reply filed after statutory period.

Though a default cannot be taken when there is a reply properly on file controverting defendant's counterclaim, the court on motion for judgment on the counterclaim, following a default for nonappearance at the trial, may, in view of Rev. Codes, §§ 6515, 6560, 6562, authorizing a default if a reply is not filed within 20 days, disregard a reply filed more than 19 months thereafter and more than 14 months after default, though plaintiff, after filing such reply and before judgment, moved the court to set aside the default and permit a reply to be filed; such reply, if only tendered with the motion, falling with the denial thereof.

3. Judgment \S 162(4)—Affidavits held insufficient to overcome presumption as to verity of court's minutes.

On motion to set aside a default for failure to appear at the trial, where the affidavits of the opposing attorneys were in conflict as to whether movant's attorney was advised as to the hour to which the cause had been continued, but it was admitted that he was present when the cause was set for trial and knew that it had been continued until the next morning, and the minutes of the court, which, being part of the record, import verity, showed that he was notified of the exact hour to which the cause was continued, the court did not err in entering judgment against movant; the presumption that the clerk's entry was correct not being overcome by the affidavits filed.

4. Pleading \S 329—Failure to file bill of particulars when properly demanded defeats right to be heard at the trial.

In an action for moneys advanced, where plaintiff made no response to defendant's demand for a bill of particulars, the case being one in which a bill of particulars may properly be demanded under Rev. Codes, § 6569, plaintiff could not demand to be heard at the trial.

Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

Action by Fred R. Munger against Andrew J. Nelson. Judgment for defendant, and plaintiff appeals. Affirmed.

Ralph J. Anderson, of Lewistown, for appellant.

Barker & Cromer, of Lewistown, for respondent.

FOORMAN, C. C. This is an appeal by the plaintiff from a judgment made and entered in favor of the defendant. The complaint was apparently filed on the 11th day of July, 1917, and it is alleged therein:

"That during the year 1914 plaintiff advanced to the defendant, at the special instance and request of the defendant, certain moneys for the purchase of a relinquishment and for the placing of improvements upon the lands, which are now the property of the defendant, in the sum of \$2,000."

"That the said sum of money was to be repaid to the plaintiff by the defendant at such time as the defendant could make final proof upon his lands."

It is further alleged that the defendant had made final proof upon the lands and had not repaid the money to the plaintiff, although demand had been made therefor. The defendant in his answer denied the allegations of the complaint, except that he admitted that he borrowed \$75 from the plaintiff, and that he executed and delivered to plaintiff a promissory note therefor; that he had made final proof upon the lands; that he refused to pay the plaintiff the sum of \$2,000 or any part thereof. Further answering the complaint, by way of counterclaim, defendant alleged that he performed certain labor and services for the plaintiff, at his special instance and request, between and during the months of March and July, 1914, and that the plaintiff expressly promised to pay to the defendant the sum of \$40 a month, amounting to the sum of \$180; that plaintiff had not paid the same to defendant, and judgment is demanded therefor, together with interest thereon. This answer was filed August 22, 1917. On the day the complaint was filed the defendant appeared and filed a general demurrer and also served and filed a demand upon plaintiff that he furnish to the defendant, within five days, a bill of particulars of the amounts of money alleged to have been advanced by plaintiff to defendant and the time when each item of money was so advanced. On January 10, 1918, the defendant caused to be entered the default of the plaintiff for failure to reply to the counterclaim. On April 10, 1919, the plaintiff served and filed his reply to the defendant's counterclaim, and on the 14th of April moved the court to set aside the default and to permit plaintiff to file his reply and filed an affidavit in support of his motion.

[1] Appellant maintains that a default may not be entered for failure of the plain-

tiff to reply to a counterclaim pleaded by defendant, but that right is given by statute, and the practice has been sanctioned by this court. Sections 6560, 6562, 6515, Rev. Codes; State v. Quantic, 37 Mont. 32, 94 Pac. 491; Anaconda Copper Mining Co. v. Thomas, 48 Mont. 222, 137 Pac. 380.

[2] Appellant further maintains that a default cannot be taken when a reply or answer is on file. It is true that a default cannot be entered when there is a reply properly on file, controverting defendant's counterclaim (Sell v. Sell, 58 Mont. 329, 193 Pac. 561), but it is also true that a party cannot escape the consequences of his neglect by filing a plea after the expiration of the time and after default entered (23 Cyc. 745). At the time the default was entered for failure of the plaintiff to reply to defendant's counterclaim, there was no reply on file, and the reply was not filed for 19 months after the 20 days had expired, and more than 14 months after the default had been entered. Four days after the plaintiff filed his reply, and on April 14, 1919, he moved the court to set aside the default and to permit a reply to be filed. This motion was never disposed of except by ordering judgment for defendant. If the reply filed was in fact only a reply tendered with the motion, it fell with the denial of the motion. Regarding the reply in any other light than as a part of the motion, it was not properly filed. The statute requires a reply to be filed within 20 days and authorizes a default to be entered if it is not filed in that time. Sections 6560, 6562, 6515, Rev. Codes.

The Court of Appeals of Maryland held, under a similar statute, that pleas filed under circumstances here stated should be disregarded as mere nullities because they were filed in violation of the terms of the statute. In discussing the question, the court said:

"This is the clear meaning of the terms of the statute, and if by construction a different meaning be attributed to them, such as that contended for by the defendant, they would be virtually deprived of all restrictive force, and the defendant, in any case, would be able to do what was attempted to be done in this case; that is, to defeat the plaintiff's right to judgment by simply placing upon record pleas and affidavits at any time before judgment entered, regardless of the fact that no cause had been shown nor any leave of the court obtained. To suffer this to be done would simply be in defiance of the express terms of the statute." In re Gemmell v. Davis, 71 Md. 458, 18 Atl. 955.

This decision was reaffirmed in the later case of John W. Waldeck Co. v. Emmart, 127 Md. 470, 96 Atl. 634.

Other courts, either directly or impliedly, have given the same construction to similar statutes. Irvine v. Davy, 88 Cal. 495, 26

Pac. 506; *Camp v. Phillips*, 88 Ga. 415, 14 S. E. 580; *Harrison v. Kramer*, 3 Iowa, 543; *Luke v. Johnnycake*, 9 Kan. 511.

It was not error for the court wholly to disregard this so-called reply in considering the motion for judgment on the counterclaim. Had the reply been filed prior to the entry of default, a different question would be presented.

[3] The cause, as made by the complaint, was set for trial on April 14, 1919, the plaintiff's counsel was then present. The case was continued for trial until April 15, 1919, at 9:30 o'clock a. m. At that hour on April 15th the case was called for trial, and defendant appeared by person and by counsel. There was no appearance on the part of the plaintiff, and the default of the plaintiff for failure to appear for trial was entered and defendant ordered to proceed with proof on his counterclaim. Defendant was then sworn and testified, and the court directed judgment to be entered against the plaintiff. Subsequently, at 10 o'clock a. m. on that day, the plaintiff's counsel appeared in open court and orally moved to set aside the default of the plaintiff. The court refused to entertain an oral motion for setting aside the default, and it was ordered that entry of judgment be stayed until April 16, 1919, at 10 o'clock a. m., and that counsel for plaintiff be given until that time to prepare, serve, and file his motion to set aside the default of the plaintiff for failure to appear at the trial. The plaintiff's motion was served and filed, supported by the affidavit of his attorney, at the time named.

"In legal effect, the order [entering default of plaintiff for failure to appear at the trial] amounted to nothing more than a declaration that the plaintiff had failed to be personally present at the time of trial, and in that sense the term 'default' is not infrequently used." *Sell v. Sell*, 58 Mont. 331, 193 Pac. 561.

The court directed judgment to be entered in favor of the defendant. The affidavit of plaintiff's attorney is to the effect that he was not advised of the fact that the cause had been continued until 9:30 a. m. on April 15th, but supposed the same would come up regularly at the hour of 10 o'clock a. m., when under the rules court convened, un-

less a different hour was named, and also that he had been advised by the judge that the cause would be heard at 10 o'clock; that, relying upon this information, he was not present until the hour of 10 o'clock, and the default had already been entered. The affidavit of defendant's attorney, however, is to the effect that the cause was originally set for April 14th at 10 o'clock in the morning, and was then continued until 3:30 p. m. of that day; that at the latter hour it was again by order of the court continued until April 15th at 9:30 a. m., and that the plaintiff and his counsel were both present in court at the time this order was made. It is admitted that the plaintiff was present on the 14th day of April when the cause was set for trial, and knew that an order had been made continuing it until the next morning. It was certainly incumbent upon him to keep himself informed as to what particular time the cause was continued for trial. The affidavits of the attorneys filed are hopelessly in conflict, but the minutes of the court are to the effect that the plaintiff's attorney was notified of the setting of the case at the hour of 9:30 a. m. of April 15th. These minutes are a part of the court record and import verity. The evidence regarding the correctness of this entry by the clerk is in conflict. The presumption is that the entry made by the clerk is correct, and this presumption is not overcome by the affidavits filed.

[4] Furthermore, it does not appear from the record that the plaintiff made any response whatsoever to the defendant's demand for a bill of particulars. On the face of the complaint it appears that this is a case where a bill of particulars may properly be demanded. Hence, had this default not been taken at all, the plaintiff could not, as a matter of right, have demanded to be heard at the trial. *Section 6569, R. C.*; *Martin v. Heinze*, 31 Mont. 68, 77 Pac. 427; *Scott v. Frost*, 4 Colo. App. 557, 36 Pac. 910.

We find no reversible error in this cause, and recommend that the judgment appealed from be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

OLIVER et al. v. POLSON et al. (No. 16449.)

(Supreme Court of Washington. Oct. 21, 1921.)

1. Mines and minerals §70(6)—Lessee being sued for minimum royalties held to have burden of proving nonexistence of coal.

Where a coal lease provided for payment of minimum amount of royalties annually during specified number of years "unless the coal in said land shall be sooner exhausted or it shall be ascertained that merchantable coal does not exist thereon in quantities sufficient to be profitably mined," the lessees, being sued for minimum amount of royalties due for certain number of years, had the burden of proving that they made reasonable search and exploration of the land for purpose of determining the existence or nonexistence of coal, and that merchantable coal in sufficient quantities to be profitably mined did not exist on the lands.

2. Appeal and error §1069(2)—No reversal because jury took to jury room complaint containing causes of action elected against.

Where plaintiffs had been required to elect between two causes of action stated in complaint, that jury took the complaint to jury room was not ground for reversal where the court instructed jury to disregard the cause of action elected against.

3. Trial §296(2)—Instruction directing jury's attention to particular provisions of lease held not misleading.

In an action on a mining lease containing many provisions not germane to issues, instruction that lease was voluminous, and that it was only necessary to direct jury's attention to a few of its provisions which were directly involved, held not misleading as against contention that jury should have been instructed to consider all the provisions, where the lease was in evidence and the jury in other instructions were told to decide issues on all the evidence.

4. Appeal and error §169—Point not pleaded or raised before verdict not considered on appeal.

A point not pleaded or raised before the verdict cannot be raised for the first time on appeal.

5. Mines and minerals §70(6)—Refusal of instruction precluding plaintiff from recovering royalties not sought proper.

In lessors' action for royalties due for certain years in which plaintiffs did not seek to recover royalties for the term of the lease subsequent to such years, refusal of instruction that by commencement of action on certain date plaintiffs elected to treat the contract as breached on such date, precluding them from recovering minimum royalties for any period subsequent thereto, held proper.

6. Trial §260(1)—Refusal of instructions substantially covered by others not error.

Refusal of instructions substantially covered by other instructions is not error.

7. Judgment §199(3)—New trial §71—Denial of motion for judgment n. o. v. proper where evidence is such that jury might have decided for either party.

Where the evidence was such that the jury could have decided the issues of fact in favor of either the plaintiffs or the defendant, denial of motion for judgment n. o. v. or in the alternative for a new trial held proper.

Department 2.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Angus J. Oliver and others, associated together as the Glacier Coal Company, unincorporated, and another, against Alex Polson and another. Judgment for plaintiffs against the named defendant, and the latter appeals. Affirmed.

Kerr, McCord & Ivey, of Seattle, for appellant.

Flick & Paul and Peters & Powell, all of Seattle, for respondents.

MITCHELL, J. In February, 1920, plaintiffs, Angus J. Oliver and others, as owners, entered into a miner's lease of certain portions of sections 18, 17, 20, and 21, township 39 N., range 7 E. W. M., with defendant Alex Polson, for a term of years. For the purpose of this case the conditions of the lease were, substantially, a cash payment (which was made) with the right of entry for the purpose of coal mining and the making of any and all improvements on and means of transportation on any and all of the lands as might be necessary or convenient for searching for, working, getting, preparing, carrying away, and disposing of the coal to be got from the lands. The lessee was given the right to the use of water, water power, timber, rock, stone, and so forth as found necessary or convenient in mining and transportation operations. Section 4 of the lease provides:

"The party of the second part shall pay to the parties of the first part, or their heirs and assigns, as royalties:

"First: For pea coal and sizes above, sixty-five (65) cents per ton.

"Second: For buckwheat coal, twenty-five (25) cents per ton.

"Third: For rice coal, ten (10) cents per ton.

"Fourth: For all coal other than anthracite mined and marketed, twenty-five (25) cents per ton.

"Long ton is contemplated in all cases.

"Such payments to be made for each ton that is mined and marketed from the said lands, during the term of this agreement, such mining and marketing to be done and royalties paid during the full term of this lease, to wit, the term of ninety-nine (99) years, unless the coal in said land shall be sooner exhausted or it shall be ascertained that merchantable coal does

not exist thereon in quantities sufficient to be profitably mined."

Section 6 of the lease provides:

"The minimum amount of royalties to be paid by the second party under this agreement in any one year, after issuance of the patent, or in any event beginning not later than May 1, 1911, shall not be less than four thousand dollars (\$4,000). If the royalties accruing under the provisions of this agreement for coal mined and marketed shall aggregate in any one year less than the sum of four thousand dollars (\$4,000), yet, nevertheless, second party shall pay to first parties or their assigns on account of royalties the full sum of four thousand dollars (\$4,000), provided, however, that in the event the royalties accruing shall be less in any one year than the sum of four thousand dollars (\$4,000), the difference between the royalties so accruing and the said sum of four thousand dollars (\$4,000) shall be advanced and paid on account of royalties on coal to be mined and marketed in subsequent years, and if thereafter the royalties accruing in any one year shall exceed the sum of four thousand dollars (\$4,000) there shall be deducted from any such excess of royalties accruing, the sum or amount paid in any prior year, in excess of royalties accruing, in each year of payment; provided further, that except as hereinbefore in this paragraph limited, the parties of the first part shall be entitled to and shall receive from the second party, in addition to the sum of four thousand dollars (\$4,000) per year, all royalties that may accrue in excess of that sum."

Section 10 provides:

"The party of the second part shall begin the development of the coal deposits upon said lands hereinbefore described within nine months from the date hereof, and shall thereafter prosecute the same with reasonable diligence and shall mine and market the coal from said lands as rapidly and extensively as the conditions and the market for coal shall permit."

The parties bound their heirs, representatives, assigns, and successors in interest, jointly and severally, with permission to assign the lease as a whole to any party desired by the lessee, he being responsible, nevertheless, for the performance of the conditions and terms of the lease.

The lease was assigned by the lessee to the Washington Development Company, a corporation, of which the lessee is president and principal stockholder. Immediate possession was taken of the property, and thereafter, for a number of years, a large amount of money was spent in prospecting and attempting to develop the coal prospects on the lands and other lands adjacent thereto under the control of the lessee and his assignee, within the so-called coal field. At the expiration of several years the lessee, claiming to be satisfied by his investigations and the advice of competent geologists, coal mining engineers, and experts that the lands

were destitute of merchantable coal in quantities sufficient to be profitably mined, abandoned the field, including the lands involved in this section, and gave his lessors notice accordingly. The owners, having received no pay other than the cash consideration at the date of the contract, commenced this action against the defendants, Alex Polson and the Washington Development Company, on December 16, 1915, to recover \$20,000 as minimum royalties for the years May 1, 1911, to May 1, 1915, and the further sum of \$100,000 for failure of the defendants to properly prospect the lands for coal and put them in producing condition alleging the lands contained valuable deposits of coal capable of production in such quantities that royalties would far exceed \$4,000 per annum during the term of the lease.

On November 5, 1917, the plaintiffs filed an amended complaint containing two causes of action separately stated, the one to recover \$28,000 claimed due under the contract for minimum royalties at \$4,000 per annum from May 1, 1911, and the other to recover \$120,000 damages for the failure of defendants to open and develop the coal mine or mines on the lands alleged to have been available and sufficient in quantity and quality to warrant large profits in the market as conditions then existed, and to have reasonably furnished an output of 400 tons daily, which would have made an average of 25 cents per ton royalty under the terms of the lease. To the amended complaint the defendants interposed a motion to require the plaintiffs to elect as between the first and second causes of action, on the ground, as claimed by the defendants, that they were inconsistent. The court required the plaintiffs to elect, and thereupon they chose their first cause of action, comprising the annual minimum royalties. In the amended answer to the amended complaint, it is admitted that the defendant, Washington Development Company, is a corporation, that the lease between the parties, a copy of which was set out in the complaint, was entered into by the parties thereto, that it had been assigned by Alex Polson to the Washington Development Company, and that he is president and principal stockholder of the corporation. All other essential allegations of the amended complaint were denied, and affirmatively it was alleged that at the date of the lease, and at all times since, no coal in merchantable quality and sufficient quantity existed in the lands; that no consideration existed for the execution of the lease; that there has been a total failure of consideration for the lease; that royalties were to be paid only in the event coal existed in sufficient quantities to be profitably mined; and that no royalties in any sum whatever have accrued or have been owing from defendants or either of them to the plaintiffs.

The reply denied the affirmative allegations in the amended answer.

There was a jury trial, which resulted in a verdict for the plaintiffs in the sum of \$28,000. By consent of plaintiffs in open court the defendant the Washington Development Company, a corporation, was dismissed from the action. From a judgment on the verdict with interest defendant, Alex Polson, has appealed.

[1] 1. The principal controversy in this case depends upon the construction of the lease, and consequently upon which side the burden of proof rested in the trial of the case. The jury was instructed that the burden of proof was upon the defendants to prove, by a fair preponderance of the evidence, that they made reasonable search and exploration of the lands in question for the purpose of determining the existence or nonexistence of coal, and to prove, by a fair preponderance of the evidence, that merchantable coal in sufficient quantities to be profitably mined does not exist upon such lands. Appellant claims the instruction was erroneous, and that the burden was on plaintiffs, who were not entitled to recover anything until they fairly met the burden. Elaborate arguments have been made and many authorities cited by respondent's counsel upon this subject. It would be unprofitable to write with attempted clearness upon all such authorities.

In the annotation, page 1078, L. R. A. 1917E, following the decision in the case of *Bennett v. Howard* by the Kentucky Court of Appeals, it is said:

"It is very frequently provided in mining leases that the lessee shall pay a designated royalty on a certain tonnage of coal or ore produced, whether the same is mined or not, and very frequently the lease also contains a provision relieving the lessee of the liability for this minimum royalty under designated circumstances or conditions. In construing leases of this character, the general rules for the construction of contracts in general apply, and the provision will be construed with due regard to the lease as a whole, and in a manner to give effect to the intention of the parties as shown by the entire lease and the surrounding facts and circumstances. In general, in order for the lessee to avoid liability for the minimum royalty reserved, by invoking the provision in the lease relieving him therefrom under designated circumstances, the burden of proof rests upon him to show the existence of the circumstances or conditions designated in the lease as a ground for the suspension of the payment of the minimum royalty reserved, and also to show that the existence thereof is due to no fault on his part, and that, by reason thereof, the production or mining of the minimum tonnage is not practicable. *Bennett v. Howard*, ante, 1075; *New York Coal Co. v. New Pittsburgh Coal Co.* (1912) 86 Ohio St. 140, 99 N. E. 198; *Dorris v. Morrisdale Coal Co.* (1906) 215 Pa. 638, 64 Atl. 855; *Holt v. Kelley* (1909) 224 Pa. 620, 73 Atl. 947."

The lands involved are situated in Whatcom county within what is commonly called the Mt. Baker district. For some years prior to the date of this contract there had been considerable prospecting, tunneling and drilling for coal in the district by a number of persons. There were certain indications of coal on portions of the leased lands, but there were no developed or well-established coal mines or coal properties in the entire district, and at that time, or indeed at the trial of this case 9 years later, no coal had ever been sold from the entire district. No doubt all the parties to this contract thought there was profitable coal in the lands, but it seems to be clear that the appellant did not rely upon any representations or assurances thereof made by the respondents, nor on the terms of the lease itself, for as to the first he testified:

"At the time I went in in 1909 until 1911 I had the utmost confidence I was going to open up the first and the finest anthracite coal vein that was opened up on the Pacific Coast. I based that opinion on my engineer's report."

Upon getting possession of this land the appellant continued expensive explorations in the field, at heavy expense, a part of which consisted of borings upon these particular lands, until reaching the conclusion that there was no coal in profitable quantities in the lands of the respondents, he notified them in April, 1912, that he would give up his lease on the property, after which it appears he did nothing more on these lands; and thereafter, about February, 1916, he abandoned the whole field, with reference to which he testified:

"I had absolutely no intention at any other time of ever returning there for the purpose of developing this property. I was through with the field forever, as far as I was concerned."

In the meantime, and prior to notifying the respondents of his intention to give up the lease, there is evidence to show there were negotiations at the instance of the appellant looking to an extension of time in which to pay the annual minimum royalties as provided for in the lease. Now, turning to the text or the terms of the lease, it is said by counsel for appellant in written argument:

"The lease itself recognized that it had not been ascertained or become known whether merchantable coal existed upon the leased lands."

The written lease does not assure the existence of coal in merchantable quantities nor provide for compensation only upon condition that it is there in that kind and quantity, but on the contrary it was covenanted:

"Such mining and marketing to be done and royalties paid during the full term of this lease,

to wit: The term of ninety-nine (99) years, unless the coal in said land shall be sooner exhausted or it shall be ascertained that merchantable coal does not exist thereon in quantities sufficient to be profitably mined."

The words in the alternative, viz. "Or it shall be ascertained that merchantable coal does not exist thereon in quantities sufficient to be profitably mined," would be idle if appellant's present contention be allowed to prevail. The ignoring of those words would constitute a transgression of the rule requiring all the language of a written instrument to be taken into account in construing it.

The appellant undertook to pay annually a minimum amount of \$4,000 unless he could show that merchantable coal in paying quantities did not exist, and, for his protection, if he ascertained it did so exist but it became exhausted within the term of 99 years, he should then be released from liability.

The case of *Adams v. Washington Brick, etc., Coal Co.*, 38 Wash. 243, 80 Pac. 446, cited by appellant, we think is not helpful here. In that case there was no question about the tract of land containing a quantity of clay suitable for the manufacture of brick. But the clay having become exhausted before the expiration of the term, the suit brought thereafter presented the question if the whole property or simply the clay substance was the real subject-matter of the lease, and it was decided that the latter was the controlling consideration, and that upon its becoming exhausted a termination of the contract was effected. Nor do the cases of *Diamond Iron Mining Co. v. Buckeye Iron Mining Co.*, 70 Minn. 500, 73 N. W. 507, or *Gribben v. Atkinson*, 64 Mich. 651, 31 N. W. 570, cited in the *Adams v. Washington Brick Co. Case*, and relied upon by appellants here, hold to the contrary, but, as we understand, each of them holds under its own particular facts and circumstances that the nonexistence of ore was a defense to an action to recover royalty. The situation is similar in principle to the case of *Wilson v. Beech Creek Cannel Coal Co.*, 161 Pa. 499, 29 Atl. 100, wherein it was said:

"If a test of the property was necessary, it was the duty of the lessee to make it. This is apparent from the following clause of the lease: 'It is further agreed that, should said seam of coal prove faulty in the strata, or unmerchantable in its quality, so rendering it impracticable to mine or dispose of the same in reasonable quantity, the said lessees shall have the right to abandon the same, with the right to remove all the improvements by said lessees erected on or under said premises, but all advances of royalty paid for coal not mined shall be forfeited to said lessor.' It may be that a condition such as is described in this clause would constitute a defense to an action for the rent, but the burden of showing that it exists lies on the defendant company. It has the

right to mine and dispose of the coal in the Sault seam. In the exercise of this right, it may develop a condition which will relieve it from further liability under the lease; but the lessor, having parted with his right to mine the leased coal, is not in a position to acquire by his own efforts, further information respecting the quality and quantity of it."

In the present case the court correctly interpreted the lease in this respect and placed the burden of proof on the appellant. This conclusion disposes of a large number of assignments of error relating to instructions given and others requested by the appellant which were refused by the trial court.

[2] 3. The jury was permitted to take the amended complaint to its room in deliberating on its verdict. It contained the statement of the second cause of action for damages in the sum of \$120,000. It is urged by the appellant that the possession by the jury of that portion of the amended complaint was prejudicial to him. The court, however, took care of the matter by instructing the jury to "disregard the second cause of action entirely as under the order of the court the plaintiffs have elected to proceed only upon the first cause of action."

[3] 3. Exception was taken to an instruction that the lease is voluminous, but it is only necessary to direct the jury's attention to a few of its provisions which are directly involved, and it is claimed the court should have instructed the jury to consider all the provisions in the lease. The lease was admitted in evidence, besides being pleaded and admitted, and in one of its instructions the court did tell the jury they must consider and decide the issues on all the evidence in the case. There was nothing misleading in the instruction given, but on the contrary it was perfectly proper for the sake of clearness to call the jury's attention, as the court did do, to those particulars of the lease that were directly involved, and certainly there were many of its features which were in no special way germane to the controversy or issues submitted by the pleadings and the evidence.

4. There was evidence that about September, 1916, one of the respondents ordered the employees of the appellant off the premises. The jury was instructed that, if satisfied by the evidence that the plaintiffs, or either of them refused to permit the defendants or their agents to prospect and occupy the lands, the plaintiffs could not recover any minimum royalties accruing after that date. It is argued the instruction is unsound because it advises the jury that, if the plaintiffs breached the contract, they could nevertheless recover under the contract up to the time that they breached it, thus permitting them to take advantage of their own wrong. The argument singles out but one instruction, which, when consid-

ered in connection with the rest of them, appears to have been intended to care for the rights of the appellant himself. Other instructions amply advised the jury upon the subject generally. The appellant had abandoned his lease long prior to the incident in question, and the whole theory of the defense in the submission of its evidence was that there was no merchantable coal in profitable quantities in the land. The incident referred to happened after the suit was commenced and the appellants' agents were there, it appears, to gather evidence for the purpose of the trial.

[4, 5] 5. It is objected that the court refused to give a requested instruction that, by the commencement of the action on December 16, 1915, the plaintiffs elected to treat the contract as breached on that date, and that in no event could the plaintiffs recover any minimum royalties for any period subsequent to that date. The argument is not convincing. In the first place it was not affirmatively pleaded by the answer nor raised at any time before the verdict. The two causes of action were pleaded as one in the original complaint, in different amounts as to each from what they appeared in the amended complaint, because of the added length of time the lease had run. In both complaints the two causes of action were the same in substance though not in amounts. The one cause was for the minimum royalties, and the other was for the amount of royalties recoverable according to the schedule provided in the lease had the appellant properly prosecuted the ascertainment, development, and production of coal as it was claimed he was obligated to do, not for the whole term of the lease, but only those years for which it was sought to recover the minimum annual royalties then due. The legal effect was but a duplication of the causes of action or the inclusion of the one in the other. There was no claim of damages for the breach of the contract for the whole term of 99 years, but both causes of action related only to damages for failure to comply with the obligations of the lease upon the plans of payment therein provided for the time or period from the date of the lease to the dates of the complaint and the amendment respectively.

[6] 6. Other claims of error predicated upon the court's refusal to give instructions requested by the appellant cannot be sustained, for either they were substantially covered by instructions that were given, or they were not appropriate because of appellant's mistaken view of the burden of proof.

[7] 7. Finally, it is contended the motion for judgment n. o. v. and in the alternative for a new trial should have been granted. While all the grounds for a new trial pro-

vided for in the statute were set out in the motion, the only one urged upon our attention on the appeal is the insufficiency of the evidence to justify the verdict. There is a large amount of evidence in the record both for and against the contention that merchantable coal in profitable quantities exists in the leased lands. Each side produced an array of distinguished and experienced scientists and coal mining experts, engineers, and workers, who testified favorably to that side on the basis of both theory and actual and oftentimes repeated extensive examinations and investigations of the leased lands and the whole coal field. Many of the witnesses were familiar with market values of the different grades of coal, the costs of mining, and of the transportation rates prevailing during the period of time involved in the controversy. At the conclusion a situation was presented wherein the jury could easily, within the testimony, have decided the issues of fact in favor of either the respondents or the appellant without the risk of any possible proper interference at the hands of the court. Under such circumstances the trial court did not commit error in denying the motion.

Concluding that the trial was fair, the judgment is affirmed.

PARKER, C. J., and MACKINTOSH, TOLMAN, and MAIN, JJ., concur.

SCHOEN et ux. v. CITY OF SEATTLE et al.
(WELLS, Intervener). (No. 16709.)

(Supreme Court of Washington. Oct. 8, 1921.)

1. Municipal corporations \S 459—The actual value of property, not the value for taxation purposes, is the basis of estimate for limit of assessment for improvement district.

Laws 1915, p. 526, \S 1, providing that the estimated cost and expense of a local improvement which may be assessed against property in a proposed district shall not exceed 50 per cent. of the valuation of the real estate according to the valuation placed thereon for the purpose of general taxation, an assessment in a proposed improvement district that exceeds 50 per cent. of the assessed valuation, but not exceeding 50 per cent. of the actual value, is valid.

2. Statutes \S 219—Executive construction not controlling.

The construction given a statute by executive officers, assumed by the courts to be correct, but without actual determination, cannot overcome the plain import of its language.

En Banc.

Appeal from Superior Court, King County;
Calvin S. Hall, Judge.

Suit for injunction by E. R. Schoen and wife against the City of Seattle and another, in which H. H. Wells, intervened. Judgment dismissing the action and plaintiffs appeal. **Affirmed.**

Flick & Paul, of Seattle, for appellants.

Walter F. Meier, Edwin C. Ewing, and Hastings & Rubens, all of Seattle, for respondents.

MAIN, J. This action was brought for the purpose of restraining the carrying forward of a local improvement and levying an assessment therefor. The cause was tried to the court without a jury and resulted in a judgment dismissing the action, from which the plaintiffs appeal.

[1] On the 9th day of February, 1920, the city council of the city of Seattle passed an ordinance providing for improvement of Tenth Avenue N. E., by curbing side sewers and water mains. On the same day an ordinance was passed providing for improvement of the same street by paving. It will be assumed, but not decided, that the two ordinances constitute but a single improvement. Giving effect to this assumption, the cost of the improvements will be less than 50 per cent. of the actual value of the property within the proposed improvement district, but more than 50 per cent. of the assessed value thereof. The boundaries of the districts proposed under each of the ordinances coincide. The question, then, is whether the limitation for the amount of a local improvement is 50 per cent. of the assessed value of the property within the district or 50 per cent. of the actual value. Section 1 of chapter 168 of the Laws of 1915 provides that the estimated cost and expense of a local improvement which may be assessed against property in the proposed district shall "not exceed fifty per cent. (50%) of the valuation of the real estate, exclusive of improvements thereon, within such district, according to the valuation last placed upon it for purposes of general taxation." This language is the same as that found in section 12 of chapter 98 of the Laws of 1911. Prior to 1913 the assessed value of real estate and the actual value were theoretically the same. Section 1 of chapter 140 of the Laws of 1913 provides:

"All property shall be assessed at not to exceed fifty per cent. of its true and fair value in money. In determining the true and fair value of real or personal property, the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation; nor shall he adopt as a criterion of value the price for which the said property would sell at auction, or at a forced sale, or in the aggregate with all the property in the town or district; but he shall value each article or description of property by itself, and at such sum or price as he believes the same to be fairly worth in money at the time such assessment is made."

At the legislative session for the year 1919 (section 4 of chapter 142 of the Laws of 1919) this section was amended in particulars not here material. Prior to the passage of the act of 1913 above referred to, no question as to whether the limit for local improvement assessment would be 50 per cent. of the assessed value or 50 per cent. of the actual value could arise, because they were the same. The act of 1913 provided that all property should be assessed at not to exceed 50 per cent. of its true and fair value in money. In order to determine under the section from the act quoted 50 per cent. of the true and fair value in money, it was necessary first for the assessing officers to determine the actual value. Construing this statute, it was so held in *Hansen v. Hoquiam*, 95 Wash. 132, 163 Pac. 391. In that case the question was whether the city of Hoquiam had exceeded its debt limit as fixed by section 6, art. 8, of the Constitution. The Constitution provided that the debt limit should not "exceed five per cent. of the value of taxable property therein to be ascertained by the last assessment for state and county purposes previous to the incurring of such indebtedness except that in incorporated cities the assessment shall be taken from the last assessment for such purposes. * * *" Construing this language it was there held that the limitation of indebtedness was five per cent. of the actual value of the property, and not five per cent. of the assessed value. The language of the Constitution is strikingly similar to the language of the statute limiting the cost of a local improvement which may be assessed against the property in a proposed district to 50 per cent. of the "valuation of the real estate * * * according to the valuation last placed upon it for purposes of general taxation." The constitutional language is the "value of a taxable property which is to be ascertained by the last assessment." The language of the statute is 50 per cent. of the "valuation of the real estate according to the valuation last placed upon it for purposes of general taxation." In effect the language is the same, and in principle the *Hansen Case* is controlling. The close analogy of that case to the present one is recognized by the appellants, but they insist that it should not be followed.

The statute nowhere mentions assessed value, but speaks of valuation of the real estate. Prior to the passage of the act of 1913 fixing the limitation of assessment for general taxation at 50 per cent. of the value as stated, the assessed value and the actual value were theoretically the same. It cannot be held as argued by the appellants that the language of the local improvement act meant assessment value only prior to the passage of the act of 1913. It had a dual meaning—both the assessment value and the

actual value. The passage of the act of 1913 limiting the assessment did not destroy the force of the effect of the local improvement act which provided that the limitation should be 50 per cent. of the valuation of the property, and determined the manner in which that valuation should be ascertained. There are a number of cases from this court cited by the appellants where it may be said that the court assumed that the assessed valuation was to be taken as the standard but in none of those cases was the question here presented either considered or determined.

[2] The fact that the court may have assumed without determining that the limitation was 50 per cent. of the assessed value, and that the executive officers so construed the statute, if such be the fact, would not operate to control the construction of the language used and give it a meaning other than it plainly imports.

The judgment will be affirmed.

PARKER, C. J., and TOLMAN, MITCHELL, HOLCOMB, FULLERTON, BRIDGES, and HOVEY, JJ., concur.

STATE v. PASSILA et al. (No. 16401.)

(Supreme Court of Washington. Oct. 6, 1921.)

1. Criminal law §419, 420(1)—Testimony as to what was done and said by I. W. W. organizers and delegates held admissible in prosecution of members for criminal syndicalism.

In prosecution of I. W. W. members for criminal syndicalism, testimony as to what was said and done by organizers and delegates of such organization at recognized meetings or assemblage places of the organization, on occasions sanctioned or directed by it, held admissible, over objection that it was in the nature of hearsay evidence.

2. Criminal law §564(1)—Evidence that defendants were arrested in county other than that of trial insufficient to show court without jurisdiction.

In prosecution for criminal syndicalism, evidence that defendants were arrested at a place not shown to have been in the county in which they were being tried held not sufficient to show the court to be without jurisdiction, where there was ample evidence to show that they were only temporarily at the place where arrested, and that their residence was and had been for several years in the county in which they were being tried.

Department 2.

Appeal from Superior Court, Pacific County; H. W. B. Hewen, Judge.

Matt Passila and others were convicted of criminal syndicalism, and they appeal. Affirmed.

Geo. F. Vanderveer, Ralph S. Pierce, and F. D. Conden, all of Seattle, for appellants. Herman Murray, of South Bend, for the State.

MITCHELL, J. Matt Passila, Emil Gustofson, Elmer Pulkkinen, John Hill, John Nauha, Otto Pykkinen, and Sam Jaffe were tried jointly in the superior court of Pacific county on an information charging them with the crime of criminal syndicalism. With few exceptions to be further noticed herein their many assignments of error fall within the rule of, and are controlled by, *State of Washington v. Hennessy*, 195 Pac. 211.

Some claim is made of mistaken identity on part of appellants Matt (Gossila) Passila, Elmer (Golkkinen) Pulkkinen, and John (Nauka) Nauha, and that they should have been discharged. This matter was properly considered at the time of arraignment, and settled as best it could be, even with an interpreter, considering the difficult names and the foreign accent of the individuals. They were identified before the jury as the parties in mind. In passing on their separate motions to be dismissed from the case, the trial court said:

"The first names are sufficiently clear, but there may be some confusion as to how their last names are spelled. They are foreign names; but I do not think there is anything serious in this matter, or anything that is prejudicial to them."

The record altogether satisfies us; their motions to dismiss were properly denied.

[1] Very considerable complaint is made of alleged errors relating to the subject of declarations, assertions, and the conduct of certain persons, as testified to by witnesses at the trial, concerning the purposes, objects, principles, and teachings of the I. W. W. organization of which all the appellants were members. The objection is that it was in the nature of hearsay, was damaging, and hence prejudicial. But the record is apparently clear that the trial judge limited the testimony to those things and sayings done and made by organizers or so-called delegates of the organization at recognized meetings or assemblage places of the organization, and on occasions which were sanctioned or directed by it. In this respect the case falls within the rule of evidence announced in the very recent case of *State of Washington v. Pettila*, 200 Pac. 332.

[2] It is claimed on behalf of the appellants, Pulkkinen and Hill, that, as they were arrested at Siler's camp, and the evidence fails to satisfactorily show that the camp was in Pacific county, therefore the superior court of that county was without jurisdiction. There is ample evidence, however, to show that they were only temporarily at the

camp, and that the residence of each was and for several years had been at Raymond, Pacific county. The situation in this respect is similar on principle and in detail to that in the action of State of Washington v. Frank Hastings et al., 196 Pac. 13, which is decisive against this assignment of error.

Affirmed.

PARKER, C. J., and TOLMAN, MAIN, and BRIDGES, JJ., concur.

In re BREDL'S ESTATE. (No. 16378.)

(Supreme Court of Washington. Oct. 19, 1921.)

1. Executors and administrators §17(3) — Right of husband to administer community property of wife will not be upheld in case of fraud.

Where husband falsely swore that he had no knowledge of his wife's leaving a will, with intent to gain a greater share of the estate than the will left him, although Laws 1917, p. 654, § 49, provides that a surviving spouse shall be entitled to administer upon the community property notwithstanding any provision of a will to the contrary, the appointment of a son of the deceased as executor under a will will be upheld, although he did not present it for probate within 40 days as required by Laws 1917, p. 645, § 9.

2. Executors and administrators §15, 18 — Preference rights given by statute to administrator upon an estate are not absolute.

Since preference rights given by statute to administer an estate are not absolute, the rule does not require the court to appoint one as an executor or administrator who has given evidence of dishonesty of purpose in seeking the appointment or who is unfit to administer the trust.

Holcomb, J., dissenting.

Department 1.

Appeal from Superior Court, Lewis County; W. A. Reynolds, Judge.

Proceedings by Robert S. Bredl to revoke letters of administration granted to Anton Bredl on the estate of Matilda Bredl, deceased, to admit the will of said deceased to probate, and to appoint petitioner as executor according to the terms of the will. From an order granting the petition, Anton Bredl appeals. Affirmed.

W. E. Bishop, of Chehalis, for appellant.
J. H. Johnke, of Centralia, for respondent.

FULLERTON, J. On August 5, 1920, Matilda Bredl died in Lewis county, leaving an estate therein consisting of a community interest in real and personal property, and leaving as her heirs at law her husband, An-

ton Bredl, and a son by a former marriage, Robert S. Bredl. On August 16, 1920, the husband applied for letters of administration on her estate, averring in his application that due search and inquiry had been made to ascertain whether the decedent had left a will and that none had been found. On the filing of the petition letters of administration were issued to the applicant. On November 1, 1920, the son brought into court a will of the deceased, in which he was named as devisee of the decedent's interest in the estate, and as executor of the will. He petitioned the court to revoke the letters theretofore issued to the husband, admit the will to probate, and to appoint and confirm him as executor of the estate in accordance with the terms of the will. As grounds for refusing to appoint the husband as executor with the will annexed, he alleged that the husband had been guilty of fraud in procuring his appointment as administrator in that he had notice and knowledge of the existence of the will at the time he applied for letters of administration and falsely swore that no will existed, and that he had been guilty of fraud in his administration of the estate, in that he had secured a false and fraudulent appraisal of the property of the estate in order to have the same set apart to him as a homestead. The husband contested the petition of the son, but asked as alternative relief in case the will produced be proven to be the last will and testament of the deceased that he be appointed as administrator with the will annexed. At the hearing the court revoked the letters issued to the husband, admitted the will to probate, and appointed the son as executor of the estate. It made no direct finding on the question of fraud, but found that the husband had waived his right to be appointed administrator with the will annexed because he had not applied to be so appointed within 40 days after the death of testatrix. The appeal is by Anton Bredl from this order.

[1] On the ground upon which the court rested its judgment it may be doubtful whether the judgment can be sustained. The statute (Laws 1917, c. 156, § 9) provides that an executor of a will having the will in his custody shall, within 40 days after he receives knowledge of the death of the testator or testatrix, either present the will for probate to the court having jurisdiction, or present the will to such court with his written refusal to serve as executor thereof. It was shown that the son had this will in his custody at the time of the testatrix's death, having at all such times knowledge of the death, and did not produce the will into court within the forty day period. Other things being equal, therefore, the son was as much guilty of a dereliction of duty as was the husband, and since the statute pro-

vides (Id. § 49) that a surviving spouse shall be entitled to administer upon community property notwithstanding any provision of the will to the contrary, if he be otherwise qualified, there would appear no very sufficient reason in support of the ground stated for preferring the son to the husband. But we think there was not an equal dereliction, and that the judgment of the court is justified on that ground. There is no question that the husband had knowledge of the existence of the will at the time he applied for letters of administration and falsely swore to the contrary, and the evidence hardly leaves it in doubt that he acted with the deliberate intent of acquiring for himself a greater share of the estate than the terms of the will entitled him to acquire. The son was not equally guilty. While he, through ignorance of the requirement of the statute, withheld the will longer than the statutory time, he made no false oath, nor did he attempt deliberately or otherwise to deprive the husband of his rightful share of the property of the estate.

[2] The preference rights given by statute to administer upon an estate, while recognized as valuable rights, are not absolute. To administer an estate is to administer a trust, and the rule of the statute is not so hard and fast as to require the court to appoint one as an executor or administrator who has given evidence of dishonesty of purpose in seeking the appointment, or who has betrayed a gross unfitness in other respects to administer the trust, even though he have the preference right given by the statute. It is no answer to say that the law itself has thrown about the administration its own protection. No law can protect absolutely against dishonesty. In many instances it can do no more than punish, and this is not a recompense to those who have suffered by the dishonesty.

The order is affirmed.

PARKER, C. J., and BRIDGES and MACKINTOSH, JJ., concur.
HOLCOMB, J., dissents.

BOLLONG et ux. v. CORMAN et al.
(No. 16307.)

(Supreme Court of Washington. Oct. 11, 1921.)

1. Mortgages ⇐284—Mortgagors required to pay deficiency judgment could recover from their grantee who had assumed mortgage debt.

Where mortgagors conveyed land in sole consideration of grantee's promise to pay mortgage note, but were required to pay deficiency judgment rendered against them on foreclosure

of mortgage following grantee's default in payment of the note, the mortgagors could recover the amount so paid from grantee.

2. Evidence ⇐419(4)—Parol testimony admissible to prove grantee's assumption of mortgage debt.

Mortgagors suing their grantee for amount of deficiency judgment rendered against them on foreclosure, following grantee's default in payment of mortgage debt, could prove by parol testimony that grantee's promise to pay the mortgage debt was the sole consideration for the conveyance, though such promise was not merged in the executed deed, the verbal contract to assume the mortgage being enforceable as a contract independent of, and additional to, the deed, and therefore not within the rule forbidding parol testimony to vary, alter, or add to a written contract.

3. Judgment ⇐704 — Deficiency judgment against mortgagors in foreclosure action not conclusive that mortgagors could not recover amount thereof against their grantee who had assumed mortgage debt.

Deficiency judgment against mortgagors in foreclosure action, in which mortgagors had denied liability on theory that their grantee had assumed the mortgage debt with the consent of the holder of the note, held not conclusive as to the mortgagors' right to recover the amount thereof against their grantee, who had assumed payment of the mortgage debt in subsequent action, where the relative rights of mortgagors and grantee were not determined in the foreclosure action, and it was unnecessary to determine such rights under the issues involved in such action.

4. Mortgages ⇐284—Mortgagors defending foreclosure action on ground that their grantee had assumed mortgage debt with consent of holder of mortgage note could not recover expenses from grantee.

Mortgagors required to pay deficiency judgment rendered against them in foreclosure action on default of their grantee, who had assumed the mortgage debt, could not recover from the grantee the expenses of defending the foreclosure action on the theory that they were not liable because their grantee had assumed the mortgage debt with the consent of the holder of the mortgage note.

Department 2.

Appeal from Superior Court, King County;
A. W. Frater, Judge.

Action by J. S. Bollong and wife against Alpha L. Corman and others. Judgment for defendants, and plaintiffs appeal. Reversed.

O. O. Felkner, of Ellensburg, and Tracy E. Griffin, of Seattle, for appellants.

H. E. Foster and Carl J. Smith, both of Seattle, for respondents.

MITCHELL, J. Respondents have moved to strike appellants' brief and dismiss the appeal, upon the ground that the same is not sufficiently definite as to its contents to comply with the rules of court. The motion

has been considered, and the brief of appellants examined with reference thereto, and we are of the opinion that the motion should be and it is denied.

This case is a sequel of *Buchanan v. Schubach*, 106 Wash. 399, 180 Pac. 407, 185 Pac. 583, where some of the history of the controversy still existing between the present parties may be found. That was a suit on a note and to foreclose a real estate mortgage wherein the obligors attempted to show that they had been released from their obligation by the promise of Alpha L. Corman to pay the note and mortgage upon her taking title to the property subsequent to the date of the mortgage. The result of that suit was a judgment of foreclosure of the mortgage and a decision that there had been no substitution of Miss Corman in the place of the original makers of the note and mortgage, for the purpose of the deficiency judgment or at all. The judgment was affirmed by this court. During the pendency of the appeal therein the property was sold on a special execution for the sum of \$1,000. The sale was confirmed and a deficiency judgment entered in favor of the plaintiff therein and against the defendants, Schubach and wife and Bollong and wife, the makers of the note and mortgage. Upon the going down of the remittitur of this court in that case Bollong and wife on November 18, 1919, paid, as they were compelled to do, the sum of \$3,507.28 in full satisfaction of the deficiency judgment which had been entered against them; their joint judgment debtors Schubach and wife having been in the meantime judicially declared to be bankrupts. Prior to the payment by Bollong and wife of the deficiency judgment Miss Corman, as owner, redeemed the property from the execution sale. Now, Bollong and wife, alleging those facts and that the sole consideration for the sale to Miss Corman was her promise to pay the note and mortgage, that they were compelled to pay the deficiency judgment and \$1,789 costs and expenses of litigation in the *Buchanan* suit, all of which Miss Corman refuses to pay, and that the other defendants have acquired some subsequent and inferior interest in the property, have sued to recover judgment against Miss Corman in the amount they have necessarily expended together with interest thereon, to be adjudged subrogated to the rights of *Buchanan* so as to resell the property redeem by Miss Corman, and declaring the rights of the other defendants to be subordinate. By separate answers the defendants Miss Corman and Smith and wife denied material allegations of the complaint and affirmatively pleaded that the plaintiff was estopped by the judgment in the *Buchanan* Case from maintaining the present action. Miss Corman's answer admits she bought the property knowing the mortgage was outstanding. Replies put the affirmative matter of the answers in issue.

At the close of plaintiffs' case on the trial the court sustained a challenge to its sufficiency and dismissed the action. Plaintiffs have appealed.

All together there are 55 assignments of error, consisting largely of matters relating to evidence, all of which may be disposed of more generally.

[1, 2] In the first place, the complaint states a cause of action. It is well-established law that—

"A verbal contract by the grantee of mortgaged premises to assume the mortgage thereon is enforceable as a contract independent of the deed of conveyance and additional to it, which is not merged in the executed deed, and therefore does not fall within the rule forbidding the introduction of parol testimony to vary, alter, or add to a written contract." *Syllabus in Ordway v. Downey*, 18 Wash. 412, 51 Pac. 1047, 63 Am. St. Rep. 892.

It is just such a case that the appellants present here. It may be there is enough testimony already in the record to *prima facie* show that Miss Corman did promise to pay the mortgage, but certainly the court erroneously sustained objections to questions, struck out testimony that was admissible and important, and refused offers of proof sufficient to abundantly establish the promise. One De Britz represented the Bollongs in selling the property to Miss Corman. While he was being examined on behalf of the appellants he was asked, "What did Miss Corman pay the Bollongs or Schubachs for the property, if anything?" Upon his answering, "She didn't pay anything, she assumed the mortgage," the answer was upon motion of respondents stricken by the court, upon the ground that it was a mere conclusion. Again, the following of the same witness:

"Q. Did Miss Corman give to the vendors in this transaction any consideration, by way of money, property, or anything else?"

"Mr. Foster: That is objected to, if your honor please. It asks strictly for the opinion of the witness; his conclusions predicated upon some things that is not before the court."

"The Court: Objection sustained."

"Mr. Griffin: Note an exception."

"Q. What was the consideration for this transferring of the property from the Bollongs to Miss Corman? A. The assumption of this mortgage by the grantee."

"Mr. Foster: I move that be stricken."

"The Court: Grant the motion."

Time and again the same or similar questions were asked of the witness with the same result. Several witnesses were asked with reference to admissions claimed to have been made by Miss Corman relative to her agreement to pay the mortgage, such as the examination of Mrs. Bollong, one of the grantors, as follows:

"Q. Mrs. Bollong, did you ever have a conversation with Miss Corman relative to this

note and mortgage? A. Yes, sir. Q. What did Miss Corman say to you, if anything, at that time relative to her assumption of the note and mortgage?

"Mr. Foster: That is objected to as being incompetent, irrelevant, and immaterial for any purpose.

"The Court: Objection sustained.

"Mr. Griffin: Note an exception.

"Q. In the original foreclosure of this note and mortgage, in which you were joined as defendant with Miss Corman, did you have a conversation with Miss Corman relative to paying this note and mortgage? A. Yes, sir.

"Mr. Foster: I object to that as being incompetent, immaterial, and irrelevant for any purpose.

"The Court: Objection sustained. Exception allowed.

"Q. Did Miss Corman in any of those conversations tell you what occurred when she purchased this property? A. Yes, sir.

"Mr. Foster: I object to that as being immaterial.

"The Court: Objection sustained. Exception allowed."

Thereafter the appellants made a formal offer to prove all the matters suggested by all the questions mentioned above and other proof of a similar sort, and that she took the property without any consideration to the grantors except her promise to pay the note and mortgage, and that subsequently she had so admitted. The offer was objected to by the respondents "on the ground that it is incompetent, irrelevant, and immaterial." The objection was sustained. We are not apprised by the record, including the briefs and oral arguments of counsel for the respondents of any reason for the rulings unless possibly the contention or claim by respondents of former adjudication alleged to have been had in the Buchanan Case, but certain it is that all the rulings referred to and others of a similar sort, rather too numerous to be set out herein in detail, were erroneous.

[3] No reasons were given by the trial court for granting the nonsuit. At the end of plaintiff's proof the record shows, as follows:

"Mr. Foster: I now challenge the sufficiency of the evidence, and move for a nonsuit.

"The Court: Grant the motion.

"Mr. Griffin: We take an exception to the ruling."

It is argued by the appellants that the court's conclusion was based largely upon the contention of the respondents that the appellants were estopped by the judgment in the Buchanan Case. Indeed, counsel for respondents say in their brief and orally argue here, "The complaint simply asks for a re-adjudication of a matter already adjudicated," referring to the Buchanan Case. But we

cannot agree that there has been a former adjudication. A consideration of the pleadings in this case together with the pleadings, findings and decree in the Buchanan Case warrant us in so holding. In that case, while these appellants and Miss Corman were co-defendants therein, neither filed any cross-complaint or tendered to the other any issue whatever. They were not litigating with each other, but each defending against the suit of the plaintiff therein. The relative rights of these appellants and Miss Corman were not determined in that case, nor was it necessary to do so nor could they under the issues in that case. The theory of that case on the part of the Bollongs was simply that there had been, with the consent of the holder of the note and mortgage, a substitution of Miss Corman as obligor and the release of the makers of the note and mortgage to pay it. That such was the case is clearly shown by the decision in *Buchanan v. Schubach et al.*, supra, wherein this court found it unnecessary to discuss and refused to discuss the relative rights between Miss Corman and the makers of the note and mortgage. That that case did not adjudicate the matters now in issue between the Bollongs and Miss Corman appears too plain to merit discussion or the citation of authorities.

[4] In this connection the contention made by the appellants that they are entitled in this case to recover the \$1,789 expended by them in the Buchanan Case is without merit. Objections were properly sustained to questions on that subject. That amount was expended by them in a fruitless effort to show that the holder of their note and mortgage had made a contract by which they were released from the payment.

As the appellants were compelled to pay the deficiency judgment they alleged Miss Corman agreed with them that she would pay, we are earnestly urged, upon a reversal of the judgment herein, to pass upon claimed rights of the appellants to be subrogated to the rights of Buchanan under the judgment in that case, for the purpose of a resale of the mortgaged property redeemed by Miss Corman, and also to determine the rights of the appellants as against other defendants in this case who it is alleged are claimants of some junior interest in the property. Those questions, however, are not involved in the appeal. They are questions of law that become pertinent only when the facts alleged in the complaint are established against Miss Corman and will be decided by the trial court at the proper time.

Reversed.

PARKER, C. J., and HOLCOMB, MAIN, and TOLMAN, JJ., concur.

In re SKAGIT RIVER POWER PLANT.

CITY OF SEATTLE v. BINGHAM INV. CO.
(No. 16521.)

(Supreme Court of Washington. Oct. 15, 1921.)

1. Eminent domain \S 219—City's proceeding to condemn land to be tried in same manner as other civil actions.

City's proceeding to condemn land for hydroelectric power plant purposes, under Const. art. 1, \S 16, and Rem. Code 1915, \S 7779 (Pierce's Code 1919, \S 7556), is to be tried in the same manner as other civil actions.

2. Eminent domain \S 224—New trial may be granted in city's proceeding to condemn land.

The court's power to grant a new trial is the same in city's proceeding to condemn land under Const. art. 1, \S 16, and Rem. Code 1915, \S 7779, as in other civil actions.

3. Eminent domain \S 262(1)—Ruling on motion for new trial not disturbed unless court abused discretion.

Court's ruling on motion for new trial in city's proceeding to condemn land under Const. art. 1, \S 16, and Rem. Code 1915, \S 7779, will not be disturbed on appeal in the absence of an abuse of discretion.

4. Eminent domain \S 253(4)—Order granting city's motion for new trial on only one of the grounds specified in motion appealable by city.

In city's action to condemn land, where order granting its motion for a new trial was granted upon only one of the grounds specified in the motion, the city could appeal from the order.

5. Appeal and error \S 643(2)—On appeal from order granting new trial grounds not passed on by trial court not discussed.

On appeal from order granting a new trial, in which the movant cross-appeals because the order was granted on fewer grounds than were urged in the motion, the Supreme Court, in affirming the order, will not discuss the additional grounds urged in the motion, and not passed upon by the trial court, so as not to hamper the trial court by making rulings on the errors to constitute the law of the case in the event they arose in the course of the new trial.

Department 2.

Appeal from Superior Court, Whatcom County; Wm. H. Pemberton, Judge.

Proceeding by the City of Seattle, a municipal corporation, against the Bingham Investment Company, a corporation, to condemn lands for a hydroelectric power plant on Skagit River under Ordinance No. 40476. Verdict for defendant, and from an order granting a new trial, both parties appeal. Affirmed.

Walter F. Meier, Chas. T. Donworth, and Robt. H. Evans, all of Seattle, for plaintiff.
Thos. Smith and Coleman & Gable, all of Mt. Vernon, for defendant.

MITCHELL, J. The city of Seattle, by eminent domain proceedings, seeks to acquire title to land on the Skagit river to be used in connection with the establishment of a hydroelectric light and power plant. The question of damages was tried to a jury, which returned a verdict in the sum of \$27,500. The city contended the property was worth not to exceed \$3,000, while the witnesses for the owner, Bingham Investment Company, valued it at from \$17,000 to \$50,000. The city moved for a new trial on the grounds: (1) Excessive damages appearing to have been given under the influence of passion and prejudice; (2) insufficiency of the evidence to justify the verdict and that the same is against the law; and (3) error in law occurring at the trial and excepted to at the time by the petitioner. An order was entered that a new trial be granted unless the owner should agree to accept \$13,750. This the owner refused to do, and a new trial was granted. In the order granting the new trial the court expressly found and stated that the verdict "is excessive in the sum of \$13,750 and is the result of passion and prejudice against the petitioner, etc." The other grounds of the city's motion were in no way recited or specifically referred to in the order.

Both the property owner and the city have appealed, one contending a new trial was not authorized, and the other that it should have been granted upon all the grounds mentioned in its motion.

As we understand, the property owner contends the verdict of a jury is more binding upon the court in this kind of a case than in other kinds of civil actions. Upon the subject of compensation in eminent domain proceedings, article 1, \S 16, of the state Constitution provides:

"* * * Which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in courts of record, in the manner prescribed by law."

Under this mandate of the Constitution and keeping within both its letter and spirit the Legislature has provided (section 7779, Rem. Code; section 7556, Pierce's 1919 Code), in condemnation proceedings by cities, as follows:

"Upon the return of the verdict the proceedings of the court regarding new trial and the entry of judgment thereon shall be the same as in other civil actions, and the judgment shall be such as the nature of the case shall require."

In the case of *Seattle v. Williams*, 41 Wash. 366, 83 Pac. 242, a condemnation suit by the city, after referring to the privilege or duty of the jury to fix by its verdict the amount of compensation, it was said:

"Having done so, and the appellants having moved for a new trial, it then became the duty of the trial judge to ascertain whether or not there were any reasons for setting aside such verdict. If he believed the verdict to be grossly inadequate, or that a fair legal trial was not had, he should have granted a new trial."

Again, in the case of *Renton v. Dykeman*, 61 Wash. 330, 112 Pac. 348, an eminent domain case, upon reciting the reasons given by the trial judge for refusing a new trial, this court said:

"This would be no reason for any interference with the verdict, unless he went further and was of the opinion that it was clearly contrary to the weight of the evidence."

[1-3] We think there can be no serious question that under the Constitution and statute above referred to the trial of this kind of an action including the motion for a new trial is similar to that in other civil actions, and, as pointed out in the case of *Stimson Mill Co. v. Troxel*, 193 Pac. 213, the scope of our authority over motions for new trials is more limited than that of the trial court, being confined to a determination if the trial court abused its discretion in passing on such a motion. In all those cases where a motion for a new trial does not have to be supported by affidavits, and where the witnesses have testified in person at the trial, the rule that the trial judge has peculiar advantages for the exercise of discretion is more specially applicable. With such ideas in mind the record in this case consisting, among other things, of abstracts of the evidence and all other features of the trial prepared by both parties have been examined, from which it cannot be said there was any abuse of discretion in granting the new trial, although confined as it was to the one ground stated by the trial court.

[4] A motion is made to dismiss the city's cross-appeal upon the ground that the order granting the new trial, being in favor of the city, precludes it from the right of appeal. The rule, however, is otherwise under the circumstances of this case. *Rochester v. Seattle*, 75 Wash. 559, 135 Pac. 209; *Pierce v. Seattle Electric Co.*, 78 Wash. 167, 138 Pac. 666; *Pierce v. Seattle Electric Co.*, 83 Wash. 141, 145 Pac. 228; *Langley v. Devlin*, 87 Wash. 592, 151 Pac. 1134; *Parkhurst v. Elliott*, 103 Wash. 89, 173 Pac. 781.

[5] But the cross-appeal becomes unimportant now upon our affirming the trial court's order granting a new trial upon the ground therein specified. The cases in this court just cited establish the doctrine that the practice of permitting a cross-appeal by a party in whose favor an order has been made granting a new trial upon a less number of grounds than were urged in the motion therefor is to sustain the order so as to save

the necessity of further proceeding in the trial court or another appeal on the same record, and that this court will, in affirming the order, decline to discuss the additional grounds urged on the motion for the new trial, as they have not been passed upon by the trial court, which will not be hampered by those alleged errors on the score that they have become the law of the case in the event they arise in the course of the new trial ordered.

The order appealed from is affirmed.

PARKER, C. J., and TOLMAN, FULLERTON, and MAIN, JJ., concur.

FIDELITY SECURITIES CO. v. MARTIN et al. (No. 16466.)

(Supreme Court of Washington. Oct. 11, 1921.)

1. Deeds \S 13—Conveyance treated as one to grantee's estate on grantee's death prior to execution and delivery of deed.

Where purchaser, pursuant to a contract with third person to so do, caused deed to be executed in the name of third person, the fact that third person had died before execution and delivery of deed to purchaser did not affect the validity of the transaction, since in such case the conveyance will be treated by equity as one to third person's estate.

2. Deeds \S 195—Grantee presumed to have paid consideration.

The consideration for the purchase of land will be presumed to have been paid by the grantee.

3. Municipal corporations \S 962—Tax title superior to mortgage which antedated accumulation of taxes.

Tax title held superior to lien of mortgage which antedated the accumulation of taxes.

4. Municipal corporations \S 882—Fee title not merged in subsequently acquired tax title.

Where holder of certificate of sale procured quitclaim deeds from owners during period of redemption under Laws 1911, c. 96, \S 33, the fee title so acquired did not merge with the tax title acquired by deed from city on expiration of period of redemption, the title in such case being held through two independent sources, either of which or both of which could be relied on to defeat interest asserted in property by other person.

5. Estates \S 10(1)—Doctrine of merger applicable only where lesser and greater estate unite in same person.

The doctrine of merger applies only where a lesser and a greater estate unite in the same person and there is no intermediate estate.

Department 1.

Appeal from Superior Court, King County; John S. Jurey, Judge.

Action by the Fidelity Securities Company, a corporation, against Orison Dickinson, Marie M. Martin, Rudolph Beck, as executor of the last will and testament of Theodore Zilinsky, deceased, and others. Judgment for plaintiff, and the last two named defendants appeal. Reversed and remanded, with instructions.

Karl H. Kober, Walter A. Keene, and Howard A. Adams, all of Seattle, for appellants. Wright, Kelleher, Allen & Hilen, of Seattle, for respondent.

FULLERTON, J. On November 18, 1911, Orison Dickinson and wife owned certain real property situated in the city of Seattle. On that day they mortgaged the property to the First Mortgage & Savings Bank to secure a loan in the sum of \$1,200, then made by the bank to them. Subsequent thereto the mortgage by assignments, duly and regularly executed, passed into the possession and ownership of the Fidelity Securities Company, the respondent on this appeal. No part of the principal of the loan was ever paid. Interest was paid thereon according to the terms of the loan down to the year 1916, but nothing more.

In the year 1914, Dickinson and wife conveyed the property to one William D. Ingalls, and subsequent thereto the title to the property passed by mesne conveyances through sundry holders to one Elizabeth M. Davis and one John Carrigan, in whom it was vested in the year 1919. In 1910, the city of Seattle authorized the construction of sewers in the streets and avenues abutting upon and adjacent to the property, providing in the ordinances that the cost of the sewers should be paid by assessment upon property benefited.

Pursuant to the ordinance the city of Seattle caused an assessment to be levied upon the property in question, payable in installments. One such installment was not paid, and subsequently the city caused the property to be sold under the lien of assessment. No other purchaser appearing at the sale, the city purchased the property for the amount of its lien thereon, and issued to itself a certificate of sale. On February 13, 1919, more than two years after the sale of the property to the city, C. V. Martin, acting pursuant to a contract entered into between himself and Theodore Zilinsky, purchased the certificate of sale in the name of Zilinsky. Immediately after the purchase of the certificate, notice was given in the name of Zilinsky to the owners of the property, under section 33, chapter 98, of the Laws of 1911, that Zilinsky was the holder of the certificate of sale, and that he would demand a deed to the property from the city. After service of the notice, and prior to the expiration of the 60-day period in which the owners are permitted under the statute to redeem from the sale, Martin in the name of Zilinsky took quitclaim deeds to the property from the

owners. Between the time of the service of the notice and the delivery of the deeds Zilinsky died, a fact unknown to Martin. Zilinsky left a will in which Rudolph Beck was named as executor, and in due course he was appointed and confirmed as such by the superior court of King county. Acting in the name of the executor Martin applied to the city for a deed to the property. At that time the 60-day period in which Elizabeth M. Davis had the right to redeem by the terms of the statute had expired; Carrigan's time, however, had as yet some days to run. The city officers treated his quitclaim deed as a waiver of his right, and on May 12, 1919, one day prior to the time Carrigan's right to redeem expired, issued to the executor a deed to the property. Subsequently, and on May 29, 1919, the city issued to the executor another deed to the same property. This deed differed in no respects from the earlier deed, save that it had written on its margin the words, "Correction Deed."

By the terms of the contract between Zilinsky and Martin, Zilinsky agreed, in the case he should obtain title to the property, to deed the same to Martin "or his daughter," for the consideration of \$300 in cash and a note for \$1,500, payable three years after its date, with interest at 7 per centum, payable semiannually, secured by a mortgage on the property. On the execution of the deed to him from the city, the executor, pursuant to the terms of this contract and with the leave and approval of the court in which the probate proceedings were pending, conveyed the property to Marie M. Martin, a daughter of C. V. Martin, who, in turn, paid to the executor the sum of \$300 in cash, and executed and delivered to him a note and mortgage in accordance with the terms of the agreement between Zilinsky and her father.

After the occurrence of these transactions, the respondent, as the owner and holder of the Dickinson mortgage, began the present action to foreclose the same. It made parties defendant to the action, among others, the executor Beck, C. V. Martin, and Marie M. Martin. The complaint was in the usual form, and contained allegations appropriate under our form of procedure to show a lien by mortgage on the property, and a right to its foreclosure. With reference to the defendants named, it was alleged that they had or claimed to have some interest in or title to the mortgaged property, but that such interests or liens, if any, were subject and inferior to the plaintiff's mortgage. The defendants named answered separately. C. V. Martin's answer was a disclaimer of interest. Marie M. Martin answered, setting up title herself, claiming title superior to the lien of the plaintiff's mortgage in virtue of the deed from the city to the executor and the deed from the executor to her. The executor's answer was to the same effect.

The cause was tried on the issues as thus framed, at the conclusion of which the court made, among others, the following findings of fact:

"I. All of the allegations of the plaintiff's complaint are true and correct."

"IV. The mortgage described in the plaintiff's complaint is a valid lien upon the property described in the plaintiff's complaint to secure said sums and each of them, and said sums and all of them are due, owing, and unpaid.

"V. Theodore Zilinsky at the instigation of C. V. Martin purchased the record title of certain delinquent tax certificates, the record title of which, after the death of Theodore Zilinsky, descended to Rudolph Beck, as executor of the last will and testament of Theodore Zilinsky, deceased, subject to an agreement whereby the title to said property was to become vested in said C. V. Martin, the said C. V. Martin to pay said Theodore Zilinsky \$300 in cash and to execute a mortgage to him on said property for the sum of \$1,500 as compensation to said Theodore Zilinsky for the use of his name and money.

"VI. Subsequent to the death of Theodore Zilinsky, C. V. Martin, acting for himself and as attorney for said Rudolph Beck, as executor of the last will and testament of Theodore Zilinsky, deceased, for the purpose of obtaining a tax deed to said premises prior to the expiration of the period of redemption, and for the purpose of securing the entire title of said property in order to convey the entire title to Marie M. Martin, C. V. Martin's daughter, purchased for a valuable consideration the fee of said premises from the owners thereof prior to the expiration of the right of redemption from said delinquent tax certificates, and with the knowledge both of himself and said Rudolph Beck, executor of the last will and testament of Theodore Zilinsky, deceased, of the death of said Theodore Zilinsky, erroneously filled in the name of Theodore Zilinsky as grantee, on May 11, 1919, the deeds having been delivered to said C. V. Martin with the names of the grantees in blank and authority having been given to him to fill in the blanks.

"VII. Rudolph Beck, as executor of the last will and testament of Theodore Zilinsky, deceased, acting through C. V. Martin as his attorney, acquired deeds from John Carrigan and Elizabeth M. Davis, the owners of said property, for the purpose of inducing the treasurer of the city of Seattle to issue the said tax deeds prior to the expiration of the period of redemption, and represented to the treasurer of the city of Seattle that in obtaining said deeds Rudolph Beck, as executor of the last will and testament of Theodore Zilinsky, deceased, became the owner of the fee to said premises.

"VIII. The use of the names of Theodore Zilinsky and Marie M. Martin were merely assumed names of C. V. Martin, said C. V. Martin being the real party in interest."

As conclusions of law, the court found that the answering defendants were estopped to deny that the executor became the owner of the fee to the property prior to the date of the issuance of the deed from the city on the certificate of sale; that the title acquired by the deed from the city merged in the legal title acquired from such owners; that this

title was subsequent and inferior to the lien of the plaintiff's mortgage; and that the plaintiff was entitled to a decree of foreclosure in accordance with the prayer of its complaint. A decree was entered accordingly, from which this appeal is prosecuted.

There is much in the court's findings for which we can find no support in the evidence. It is found that Theodore Zilinsky purchased the certificate of sale from the city of Seattle at the "instigation" of C. V. Martin. If the word "instigation" is here used in its evil and corrupt sense, there is nothing to support it. The evidence on the question is found in the testimony of C. V. Martin. He testifies that he and Mr. Kanfers were engaged in a small way in the real estate business; that Mr. Kanfers was an old acquaintance of Mr. Zilinsky, and had made a loan for him which the borrower had repaid; that Mr. Zilinsky came to their office in connection with the matter, and inquired of Mr. Kanfers whether he knew of a place where the money could be again loaned or invested; that Mr. Kanfers answered that he personally knew of no such place, and called in the witness and put the inquiry to him, when he directed attention to the certificate of purchase held by the city. The result was the written contract hereinbefore mentioned. The contract was entered into after a full explanation of the procedure necessary to be pursued to acquire title under it, and of the probable expense necessary to be incurred in so doing. The contract on its face is explicit and plain. It involved in its execution nothing corrupt or evil; on the contrary, it involved a transaction expressly authorized by statute, and is such a contract as honest men, with honest intention and purpose, may lawfully make. Mr. Zilinsky entered into it of his own free will, and it is idle to say that he did so at the corrupt solicitation of C. V. Martin.

[1] The finding that the deeds from the owners of the fee to Zilinsky were delivered to C. V. Martin without naming a grantee, and that he with the knowledge of both himself and the executor, Beck, of the death of Zilinsky "erroneously filled in the name of Theodore Zilinsky as grantee," is likewise without support in the evidence. The undisputed evidence is that at this time the executor, Beck, knew nothing at all of the transaction, and that Martin did not then know of the death of Zilinsky. The undisputed evidence shows also that the grantee's names were inserted in the deeds when they were delivered. The evidence is that C. V. Martin bargained for the purchase of the owner's interest; that this bargaining was made with the agents of the owners, and not with the owners directly; that after the terms had been agreed upon, the agents procured the deeds from their principals with the grantee's name left blank, with the authority to fill in the name of such person as Martin

directed, and that Martin, when the deeds were tendered him, directed that the name of Zilinsky be inserted, and that his name was inserted, by the agents before delivery. Manifestly there was nothing "erroneous," corrupt, or illegal in this. The intervening death of Zilinsky in no manner affected the legality of the transaction. It was the intention of the grantors to convey the fee. It was the intent of Martin that the title should pass to Zilinsky in accordance with the terms of the contract entered into between himself and Zilinsky. Justice demands that it be so treated, and equity, under a familiar maxim, will treat the conveyances as conveyances to Zilinsky's estate.

[2] Again, the finding that the use of the names of Theodore Zilinsky and Marie M. Martin were merely assumed names of C. V. Martin, "said C. V. Martin being the real party in interest," is also contrary to the evidence. Zilinsky in his lifetime advanced the money necessary to finance the transaction, and out of the money so advanced were paid the costs and expenses of procuring the deed from the city. These amounted to a considerable sum. There was paid \$450 to procure the deeds from the owners of the fee; there was paid more than \$700 in general state, county, and municipal taxes, which the law exacted as a condition precedent to receiving a deed to the property under the city's certificate of purchase; there was paid the amount of the assessment for which the property was sold to the city with the accumulated costs and interests; and there was paid the costs and expenses of procuring the deed which involved proceedings in the probate department of the superior court. The amount of these latter items was not shown, but enough is shown to make it certain that there was no great profit in the transaction for Zilinsky's estate. On these advancements the estate has been repaid \$300 in cash, and there has been executed to it a note for \$1,500, secured by mortgage on the property. Contrary to the inference which the finding imports, therefore, Zilinsky in his lifetime had a substantial interest therein. What the business relations between C. V. Martin and his daughter Marie were the record does not disclose. Nor does the record disclose whether C. V. Martin or the daughter furnished the cash consideration which was paid to Zilinsky's estate on the execution of the deed. But if this question be material, and it be necessary so to do, the law will presume that it was paid by the daughter. But the record does show affirmatively that it is the daughter and not C. V. Martin who now holds the substantial interest. She has the legal title to the property, and to procure that legal title has obligated herself to pay to the source from which she acquired title the sum of \$1,500. C. V. Martin, on the face of the record at least, has now no interest in the transac-

tions whatsoever, and is in no wise bound by any contract. It is well to remember, also, in this connection, that the conveyance to the daughter is not an afterthought on the part of any one. The very contract entered into between Zilinsky and C. V. Martin at the inception of the transaction provides that title to the property when acquired by Zilinsky shall be conveyed to C. V. Martin "or to his daughter." The finding, therefore, that the daughter is without interest has likewise no support in the evidence.

If, then, the decree of the trial court is to be sustained, it must be sustained on the theory stated in the court's conclusions of law, namely, that there has been an estoppel by merger. But we cannot think there is any foundation for this conclusion. Perhaps no better argument on the question can be made than is made by Judge Cooley, in his work on Taxation (volume 2, p. 972 [3d Ed.]), where he says:

"It has been very properly held that the one who has conveyed lands with warranty cannot, as against his grantee, acquire a tax title for taxes, any part of which were on the land when his conveyance was given. So he who, pending an injunction sued out by himself to restrain the enforcement of a mechanic's lien, obtains a tax title, will not be allowed to make use of it to defeat the lien. So a guardian cannot destroy the estate of his wards by purchasing a tax title adverse to them. So a tax title to land acquired by one who holds the legal title to the land in trust to secure the legal payment of a debt is also held in trust. So a beneficiary under a trust deed cannot acquire a tax title adverse to the trust. And any purchase by one whom by contract or otherwise was under obligation to pay the taxes will be deemed a payment only. But one who has been in possession under a contract of purchase which he has surrendered is not precluded from buying.

"Whether one should be precluded by the naked fact that he claims title to the land, or that he has possession of it, from making a purchase in extinguishment of the right of another with whom he stands in no contract or fiduciary relations, is a question often touched by the discussion of courts without having as yet been very fully or comprehensively examined. So far as the cases hold that one who ought, as between himself and some third person, to pay the taxes, shall not build up a title on his own default, the principle is clear and well-founded in equity. But when one owes no duty to any other in respect to the land, it is not so clear upon what principle of equity or of estoppel such other is to set up, as against him, his neglect to perform in due season his duty to the state.

"There are some cases in which it has been distinctly held that possession, when the tax was assessed, fixed upon the possessor the duty to pay, and precluded his becoming a purchaser at a sale for the taxes when they became delinquent. In the leading case the occupant had gone into possession under an invalid tax title, and by the decision he was precluded from relying upon a second title which accrued while he was in the occupancy of the land. The sub-

ject is dismissed with very brief mention, the court appearing to regard the claim as inequitable and unjust, but for what reason is not very clearly explained. Other cases treat the point as equally plain. But it seems to be very well deserving of more consideration whether, where parties stand to each other in the position of adverse claimants to land, either of them can insist that the other shall discharge for his protection a duty owing to the public. There being nothing in the relation of the parties to each other upon which an estoppel can be raised, it is necessary to look elsewhere for the disqualification insisted upon; and this can only be found in some general rule of public policy. It is certainly an imperative requirement of public policy that the revenues of the state shall be collected, and that no one shall be allowed to defraud the treasury of his due proportion; but in the case where a tax sale has been made there is no fraud, and the revenue chargeable upon the land has been received. No wrong has consequently been done to the state. There has been delay in payment, but it is one for which the state makes ample provision, and for which it charges and collects all costs, as well as a further sum under the name of interest or penalty sufficient fully to compensate for any public inconvenience. It is not perceived that the state can then have any complaint to make, as the duty owing to it, though performed tardily, has been performed at last, and the incidental inconvenience paid for. The state, then, not being wronged in the purchase, it would seem that if any individual objects to it he ought to be able to point out how and in what particular it wrongs him.

"It is difficult to dispute the truth of what is said by the Supreme Court of Pennsylvania that 'there is nothing in reason or law to prevent a man who holds a defective title from purchasing a better at a treasurer's sale for taxes.' As between himself and any adverse claimant, the state is not concerned to inquire whether the one or the other was in possession. If the state, in taxing land, takes any notice of ownership, it is either for the convenience of the officers in making collections or for information to parties concerned. The tax is upon every possible interest in the land; and all parties having interests are equally under obligation to the state to make payment. The penalty for failure is a forfeiture or sale which will cut them all off; and while, without doubt, any one may defeat such a sale who can give satisfactory reasons for an assertion that it would be unjust to him for the purchaser to be allowed to rely upon it, it is not perceived that any other person can, upon plausible grounds of equity, insist upon the privilege to do so. There are decisions that the possession of a mere intruder or trespasser will not preclude his becoming purchaser; if this is true, mere possession ought not to be an impediment in any case; for the elements of wrong involved in the pos-

session of a trespasser cannot, on any grounds of equity or justice, be taken notice of as giving him a privilege denied to one whose possession is rightful."

[3-5] The case presented for the appellants is even stronger than cases considered by Judge Cooley. The appellants never had possession of the property, and never enjoyed any of its rents, issues, or profits. The taxes and assessments for which they purchased the property from the city accrued prior to the time they acquired the legal fee from the owners, and they assumed by acquiring the fee no obligation to any one, not even the state, to pay these accumulated taxes and assessments. No principle of law, equity, or morals, therefore, required them to make the judgment for the benefit of a mortgagor to whom they were in no manner obligated and whose mortgage antedated the accumulation of the taxes. Again, the doctrine of merger is applicable only in those instances where a lesser and a greater estate unite in the same person and there is no intermediate estate; and the courts which hold that a title acquired from a tax sale merges in a title derived by grant from the original proprietor do so for the stated conclusion that a tax title is inferior to the granted title. In none of the cases cited is a reason given for the conclusion, and we agree with Judge Cooley that no sound reason exists therefor. Manifestly, in this instance, if either of the titles acquired by the appellants was superior in law or equity to the other, the tax title is the superior title. The fee title was taken subject to all the existing liens on the property, the mortgage as well as the assessment and taxes. The tax title eliminated the mortgage, and on the doctrine as stated, if there is to be a merger at all, it would seem that the fee title merged into the tax title. But, in our opinion, no case is presented for the doctrine of merger. The appellants hold title through two independent sources, and they may plead and rely upon either or both against the suit of any person who asserts an interest in the property.

The decree appealed from is reversed and the cause is remanded, with instruction to enter a decree holding the appellants' title to be superior and paramount to the respondent's mortgage.

PARKER, C. J., and HOLCOMB and BRIDGES, JJ., concur.

HARRINGER v. KEENAN. (No. 16369.)

(Supreme Court of Washington. Oct. 8, 1921.)

1. Dismissal and nonsuit \S 81(7)—Motion for reinstatement proper remedy where dismissal entered without notice.

Where a dismissal was entered without notice because of plaintiff's failure to furnish a cost bond, motion to reinstate was the proper remedy; it not being necessary to bring proceedings by petition under Rem. Code 1915, §§ 464-473.

2. Dismissal and nonsuit \S 81(5)—Plaintiff's poverty properly considered on motion to reinstate after failure to furnish cost bond.

On a motion to reinstate an action dismissed without notice because of plaintiff's failure to furnish a cost bond, it was proper to consider the fact that because of plaintiff's extreme poverty, induced by illness, he had been unable to furnish the bond at the time required.

3. Dismissal and nonsuit \S 81(7)—Showing of a meritorious cause of action not necessary where dismissal without notice.

Where plaintiff's cause of action was dismissed without notice for failure to furnish a cost bond, it was not necessary, on a motion to reinstate, that a meritorious cause of action be shown; the cause of action being already set out in the complaint previously filed.

4. Appeal and error \S 1026(1)—Error without prejudice not ground for reversal.

Where the rulings of the court worked no prejudice to appellant, whether correct or not, they are not ground for reversal.

5. Appeal and error \S 889(2)—Necessary amendments will be considered to have been made.

On appeal from an order reinstating a case after dismissal, the complaint, if less specific than it should have been, will be considered to have been amended.

6. Husband and wife \S 333(3)—Wife's letters prior to separation held admissible in suit for alienation.

In a suit by the husband for the alienation of his wife's affections, a letter written by the wife to the husband after defendant began his attention to the wife and before the separation, was admissible, for the purpose of showing affection.

7. Husband and wife \S 333(3)—Wife's letter in defendant's handwriting held admissible in alienation of affection suit.

In a suit for alienation of the wife's affections, a letter purporting to have been written by the wife, but shown to be in the defendant's handwriting, was admissible as showing defendant's influence over the wife at the time.

8. Witnesses \S 380(5) — Impeachment of plaintiff's own witness by showing contradictory statements held proper.

In a suit for alienation of affections, impeachment by plaintiff of one of his witnesses,

by showing contradictory statements, was not improper.

9. Witnesses \S 244—Leading questions may be asked hostile witnesses.

In jury trials leading and suggestive questions may be asked of hostile and unfriendly witnesses.

10. Husband and wife \S 333(5)—Property settlement between husband and wife after separation properly excluded in alienation suit.

In a suit by the husband for the alienation of the wife's affections, evidence of a property settlement between the husband and wife after the separation was properly excluded as not bearing on the fact of alienation.

11. Husband and wife \S 324—Acts whereby wife's affections were alienated from husband held actionable wrong.

Where defendant, during the husband's absence, paid marked attention to the wife, with the result that her affections were transferred from her husband to defendant, such acts constituted actionable wrong.

12. Husband and wife \S 334(3)—\$600 held not excessive for alienation of a wife's affections.

In a husband's suit for alienation of his wife's affections, an award of \$600 was not disproportionate to the wrong suffered.

Department 1.

Appeal from Superior Court, King County: Wm. H. Pemberton, Judge.

Action by Joseph Harringer against Thomas Keenan. Judgment for plaintiff, and defendant appeals. Affirmed.

Arthur C. Bannon, of Seattle, for appellant.

Joseph M. Glasgow and Van C. Griffin, both of Seattle, for respondent.

FULLERTON, J. In this action the respondent, Harringer, sued the appellant, Keenan, for alienation of his wife's affections. The cause was tried by the court sitting without a jury and resulted in a judgment in favor of the respondent for the sum of \$600.

[1, 2] The first error assigned on the appeal is that the court erred in reinstating the cause after it had been dismissed for the failure of the respondent to file a non-resident cost bond. It appears that the appellant, on his appearance in cause, moved for a cost bond, and that the court ordered such a bond to be furnished on or before a date fixed in the order. The bond was not so furnished and the action was dismissed on the ex parte application of the appellant. Afterwards the respondent applied by motion to have the cause reinstated, basing his motion upon two grounds: First, that it had been entered without notice to him; and, second, that he had been unable

to furnish the bond in the required time because of his extreme poverty induced by illness. The trial court granted the motion, and it is objected that motion was not the proper remedy, as relief on the grounds stated can only be had by petition under sections 464-473 of the Code (Rem.). But the remedy by motion is proper when based upon the first ground stated. *Griffith v. Maxwell*, 25 Wash. 658, 66 Pac. 106. Whether on the second ground the remedy by petition is the only remedy we need not consider. The matter set forth thereunder was pertinent to be considered with the first ground of the motion, as it clearly showed that the plaintiff's failure to file the bond within the required time was founded upon a valid excuse, and was not due to neglect or to a willful disregard of the order of the court.

[3] The second contention under this head is that the application was not accompanied by a showing of a meritorious cause of action. But this is not necessary where a plaintiff seeks to be relieved from a default inadvertently entered against him. His cause of action appears in his complaint, and repetition thereof would in no manner enlighten the court. The cases cited in support of the point, namely, *Hoefer v. Sawtelle*, 43 Wash. 23, 85 Pac. 853, *Brandt v. Little*, 47 Wash. 194, 91 Pac. 765, 14 L. R. A. (N. S.) 213, and *Chehalis Coal Co. v. Laisure*, 97 Wash. 422, 166 Pac. 1158, are cases where a defendant sought relief from a judgment against him. In such instances the courts generally hold it necessary to show, in addition to the causes for vacating the judgment, that the applicant has a meritorious defense to the action in which the judgment against him was entered. This for the reason that it does not otherwise appear—a principle inapplicable to the plaintiff in an action.

[4, 5] The second assignments to be noticed are that the court erred in denying the motion of the appellant to make the complaint more definite and certain, and erred in overruling his demurrer to the complaint. But these assignments are of but little moment at this stage of the proceedings, even though they were technically well taken when interposed. The trial court treated the complaint as sufficient, and allowed each side to present all of his evidence which bore upon the general question. The appellant therefore suffered no prejudice from the rulings of the court, whatever view may be taken as to the correctness of its ruling. Error without prejudice, as we have often said, is not ground for reversal. Moreover, we are admonished by the Code to consider all amendments as made which could have been made, and were we to find that the complaint was less specific than it should have been we would treat it as amended to conform to the facts.

[6] The next assignments relate to the admission of evidence. It is contended that inadmissible evidence was admitted and considered by the court, and that with this eliminated insufficient evidence remains to support the judgment. Specifically, objection is made to the introduction of some five letters written by the wife to her husband during the year preceding their separation. The letters were couched in endearing terms, and tended strongly to show that the wife had at the time they were written a strong affection for the respondent. It is not contended, if we understand the appellant, that letters of this sort are inadmissible under all circumstances, but that they were inadmissible under the particular circumstances of the present case, since it was shown that they were written after the time the appellant began his attentions to the wife. The objection is not tenable. Alienation of affections is not usually accomplished on the instant. It is ordinarily a gradual process, extending over a considerable period of time, and it cannot be said to be finally accomplished until some overt act takes place which shows a want of affection. Here the overt act was separation, and letters written prior thereto were admissible. Such was the effect of our holding in *Beach v. Brown*, 20 Wash. 266, 55 Pac. 48, 43 L. R. A. 114, 72 Am. St. Rep. 98, and *Stanley v. Stanley*, 27 Wash. 575, 68 Pac. 189. In the latter case we said:

"It is well settled that acts and declarations of the husband in a case like this may be shown at and prior to the time of separation, for the purpose of showing affection."

[7] Another letter purporting to come from the wife, written some ten days after the separation, was also admitted over objection. But this was admitted for a purpose other than to show affection, although its tenor was to that effect. It was testified to be in the handwriting of the appellant, and was admissible to show his then influence over her.

Objection is made to the admission and consideration of certain letters purported to have been written by the wife to the appellant. It is objected to these that they were not sufficiently proven, but the evidence leaves but little doubt on that score. A comparison of the handwriting with the admittedly genuine handwriting of the wife demonstrates their actual authorship.

[8] Another assignment is that—

"The leading questions propounded to and the attempted impeachment thereafter by the respondent of his witness Mary Brugger was improper, and the court erred in the allowance thereof."

[9] But there was nothing improper in this. The witness, while at first friendly and free to talk, became hostile before the actual trial, and would answer only when

direct questions were put to her. The purported impeachment went no further than to show that she had previously made, both orally and in writing, statements contradictory of her then testimony. In trials before a jury it is well settled that leading and suggestive questions may be asked of a hostile or unfriendly witness, and the rule does not infringe on the other general rule that a party may not impeach his own witness. In this instance, since the case was tried by the court without a jury and is thus triable here de novo, the question only affects the weight of her testimony. Under no circumstance could it be error for which a new trial must be granted.

[10] The court denied the appellant the right to show a property settlement had between the husband and wife after the separation. There was no error in the ruling. Plainly the transactions between the husband and wife with relation to their property after their separation would have no tendency to show that the appellant had not alienated the wife's affections. |

[11, 12] Finally, it is objected that the preponderance of the evidence does not support the findings of the trial court. But on this question the evidence hardly leaves a doubt. The story is not an unusual one. The respondent and his wife were married on August 17, 1896. They lived together as husband and wife until June 8, 1918, when the wife left their home. His testimony and her letters to him show that until the appearance of the appellant, and for a considerable time thereafter, they had for each other mutual affection and regard. The respondent was a fisherman, and for a time in each year was away from his home in the pursuit of his calling. During these periods of absence the appellant paid the wife marked attention, with the result that the wife's affections were transferred from her husband to the appellant; the final result being the abandonment of the husband by the wife. The appellant's acts constituted actionable wrong, and the award made by the trial court is not disproportionate to the wrong suffered.

The judgment is affirmed.

PARKER, C. J., and HOLCOMB, BRIDGES, and MACKINTOSH, JJ., concur.

SUMNER K. PRESCOTT COMPANY v. SUMNER et al. (No. 16450.)

(Supreme Court of Washington. Oct. 6, 1921.)

1. Sales \S 214—Title held to remain in seller during period of manufacture.

Rule that, in case of sale of an article to be manufactured, title does not vest in the

buyer till the article is finished and delivered, or ready for delivery, is not changed either by the fact that by the contract the buyer has a right to inspect material and pass on workmanship, or that he is required to make payments as the work progresses, or that the seller is declared entitled to a lien for the unpaid portion of the price due when the article is delivered, properly packed, if there is default in the payment for a certain time.

2. Sales \S 342—Seller of articles entitled to sue for price and lien, though they were made in another's plant and by it delivered.

That castings, necessary for construction of an engine, which plaintiff contracted to furnish to defendant, an engine manufacturer, were by plaintiff's procurement actually made in the plant of another, and by it delivered directly to defendant, did not defeat right of plaintiff to sue on its contract for the price and to foreclose the lien; there being neither assignment of the contract nor novation.

3. Novation \S 1—Is a new contractual relation.

Novation is a new contractual relation, is based on a new contract of all the parties interested, and must have a valid prior obligation to be displaced and a proper consideration.

4. Liens \S 8—Possession not necessary for materialman's lien on chattel.

Under Laws 1917, p. 229, § 1, declaring that one who shall have performed labor or furnished material in the construction of a chattel, at the owner's request, shall have a lien on the chattel for the labor or material, though the chattel be surrendered, it is not essential to right of a materialman to a lien that he shall have had possession of the article to be manufactured.

5. Liens \S 9—Time for filing notice of claim of lien by one furnishing castings for construction of engines runs from last delivery of castings.

In case of one furnishing castings for construction of two engines, time for filing notice of claim of lien under Laws 1917, p. 229, § 2, "within 60 days of the date of the delivery of such chattel to the owner," commences to run from the last delivery of castings under the contract, and not from the commencement of the construction of the engines.

6. Liens \S 8—Not defeated by trade acceptance not paid.

Trade acceptance drawn by one furnishing castings for construction of engines on the engine manufacturer and accepted by the latter, not having been paid, did not operate as payment of the debt, nor defeat the lien.

7. Assignments \S 109—Duty of assignee of moneys to become due under terms of contract to payor stated.

A bank which, as security for advancements which it was making to F., an engine manufacturer, took an assignment of "all moneys due or to become due under the terms" of a contract, under which F. was constructing engines for S., and which provided for payment monthly by S. to F. of a sum equal to

the amount of the labor pay roll expended by F. on the engines during the preceding month, on the presentation to S. of properly verified copies of the pay roll, was under no duty to S. to see that the pay rolls had been paid, nor to apply the money, when paid, on indebtedness of F. to the bank contracted in the manufacture of the engines, rather than on other indebtedness of F. to the bank.

8. Negligence \Leftrightarrow 2—No liability to one to whom no duty is owed.

Any negligent delay of a bank at which was payable a trade acceptance, drawn by a materialman and accepted by a manufacturer, which was constructing engines for S., to return promptly the acceptance, on lack of funds for payment thereof appearing, did not make it liable to S.; any duty which it owed in the matter not being to S.

Department 2.

Appeal from Superior Court, King County; Everett Smith, Judge.

Action by the Sumner K. Prescott Company against the Franklin Tool Works and others. From a judgment awarding relief to plaintiff, and dismissing the cross-complaint of Henry W. Sumner and another, copartners as the H. W. Sumner Company, against the Union National Bank of Seattle, an added defendant, the partners appeal. Affirmed.

John B. Hart and F. C. Kapp, both of Seattle, for appellants.

Gates & Helsell and Donworth, Todd & Higgins, all of Seattle, for respondents.

MAIN, J. The primary purpose of this action was to recover a money judgment and to foreclose a chattel lien. After the action had been instituted upon the motion of the defendants Henry W. Sumner and Albert E. Parker, copartners doing business under the firm name of H. W. Sumner Company, the Union National Bank was made a party, and the issues made between the bank and the Sumner Company were also determined in the action. The trial resulted in a money judgment, and a direction that the lien be foreclosed, and in the dismissal of the cross-complaint filed by the Sumner Company against the bank. The Sumner Company appeals. The preliminary facts essential to be stated are as follows:

The Sumner K. Prescott Company is a corporation organized under the laws of this state. The Franklin Tool Works is also a corporation organized under the laws of this state. The Union National Bank is a corporation engaged in the banking business. As already stated, Henry W. Sumner and Albert E. Parker were copartners doing business under the name of H. W. Sumner Company. The Prescott Company was engaged in the business of manufacturing machinery, castings, etc. The Franklin Tool Works was

engaged in the business of constructing engines. The Sumner Company was engaged in the business of having engines manufactured for sale. On the 15th day of January, 1919, the Sumner Company entered into a written contract with the Tool Works Company whereby the latter company agreed to build and deliver on board the cars, packed for export, two heavy marine oil-burning engines. On March 10, 1919, the Tool Works Company entered into a contract with Sumner K. Prescott Company, whereby the latter company agreed to furnish iron castings necessary to the construction of the engines. After these contracts were entered into the parties entered upon their performance. The Union National Bank was loaning money to the Tool Works company in order that it might carry on its enterprise, and took from that company a written assignment of all the moneys due under the contract as the payments should be made from time to time. This assignment was accepted by the Sumner Company. The contract between the Sumner Company and the Tool Works provided that on the 10th day of each month the latter company should be paid a sum equal to the amount of the labor pay roll expended by that company on the engines during the preceding month, exclusive of any overhead charges, upon the presentation to the Sumner Company of properly verified copies of the pay roll, and further provided that a sum equal to 75 per cent. of the amount expended for material should be paid at the same time. In carrying this out, the method of procedure was for the Tool Works company to deliver to the bank copies of the pay roll and duplicate invoices for material furnished during the preceding month, and the bank in turn presented these, together with an assignment thereof, to the Sumner Company, and that company made payment directly to the bank. The business proceeded in this way until the Tool Works company, in the month of July or August, 1919, became financially embarrassed and a trustee in bankruptcy was appointed, who for a time continued to operate the plant and carry on the work of manufacturing the engines. After a time, under an order from the federal court, the plant was turned over to the Sumner Company and they completed the work upon the engines. The Prescott Company, not being fully paid for the castings which it had furnished, filed a notice of lien, and, as above stated, one of the purposes of this action was to foreclose thereon. Other facts will be stated in connection with the points to which they may be particularly pertinent.

[1] The first question to be determined is: Was the title to the engines during the time they were being constructed under the contract between the Sumner Company and the

Tool Works company in the former or in the latter? It is the contention of the appellant that the title was in the Sumner Company. The contract provided that the Franklin Tool Works agreed "to build, assemble, test, and deliver on board the cars, packed for export, at its plant in the city of Seattle, county of King, and state of Washington, two H. W. Sumner Company marine type heavy oil-burning engines of 600 shaft horse power each. * * *" The contract further provided that the Sumner Company had the right to inspect the building and construction of the engines. Where a contract is made for the manufacture of an article, not existing in specie at the time of the making of the contract, the general rule is that no title vests in the purchaser during the progress of the work, nor until the chattel is finished and delivered, or at least is ready for delivery, or by some act is appropriated to the buyer. The text of Mechem on Sales, vol. 1, p. 630, states the rule as follows:

"The question of the time when the title will pass to goods which have been ordered to be manufactured is involved in some little conflict of decision, though the decided tendency of the authorities in the United States is clear. Under a contract for the manufacture of an article, as for the building of a ship or the construction of any other chattel, not existing in specie at the time of making the contract, it is the general rule that no title vests in the purchaser during the progress of the work, nor until the chattel is finished and delivered, or, at least, is ready for delivery, and, by tender or other equivalent act, is appropriated to the buyer."

This court, in *North Pacific, etc., Mfg. Co. v. Kerron*, 5 Wash. 214, 31 Pac. 595, has adopted substantially the same rule. The appellant seeks to take the present case out of the rule by reason of the fact that the Sumner Company, under the contract, had a right to inspect all material before installation, and pass upon all workmanship, and the further fact that the contract provided for payment as the work progressed. The fact that the Sumner Company had the right of inspection, and was required to make payments as the work progressed, did not conclusively establish that the title passed to the Sumner Company. *Andrews v. Durant*, 11 N. Y. 35, 62 Am. Dec. 55; *Clarkson v. Stevens*, 106 U. S. 505, 1 Sup. Ct. 200, 27 L. Ed. 139. They are circumstances to be taken into consideration in determining what the parties intended by the language in their contract. It is also said that, since the contract provides that, in the event default is made in the final payment for the engines for a period of 90 days after they are ready to be delivered, the Tool Works company shall be entitled to a lien for the unpaid portion of the indebtedness, this shows an intention that title should be in the Sumner

Company. The final payment was due when the engines were delivered, properly packed for export, as provided in the preceding paragraph of the contract, which is above quoted. As we read this portion of the contract, it is nothing more than providing that the Sumner Company shall have a right to a lien after the engines have been completed, properly packed, and delivered. Prior to that time there is no provision in the contract covering the matter of liens. There is nothing in the contract or in the evidence which would take the case out of the general rule stated by Mechem to the effect that the title during the period of construction is in the manufacturer.

[2, 3] The title being in the Tool Works company, the appellant further contends that the Prescott Company had no right to maintain an action to foreclose the liens, because it is claimed that all rights under the castings contract were transferred by assignment or novation from the Prescott Company to the American Foundry Company, and if any right to a lien exists it is in the latter company. The Prescott Company and the American Foundry Company were closely affiliated. Sumner K. Prescott owned all the stock in the Prescott Company, with the exception of one share; he owned 75 per cent. of the stock in the American Foundry Company. The business of the two companies was conducted from the same offices. It was the practice, when orders came in, to send them to the factory where the articles required could be manufactured promptly. In this case the castings were in fact manufactured by the American Foundry Company, and were billed direct by that company to the Tool Works company. In this way it saved double entry on the books, as would be required if the American Foundry Company had delivered to the Prescott Company and that company in turn to the Tool Works company. There was no assignment of the contract, or pretense of assignment, from the Prescott Company to the American Foundry Company. At all times the Prescott Company was under obligation to fulfill the terms of the contract which it had entered into, and were the Sumner Company seeking recovery upon the contract there is no way by which it could maintain an action thereon against the Foundry Company. The contract was not transferred by assignment or novation from the Prescott Company to the American Foundry Company. A novation is a new contractual relation. It is based upon a new contract by all the parties interested. It must have the necessary parties to the contract, a valid prior obligation to be displaced, and proper consideration, and a mutual agreement, as was pointed out in the cases of *Sutter v. Moore Investment Co.*, 30 Wash. 333, 70 Pac. 746, and *Osburn v. Dolan*, 7

Wash. 62, 34 Pac. 433. The fact that the castings were actually made in the American Foundry Company's plant, and delivered by it direct to the Sumner Company, did not defeat a right of the Prescott Company to proceed upon its contract and foreclose the lien.

[4] It is next claimed that the Prescott Company's lien must fail, because it never had possession of the engines. It is argued that the lien statute (Laws 1917, p. 229) is not broader than the common-law rule, and to enforce a lien for work done upon a chattel possession was a necessary prerequisite. The statute provides, in section 1 thereof:

"Every person, firm or corporation who shall have performed labor or furnished material in the construction or repair of any chattel at the request of its owner, shall have a lien upon such chattel for such labor performed or material furnished, notwithstanding the fact that such chattel be surrendered to the owner thereof."

The statute, as we view it, is broader than the common law, and gives the right to one furnishing material of a lien, even though such material may not be in possession of the thing manufactured. Under the statute the Prescott Company, even though it did not have possession of the engines, had a lien for the balance owing to it.

[5] It is next contended that the notice of the claim of lien was not filed within the time required by law. Section 2 of the lien statute (Laws 1917, p. 229) provides that, in order to make the lien effectual, the lien claimants shall "within sixty days from the date of delivery of such chattel to the owner" file in the office of the county auditor a lien notice. The last delivery of castings under the contract was made by the Prescott Company on July 19, 1919, and the lien notice was filed on September 15, 1919, which was within the 60-day period. The appellant argues, however, that there could be no lien, under the terms of the statute, if the Tool Works company were the owner, unless the lien notice was filed "within 60 days after the construction of the engines commenced." The notice of lien was filed within the time required by law.

[6] Finally, upon this branch of the case, it is contended that the amount of the judgment should be materially reduced. It is claimed that certain of the castings furnished were defective, and that the Tool Works company was required to do a considerable amount of work in putting them in proper condition to be used; and, second, that there should be a material reduction on account of a trade acceptance. As to the work having been done on the castings necessary to fit them for use, the evidence, without reviewing it in detail, is too indefinite to enable the court to hold that an offset of this character should be allowed. The Prescott

Company at all times was ready to take back any castings that were defective, and had so notified the Tool Works company. The other matter on which a reduction was claimed was that of a trade acceptance. On June 6, 1919, the American Foundry Company, drew a trade acceptance for \$4,487, which was presented to the Franklin Tool Works, and accepted by that company, and made payable at the Georgetown branch of the Union National Bank. This was deposited in the Seattle National Bank on July 3, 1919, and credit was given therefor. It was payable 20 days after date. The due date was July 7, the preceding day being a Sunday. When the trade acceptance reached the Georgetown branch of the Union National Bank, there were not sufficient funds of the Tool Works company to cover it, and it was returned to the Seattle National Bank, and that bank charged back to the depositor, with the consent and approval of Mr. Prescott, the amount thereof. Prescott also testified that the trade acceptance was delivered to the Seattle National Bank for collection. Its right to charge back cannot be doubted. The trade acceptance, not having been paid, did not operate as a payment of the debt, nor defeat the right of foreclosure. 27 Cyc. 270; German Bank v. Schloth, 59 Iowa, 316, 13 N. W. 314; 18 R. C. L. p. 970.

[7] We will now take up the consideration of the case between the Sumner Company and the Union National Bank. By its cross-complaint the Sumner Company sought to recover against the bank moneys which it had paid thereto, and which it is claimed were not applied upon the indebtedness of the Tool Works company which was created in the manufacture of the engines. It is also claimed that it was the duty of the bank, before presenting the pay rolls to the Sumner Company, to see that the pay rolls had been paid. The bank did not take an assignment of the contract, but only "all moneys due or to become due under the terms" thereof. The assignment of money due or to become due under an executory contract is not an assignment of the contract, and the assignee is not bound to perform it. Lunt v. Lorscheider, 285 Ill. 589, 121 N. E. 237; Butler v. Gas & Elec. Co., 168 Cal. 32, 141 Pac. 818; National Surety Co. et al. v. Maag, 43 Ind. App. 16, 86 N. E. 862. Under the assignment the bank owed no duty to the Sumner Company to see that the money which was received from that company was properly applied upon the pay roll by the Tool Works company. The bank took the assignment of the moneys due on the contract merely as security for the advancement that it was making the Tool Works company. It is further claimed that the bank applied certain of the money upon the indebtedness which the Franklin Company

owed it, other than that contracted by the latter company in the manufacture of the engines in question. Even if this were the fact, the Sumner Company would not have a right to recover from the bank. That company paid the money voluntarily, and the case stood very much as though the money had been paid by the Sumner Company to the Tool Works company, and that company in turn having made payment to the bank. If this had been the procedure, it would hardly be contended that the Sumner Company had any right of action against the bank. In legal effect this was the transaction. *Winslow v. Anderson*, 78 N. H. 135, 102 Atl. 310, L. R. A. 1918C, 173; *Merchants' Insurance Co. v. Abbott*, 131 Mass. 397. In the last case, speaking of a similar situation, it is said:

"The case stands just as if the money had been paid by the plaintiffs to Abbott, and by Abbott to these defendants, in which case there could be no doubt that, while the plaintiffs could recover back the amount from Abbott, neither Abbott nor the plaintiffs could recover the amount from these defendants. The fact that the money, instead of being paid by the plaintiffs to Abbott, and by Abbott to these defendants, was paid directly by the plaintiffs to these defendants, does not make any difference in the rights of the parties. The two forms do not differ in substance. In either case, Abbott alone is liable to the plaintiffs, and these defendants hold no money which ex æquo et bono they are bound to return either to Abbott or to the plaintiffs."

[8] It is also claimed that recovery should be against the bank, because the Georgetown branch thereof, at which the trade acceptance was made payable, did not promptly return it to the Seattle National Bank. The trade acceptance was received by the Georgetown branch one day after its due date, or the 8th of July, and was returned on the 12th. What the effect of holding the trade acceptance for the time mentioned would have been, if a party to the instrument were suing, it is not necessary here to determine. The trade acceptance was drawn by the American Foundry Company, and accepted by the Franklin Tool Works. The Sumner Company was not a party to it, and so far as the bank was concerned was not known in the transaction. The bank owed no duty to the Sumner Company arising out of the trade acceptance. If it owed no duty, it would not be guilty of negligence; but if it owed a duty, but did not owe it to the Sumner Company, that company could not maintain an action. *Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621. Upon this question in *Shearman & Redfield on the Law of Negligence* (6th Ed.) vol. 1, § 8, it is said, with reference to duty as an essential element of negligence:

"The first element of our definition is a duty. If there is no duty, there can be no negligence. If the defendant owed a duty, but did not owe it to the plaintiff, the action will not lie. And there can be no duty to do any act which one has no legal right to do. The plaintiff must state and prove facts sufficient to show what the duty is, and that the defendant owes it to him."

There are two or three minor questions discussed in the briefs, and which have not been mentioned in this opinion. They have been considered, and we do not deem them to possess substantial merit. To discuss them here in detail would seem to unnecessarily prolong this opinion.

The judgment will be affirmed.

PARKER, C. J., and TOLMAN, MITCHELL, and HOLCOMB, JJ., concur.

STATE v. BIDEGAIN et al. (No. 3293.)

(Supreme Court of Idaho. Oct. 20, 1921.)

1. Criminal law §1159(2)—Judgment not reversed, where substantial evidence supports verdict.

If there is substantial evidence to support the verdict of the jury, the judgment will not be reversed.

2. Criminal law §369(1)—Held that the state may not prove defendant's arrest for a former similar offense.

On a trial of one for the offense of herding, grazing, and pasturing sheep on a cattle range, it is error to permit the state to prove that the defendant had been arrested for a former offense of the same kind.

3. Animals §102—Offense in use of cattle range.

In prosecutions under C. S. § 8333, it is not necessary to show that the cattle range is on public land.

Budge, J., dissenting.

Appeal from District Court, Custer County; Chas. P. McCarthy, Judge.

Peter Bidegain and three others were convicted of grazing sheep on a cattle range, and they appeal. Reversed, and new trial granted.

Brodhead & Clark and Chase A. Clark, all of Mackay, for appellants.

Roy L. Black, Atty. Gen., and Alfred Stone, Asst. Atty. Gen., for the State.

DUNN, J. Appellants were tried and convicted on a charge of violating C. S. § 8333, which reads as follows:

"Sec. 8333. *Grazing Sheep on Cattle Range.*—Any person owning or having charge of sheep, who herds, grazes, or pastures the same, or

permits or suffers the same to be herded, grazed or pastured, on any cattle range previously occupied by cattle, or upon any range usually occupied by any cattle grower, either as a spring, summer or winter range for his cattle, is guilty of a misdemeanor; but the priority of possessory right between cattle and sheep owners to any range, is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

The principal errors assigned are: First, that the evidence is insufficient to support the verdict and judgment, and particularly that the evidence does not show that the land on which the offense was committed was public land; and, second, that the court erred in permitting testimony to be given over the objection of appellants to the effect that one of the defendants, Peter Bidegain, had formerly been arrested on a charge of having sheep on the range in controversy in this action.

[1, 3] So far as the first error above stated is concerned, the law does not require that the cattle range shall be on public land. It is sufficient to say that the evidence submitted to the jury is conflicting, but that the record contains substantial evidence to support the verdict, and, under the rule that has been many times announced by this court, the judgment will not be reversed. *State v. Askew*, 32 Idaho, 456, 184 Pac. 473.

[2] The second error above mentioned is based upon the action of the court in permitting the following question and answer:

"Q. Did you know of Mr. Bidegain's being arrested for having these sheep on that range?
A. Yes, sir."

The arrest referred to in this question and answer was made some time before the charge on which the appellants were then being tried. The other appellants in this case appear to have been Bidegain's herders. The former arrest of Bidegain had no place in the trial of the present charge, and it would seem that evidence regarding that matter could hardly fail to prejudice the appellants in the minds of the jury, and for this reason we think the judgment should be reversed, and a new trial granted.

It is so ordered.

RICE, C. J., and LEE, J., concur.

McCARTHY, J., was disqualified, and took no part in the decision.

BUDGE, J. (dissenting). The only purpose for which the testimony quoted in the majority opinion was offered—and it was so expressly stated by the state's attorney—was to establish proof of knowledge on the part of the defendant of the trespass of the sheep upon the range, theretofore used under the provisions of section 8333, *supra*, and it was not offered or received in evidence for the purpose of proving that the defendant was guilty of the violation of any other act than

the one charged. The materiality of the testimony consisted in this: that it tended to establish knowledge or intent to commit the act charged. The weight and sufficiency of the evidence were clearly left to the jury. The defendant was not called upon to explain away other criminal accusations made against him; the proof went no further than to show that the defendant had upon a prior occasion been arrested for the same offense as charged in the complaint, and for which he was then upon trial.

This court held in effect in *State v. Butterfield*, 30 Idaho, 415, 165 Pac. 218, that, in order for the state to show a possessory right to a range as between cattle and sheep owners, it is only necessary to show priority in the usual and customary use of such range either as a cattle or sheep range, and that, in the absence of evidence of a protest on the part of cattle growers, no claim of exclusive right on their part can be maintained. The court further held in substance, and so instructed the jury, that the state must show that the range had not been abandoned as a cattle range, and that in order to establish this fact evidence of protest on the part of the cattle growers must be shown; that the very character of the range depends upon the past acts and attitude of the cattle growers and sheep men in regard to it. This testimony was clearly admissible if for no other purpose than to prove that the cattle growers had protested against the use of this range as a sheep range even to the extent of procuring the arrest of the defendant. The rule is well settled that evidence of other acts may always be admitted for the purpose of proving intent or knowledge. *State v. O'Neil*, 24 Idaho, 582, 135 Pac. 60; *State v. Maguire*, 31 Idaho, 24, 169 Pac. 175; 18 C. J. 589.

It was incumbent upon the state, as held in the case of *State v. Omaechevarria*, 27 Idaho, 797, 152 Pac. 280, to prove that the range in controversy had been previously occupied by cattle growers, either as a spring, summer, or winter range for their cattle, and that they or their predecessors in the cattle business had made the usual and customary use of the range as a cattle range prior to any use thereof in the usual and customary manner as a sheep range, and that the range had not been abandoned as a cattle range, and that the defendant knew, or had information from which a reasonable man under like circumstances would have known, that he was herding, grazing, or pasturing his sheep upon a cattle range previously occupied by cattle, in the usual and customary use of such range, and that sheep had not theretofore been herded, grazed, or pastured upon such range by sheep men in the usual and customary use of the range. *Omaechevarria v. State of Idaho*, 246 U. S. 343, 38 Sup. Ct. 323, 62 L. Ed. 763.

In the case of *State v. Maguire*, 31 Idaho,

32, 169 Pac. 178, this court, speaking through Mr. Justice Rice, announced the following rule:

"Whenever mental state, scienter or quo animo constitutes an ingredient of the offense charged, evidence is admissible of acts, conduct, or declarations of the accused which tend to establish such knowledge, intention, or motive notwithstanding the fact that it may disclose a different crime in law."

In the instant case the state did not attempt to prove that the defendant had been convicted of a former offense, but merely that he had been arrested upon a charge of having theretofore violated the provisions of section 8333, supra, for the sole purpose of bringing home to the defendant that he had knowledge of the character and extent of the range upon which he had trespassed by herding and grazing sheep in violation of the statute above quoted. Clearly it cannot then be said that the admission of this testimony constituted reversible error, and the judgment in this case should not be reversed for the reason stated in the majority opinion.

GRIMSTAD et al. v. JOHNSON et al.
(No. 4434.)

(Supreme Court of Montana. Oct. 10, 1921.)

1. Divorce §222—Husband not liable for fees to wife's attorneys in abandoned divorce action.

Under Rev. Codes, § 3677, permitting the court, while divorce action is pending, to require the husband to pay as alimony any money necessary to prosecute or defend an action, counsel fees may only be allowed while the divorce action is pending, and not after the suit has been discontinued; said section being exclusive under sections 8060, 8061, excluding common law where law is declared by Code, and the whole subject of divorce and separate maintenance being covered by sections 3641-3689.

2. Divorce §197—Attorneys' fees not within Rev. Code, § 3724, making husband chargeable for wife's "necessaries."

Attorneys' fees in a divorce suit are not "necessaries," within Rev. Codes, §§ 3724, 3725, making the husband responsible for wife's "necessaries"; a divorce not being a necessary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Necessaries.]

Appeal from District Court, Yellowstone County; Charles A. Taylor, Judge.

Action by O. K. Grimstad and another against Clara E. Johnson and another. Demurrer by defendant John A. Johnson sustained, and plaintiffs appeal. Affirmed.

Grimstad & Brown, of Billings, for appellants.

Nichols & Wilson, of Billings, for respondents.

BRANTLY, C. J. On October 1, 1918, Clara E. Johnson, through the plaintiffs, her attorneys, brought an action in the district court of Yellowstone county against John A. Johnson, her husband, for a divorce on the ground of extreme cruelty. Upon filing the complaint, she made an application for an order requiring the defendant to show why he should not pay her alimony pending the action, including suit money and counsel fees. The application disclosed that she was in ill health and without means to support herself or to pay counsel for services necessary to enable her to prosecute the action. It further disclosed that her husband was possessed of considerable property from which he was receiving a monthly income of approximately \$500. Before the hearing was had under the order, and without consulting her attorneys, she became reconciled to her husband and resumed marital relations with him. Later she directed the plaintiffs to dismiss the action, and neither she nor her husband appeared at the time set for hearing under the order. Thereafter plaintiffs brought this action against John A. Johnson, the husband, joining the wife as codefendant, to recover \$300, the amount of the fees which the latter had requested the court to allow in her application, alleging that the divorce action had been brought in good faith and that this sum was reasonable compensation for their services rendered therein. To this complaint the defendant John A. Johnson interposed his separate general demurrer. After consideration the court sustained it, and, the plaintiffs standing on their complaint, rendered judgment in favor of this defendant for his costs. Plaintiffs have appealed.

The single question presented for decision is whether, under any recognized rule or principle of law, the plaintiffs are entitled to maintain this action.

It is not entirely clear from the argument found in the brief submitted by plaintiffs whether their theory is that the husband is made liable under section 3677 of the Revised Codes, or is liable on the ground that the wife had implied authority under section 3724 to employ counsel upon his credit as a necessary. Section 3677, so far as it is pertinent here, reads as follows:

"While an action for divorce is pending the court or judge may in its or his discretion require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the

(201 P.)

action. * * * The final judgment in such action may be enforced by the court by such order or orders as in its discretion it may from time to time deem necessary, and such order or orders may be varied, altered, or revoked at the discretion of the court."

[1] We shall not stop to inquire what power the courts in this jurisdiction would have had at common law in divorce cases to require the husband to pay the fees of counsel employed by the wife. The statute declares the extent of the power and, in our opinion, is exclusive; for "in this state there is no common law in any case where the law is declared by the Code or the statute" (section 8060, Rev. Codes), and "the Code establishes the law of this state respecting the subjects to which it relates" (section 8061). It requires but a casual reading of section 3677, supra, to ascertain that the object of the Legislature in enacting it was to give the courts discretionary power, to be exercised during the pendency of the action upon a proper showing by the wife in an application for that purpose, to compel the husband to provide the means necessary to enable her to prosecute or defend the action. In other words, the power in this behalf conferred by the statute is only ancillary to, or an incident of, an action for divorce. This renders the conclusion necessary that when the main power conferred by this section has ceased to be operative the ancillary or incidental power also ceases to be operative and cannot be invoked by the wife's counsel in an independent action to charge the husband.

Upon examination of the decided cases in other states which have the same or similar statutory provisions, we find that their courts generally agree that counsel fees may be allowed only while the divorce action is pending. *Loveren v. Loveren*, 100 Cal. 493, 35 Pac. 87; *Burnham v. Tizard*, 31 Neb. 781, 48 N. W. 823; *Clarke v. Burke*, 65 Wis. 359, 28 N. W. 22, 56 Am. Rep. 631; *Isbell v. Weiss*, 60 Mo. App. 54; *Meaher v. Mitchell*, 112 Me. 416, 92 Atl. 492, L. R. A. 1915C, 467, Ann. Cas. 1917A, 688; *Humphries v. Cooper*, 55 Wash. 376, 104 Pac. 606, 133 Am. St. Rep. 1036; *Beadleston v. Beadleston*, 103 N. Y. 402, 8 N. E. 735; *Kincheloe v. Merriman*, 54 Ark. 557, 16 S. W. 578, 26 Am. St. Rep. 60; *Zent v. Sullivan*, 47 Wash. 315, 91 Pac. 1088, 13 L. R. A. (N. S.) 244, 15 Ann. Cas. 19. In some of the states this is held to be the rule independently of the statute; the theory being that the power to allow counsel fees is a mere incident to the general power possessed by the courts to grant divorces. *Kuntz v. Kuntz*, 80 N. J. Eq. 429, 83 Atl. 787. The rule was impliedly recognized by this court in the case of *Bordeaux v. Bordeaux*, 29 Mont. 479, 75 Pac. 359; a. c. on rehearing,

32 Mont. 159, 80 Pac. 6. In that case it was held that a district court has no power under the statute to allow counsel fees for past services, even during the pendency of the divorce proceedings; the only possible exception to this being, perhaps, where the allowance for such past services would be necessary to enable the wife to continue the future prosecution of the action or to make her defense. If the court cannot allow counsel fees for past services, it necessarily follows that it cannot, after the divorce proceeding has terminated, entertain an independent action by counsel against the husband for services rendered for the wife during the pendency of the action.

[2] Nor do we think the action is maintainable on the ground that the services of the plaintiffs were necessary in the sense in which this term is used in section 3724, supra. This section impliedly confers authority upon the wife to charge her husband as his agent for the value of articles necessary for her support when he neglects to make adequate provision for her, in all cases except as provided by section 3725. Under this section he is not liable for her support if she abandons him until she offers to return to him, unless she was justified by his conduct, in the first instance, in abandoning him. Nor is he liable if she is living separate from him by agreement, unless her support is stipulated for in the agreement. When she is not at fault, she has her option to rely upon the authority given her by section 3724, or, if any ground for divorce exists, she may bring her action for a divorce or for separate maintenance, under section 3643. It is never necessary, however, for the wife to have a divorce, no matter upon what ground she seeks it. The necessities referred to in section 3724 are such as should be provided by the husband for the wife to sustain her as his wife, and not to provide for her future condition as a single woman, or, perhaps, as the wife of another man. The duty to support the wife grows out of the marital relation, and when the wife seeks to dissolve this relation and set it aside, her want of funds to carry on the litigation is in no sense of the term a "necessary" for her support as a wife.

The Legislature, in enacting the provisions of the Code (sections 3641 to 3689), evidently intended to cover the whole subject of divorce and separate maintenance, and by sections 3724 and 3725, and others in pari materia with them, to cover the whole subject of the rights, duties, and obligations of the husband and wife, and thus to supplant all rules theretofore in force on the subject. From no point of view do any of them give support to the present action.

We think the judgment of the district court

was right and must be affirmed. It is so ordered.

Affirmed.

REYNOLDS, COOPER, HOLLOWAY, and
GALEN, JJ., concur.

STATE ex rel. GREEN v. WRIGHT et al.
(No. 4463.)

(Supreme Court of Montana. Oct. 10, 1921.)

Intoxicating Liquors §253—Motion for new trial not authorized after hearing on return of sheriff's warrant.

In search warrant proceeding under Prohibition Enforcement Act, after judgment rendered after hearing on return of the warrant of the sheriff, declaring forfeited whisky seized under the warrant and ordering it destroyed, a motion for a new trial is not authorized.

Appeal from District Court. Missoula County; R. Lee McCullough, Judge.

Proceeding by the State of Montana, on the relation of J. T. Green, against M. F. Wright and certain intoxicating liquors. From a judgment declaring forfeited whisky seized under warrant and ordering it destroyed, and from an order refusing a new trial, defendant Wright appeals. Appeal from order dismissed, and judgment reversed.

Harry H. Parsons and Thomas N. Marlowe, both of Missoula, for appellant.

D. N. Mason, of Missoula, and Frank Woody, of Billings, for respondent.

PER CURIAM. This case is a search warrant proceeding, instituted in the district court of Missoula county under the provisions of the Prohibition Enforcement Act (Laws 1917, c. 143). It came before this court on appeal by defendant and claimant from the final judgment rendered by the court after a hearing upon the return by the sheriff of the warrant declaring forfeited a quantity of whisky seized thereunder and ordering it destroyed, and an attempted appeal from an order denying a motion for a new trial.

The appeal from the order denying the motion is dismissed, for the reason that a motion for a new trial in such proceedings is not authorized. The appeal from the judgment presents the same question as that presented in the cases of *State ex rel. Samlin v. District Court of Custer County et al.*, 59 Mont. 600, 198 Pac. 362, and *State ex rel. Hogue v. O'Brien et al.*, 60 Mont. —, 108 Pac. 1117. Upon the authority of these cases, the judgment is reversed, and the district court is directed to dismiss the proceeding,

and order the sheriff to return the whisky and articles seized to the defendant and claimant.

Reversed.

**ROWE et al. v. EMERSON-BRANTINGHAM
IMPLEMENT CO. (No. 4446.)**

(Supreme Court of Montana. Oct. 10, 1921.)

1. Sales §277—Statutory warranties construed in connection with express stipulations of contract.

Though the provisions of Rev. Codes, §§ 5109-5111, as to implied warranties, became a part of a contract for the sale of a threshing machine, they must be construed in connection with express stipulations as to things to be done by the buyer to afford the seller an opportunity to repair breaks or supply missing parts, etc.

2. Evidence §442(6)—Parol testimony as to prior representations by seller's agent not admissible to add to terms of written contract.

Under Rev. Codes, §§ 5018, 7873, evidence as to oral agreement with an agent warranting capacity of a threshing machine cannot be admitted to add to a written contract warranting machinery "to do as good work as any other machine of the same size and manufactured for a like purpose," the contract being presumed to be complete although silent as to the special purpose for which the machine was bought, the rule forbidding addition by parol where the writing is silent as well as to vary it where it speaks.

3. Sales §429—No recovery for breach of warranty without restoration of property received.

Under a written contract for the purchase of a threshing machine providing that failure to give written notice of defects or return the machinery with its defective parts within a certain time should be conclusive evidence of the fulfillment of a warranty as to capacity and quality, the purchasers, in the absence of allegation and proof of compliance with such requirements, cannot recover for breach of such warranty, in view of Rev. Codes § 5065.

Appeal from District Court, Chouteau County; John W. Tattan, Judge.

Action by Wearn Rowe and others against the Emerson-Brantingham Implement Company. Judgment for defendant, and from an order refusing a new trial, plaintiffs appeal. **Affirmed.**

H. S. McGinley, of Ft. Benton, for appellants.

McKenzie & McKenzie, of Great Falls, for respondent.

COOPER, J. This action was brought to recover damages for a breach of warranty of the quality and fitness of a threshing

machine of a specified make, and to cancel the notes given for its purchase price. The original written order was executed September 6, 1915, and contained the usual provisions intended to safeguard the interests of the seller. The answer admits the sale, but denies the breach. It also sets forth a counterclaim in which it is alleged that the notes sought to be canceled were executed and delivered to evidence the purchase price of the machine, and that the mortgage thereon was given as security for the notes. A decree foreclosing the mortgage is also asked.

Appellants' counsel limits the inquiry to the single question of the admissibility of oral representations, not embodied in the ultimate written contract, warranting the capacity of a thresher of a specified make to thresh and clean alfalfa. The warranty set forth in the contract was that the thresher was "well made, of good material, and with proper use and management" would "do as good work as any other machine of the same size, manufactured for a like purpose."

The trial court, upon objection, excluded all evidence touching the prior statements and representations of the local agent in making the sale, and denied the plaintiffs' offer to prove the following facts: That the plaintiffs had no previous experience with a machine of the character in question; that their attention was not called to any portion of the written contract, except those designating the machinery and attachments purchased; that they had no opportunity to examine the machinery before its receipt, and that, while it was being operated by one of defendant's experts, one of the screens was blown to pieces owing to defects in its manufacture; that prior to the threshing season of 1916 the plaintiffs notified the defendant, through its local agent, of that fact; that defendant agreed at divers times to replace the defective parts and to put the thresher in running order so that it would thresh and clean alfalfa seed; but that up to the time of the commencement of the action, defendant having failed to live up to its agreement, plaintiffs notified it that they would consider the contract at an end by reason of the breach of warranties, and that they (the plaintiffs) have since that time held the machine "subject to instructions from the defendant as to where to ship and deliver the same." Thereupon the plaintiffs rested. The court adjudged the aggregate amount of the notes to be due and owing from plaintiffs, and rendered and entered judgment foreclosing the mortgage given as security therefor. This appeal is from an order refusing plaintiffs a new trial.

[1] One of the grounds upon which plaintiffs seek to evade payment of the notes is that they were not given an opportunity to examine the machine before its delivery, and

that the breaking of one of the screens proved a violation of the provisions of sections 5109, 5110, and 5111 of the Revised Codes, to the effect that a seller of an article of his own manufacture warrants it to be free from latent defects; that improper materials have not knowingly been used in its manufacture; that it is reasonably fit for the purpose for which it was sold, and that its inaccessibility to the buyer carries a warranty that it is sound and merchantable. It is true that these provisions enter into and become a part of the contract; nevertheless they are to be construed in connection with the express stipulations of the agreement. If defects in the machinery are later discovered, the contract specifies the things which shall be done by the buyer in order to afford the seller an opportunity to repair the breaks or supply the missing parts. They are as follows:

"It is also agreed and understood that no agent or employé of said company (officers of the company not included) is authorized to alter, change, modify, or waive this warranty, or any part thereof, or to make any other or different warranty, or that any notice to any agent or employé of said company, or any act at any time, of any agent or employé, shall not constitute a waiver of the written notices herein provided for, nor a waiver of any other stipulation in this warranty. Workmen, salesmen, and mechanical experts employed by said company in and about starting, adjusting, and repairing said machinery are not agents of said company, and it is hereby mutually agreed that said company is not bound by any statements, promises, or declarations made by them or any of them in reference to said machinery. * * * It is hereby expressly agreed that all claims for damages against said company, by reason of the nonperformance of machinery above, are hereby waived."

It is also provided that failure to give the written notice of defects within six days from date of its first use or to return the machinery to the place whence it was received within the same period—

"shall be conclusive evidence of the fulfillment of the warranty, and full satisfaction of the purchaser, who agrees to make no claim thereafter against said company, or to make any defense to the notes given therefor on account of any breach of the warranty."

[2] If in the warranty that the machinery ordered is "to be well made, of good material, and with proper use and management to do as good work as any other machine of the same size manufactured for a like purpose" was comprehended a warranty that the thresher to be furnished would thresh and clean alfalfa as well "as any other machine of the same size manufactured for a like purpose," the written contract was complete and must be taken as a full expression of the agreement between the parties. This is so because therefrom it will be presumed

that every material item and term has been placed therein. In such case parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed. The rule forbids addition by parol where the writing is silent, as well as to vary where it speaks. 2 Phil. Evidence (Cow. & H. Notes) 669; Naumberg v. Young, 44 N. J. Law, 331, 43 Am. Rep. 380; *Hel v. Heller*, 53 Wis. 415, 10 N. W. 620; *Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1; *Armington v. Stelle*, 27 Mont. 13, 69 Pac. 115, 94 Am. St. Rep. 811; *Kelly v. Ellis*, 39 Mont. 597, 104 Pac. 873; *Arnold v. Fraser*, 43 Mont. 540, 117 Pac. 1064; Rev. Codes, §§ 5018, 7873.

The law controlling a written contract becomes a part of it, and cannot be varied by parol any more than what is written. 2 Phil. Evidence (Cow. & H. Notes) 668; *Thompson v. Libby*, supra. Our Code sections above referred to merely declare the common-law rule in definite and crystallized form. In *Armington v. Stelle*, supra, a case wherein it was sought by a contemporaneous oral agreement to include a mining claim not specified in the written lease of other claims, the following statement from *Naumberg v. Young*, supra, is adopted:

"Where the written contract purports on its face to be a memorial of the transaction, it supersedes all prior negotiations and agreements, and * * * oral testimony will not be admitted of prior or contemporaneous promises on a subject which is so closely connected with the principal transaction, with respect to which the parties are contracting, as to be part and parcel of the transaction itself, without the adjustment of which the parties cannot be considered as having finished their negotiations and finally concluded a contract."

In *Kelly v. Ellis*, supra, the question involved was whether an oral promise said to have been made by one of the defendants that the plaintiff should be the general manager of the sheep ranch in question was one of the essential elements of the contract as finally written. In reaching a conclusion that the oral promise was collateral to the principal agreement Mr. Justice Holloway, expressing the opinion of this court, very aptly remarked:

"Unfortunately for plaintiff, he consented to the writing of April 17, which completely superseded the prior oral negotiations, including the promise to employ him, and the statutes of this state now forbid him to say that there ever was any oral promise for his employment."

There is no allegation in the complaint that the plaintiffs did not understand the contract as written, nor that its contents were misrepresented; their whole claim being that the local agent of the defendant said certain things concerning the capacity of the machine before the agreement was sign-

ed. Upon this statement plaintiffs predicate their claim that defendant committed a breach of its warranty. The final written agreement "must be considered, therefore, as containing all the terms of their contract which had been agreed upon at the time the written contract was executed." *Arnold v. Fraser*, supra.

The contention that, because "the written contract is silent as to the special purpose for which the machine was bought," the parol understanding between the local agent and the plaintiffs can be read into it, is likewise without merit. In *Seitz v. Brewers' Refrigerator Co.*, 141 U. S. 517, 12 Sup. Ct. 48, 35 L. Ed. 837, cited in the case of *Armington v. Stelle*, supra, it is said:

"Whether the written contract fully expressed the terms of the agreement was a question for the court, and since it was in this instance complete and perfect on its face, without ambiguity, and embracing the whole subject-matter, it obviously could not be determined to be less comprehensive than it was. And this conclusion is unaffected by the fact that it did not allude to the capacity of the particular machine. To hold that mere silence opened the door to parol evidence in that regard would be to beg the whole question."

"The rule invoked is that, where a manufacturer contracts to supply an article which he manufactures, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment of the manufacturer, the law implies a promise or undertaking on his part that the article so manufactured and sold by him for a specific purpose, and to be used in a particular way, is reasonably fit and proper for the purpose for which he professes to make it, and for which it is known to be required; but it is also the rule, as expressed in the text-books and sustained by authority, that where a known, described, and definite article is ordered of a manufacturer, although it is stated by the purchaser to be required for a particular purpose, still, if the known, described, and definite thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. *Benjamin on Sales*, § 657; *Addison on Contracts*, Book 2, c. 7, p. 977; *Chanter v. Hopkins*, 4 M. & W. 399; *Ollivant v. Bayley*, 5 Q. B. 288; *Dist. of Columbia v. Clephane*, 110 U. S. 212; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108; *Hoe v. Sanborn*, 21 N. Y. 552; *Deming v. Foster*, 42 N. H. 165."

See, also, *Gladding McBean & Co. v. Montgomery*, 20 Cal. App. 276, 128 Pac. 790; *Bruner v. Hegge* (Cal. App.) 183 Pac. 369. This is in accord with our Code sections upon the subject above referred to.

To allow a claim of this sort to be maintained where the parties have put their engagements in writing, would be to treat the agent's oral statements as warranties, and to completely ignore the rule that parol agreements leading up to the written contract are merged in it.

(201 P.)

[3] The right of the parties to make retention of the property by the purchaser conclusive evidence that the warranty has been fulfilled to the satisfaction of the purchaser was upheld and declared to be "automatic and conclusive" by this court in *Best Mfg. Co. v. Hutton*, 49 Mont. 78, 141 Pac. 653. Having been freely made, without deceit or fraudulent representation, and plaintiffs having neither alleged nor attempted to prove compliance with its express requirements relative to notice and return of the machinery or its defective parts to the place at which they took it into their possession, the contract must be enforced as it is written.

The gravamen of the charge is that, because the defendant failed to maintain the warranties set forth in the written instrument, plaintiffs are not liable on the notes in question. The prayer of the complaint is for damages on account of the breach and cancellation of the notes, the mortgage, and the contract upon which they are based. Having failed to establish a breach of warranty, as well as to allege and prove restoration of everything they have received under their agreement (Rev. Codes, § 5065; *Como Orchard Co. v. Markham*, 54 Mont. 442, 171 Pac. 274; 18 Ency. Pl. & Pr. 829), plaintiffs are not entitled to relief upon either ground.

The order appealed from is affirmed.

Affirmed.

BRANTLY, C. J., and REYNOLDS, HOLLOWAY, and GALEN, JJ., concur.

McCAULL-WEBSTER ELEVATOR CO. v. ROOT. (No. 4432.)

(Supreme Court of Montana. Oct. 10, 1921.)

1. Sales ¶22(3)—Unaccepted agreement is not a contract.

An agreement to sell wheat, which contained no promise of the buyer to accept, and which was not "closed by the buyer," cannot be sustained.

2. Sales ¶21—Agreement lacking consideration not a contract.

An agreement for the sale of wheat, for which the buyer paid no consideration, cannot be sustained.

3. Sales ¶24—Unaccepted agreement to sell, without consideration, not an option.

An unaccepted agreement to sell wheat, for which the buyer paid no consideration, cannot be sustained as an option.

Commissioners' Opinion. Appeal from District Court, Fergus County; Jack Briscoe, Judge.

Action by the McCaull-Webster Elevator Company against A. O. Root. From a judgment for plaintiff, defendant appeals. Re-

versed and remanded, with directions to dismiss.

Thos. F. Arnett, of Geraldine, and E. K. Cheadle, of Lewiston, for appellant.

Belden & DeKalb, of Lewistown, for respondent.

POORMAN, C. C. This is an appeal by the defendant from a judgment in favor of the plaintiff, made and entered in an action tried to the court sitting without a jury, and from an order overruling the defendant's motion for a new trial. The complaint alleges that the plaintiff is a corporation and that on or about the 23d of August, 1918, "the plaintiff and defendant entered into an agreement for a consideration as therein expressed, whereby defendant agreed to sell and plaintiff agreed to purchase for the sum of \$1.30 per bushel 1,000 bushels of wheat," and that defendant promised and agreed to deliver the same to the plaintiff at its elevator in Geraldine, Mont., on or before the 1st day of November, 1918, but that defendant neglected and refused to comply with the terms of the contract and the plaintiff was damaged thereby. To this complaint the defendant filed his answer, admitting the execution of an agreement on August 23, 1918, for the sale of a quantity of wheat to the plaintiff at \$1.30 per bushel, but denying that he has sufficient knowledge or information to form a belief as to the terms of said agreement, and for a further answer alleging that he entered into an agreement on the 23d of August, 1918, to deliver certain wheat to the plaintiff and that it was understood and agreed that the plaintiff should pay to the defendant a part of the purchase price; "that defendant would not have signed said contract only upon the inducement of plaintiff that part payment of said grain would be paid upon defendant's signing the same;" that defendant was misled by plaintiff and induced to execute said agreement to deliver said grain; that not any consideration or anything of value was paid to the defendant by the plaintiff for said agreement and that defendant did not deliver any of said grain to the plaintiff."

The agreement referred to in the complaint is as follows:

"Contract—The McCaull-Webster Elevator Co. "No. 36.

Geraldine, Mont., Station, Aug. 23, 1918.

"I, A. O. Root, do hereby sell and agree to deliver to the McCaull-Webster Elevator Company, or their agent, at their elevator, warehouse, or cribs, as they may designate, at Geraldine, station, in Chouteau county, state of Montana, between the 23d day of Aug., 1918, and the 1st day of Nov., 1918, buyer's option, 1,000 bushels of good, sound, dry, and merchantable wheat to grade 2 H. M., for which

I am to receive one and ⁸⁰/₁₀₀ dollars per bushel; said wheat being now in my possession and free from incumbrance. I do furthermore agree that, in case of default in the delivery of the grain as stipulated above, or by such date as buyer may extend the time of expiration of this contract, to pay as liquidation damages the difference between the price as above stipulated and the market value of same grain and grade on date this contract is closed by the buyer. I do furthermore acknowledge the receipt of none dollars as part payment on this sale, and confirm the contract as above made.

"Witness my hand this 23d day of August, 1916.

"Witness: Robt. Fulton. A. O. Root."

At the trial of the case the plaintiff introduced the agreement in evidence, and offered further evidence as to damages suffered by the plaintiff, and rested. The defendant testified to the effect that at the time of signing the agreement—

"He [Fulton] wanted me to sell some wheat to be delivered in the future, and I finally told him I would do so. He produced the blank form of contract, filled it out, and I signed it. I said to Mr. Fulton, 'How much do I get down?' I needed some money at the time; he shoved the contract in his drawer and said, 'None.' I answered that 'I would not have signed the contract if I did not want to raise some money,' and Fulton replied, 'We never do.' I answered, 'I don't know much about the laws of Montana, but in some states that contract is not worth the paper it is written on; I would not have to deliver, or you receive or pay for, the wheat.' Mr. Fulton answered, 'We don't pay anything on the contracts.' He refused to pay me anything on the contracts, and I refused any delivery. * * * I told him that I would not deliver grain on that contract unless he would pay me something on it."

He further testified that the plaintiff did not make any demand upon him for the delivery of the wheat until some time in December, 1916. The defendant rested at the close of Mr. Root's testimony and the plaintiff did not offer any rebuttal evidence.

[1-3] The agreement on its face shows that no consideration was paid therefor. The testimony of the defendant is also to the effect that there was not any consideration paid for the agreement and that he signed it with the understanding that a part payment was to be made. By the terms of the agreement the plaintiff does not bind itself to accept the wheat, nor does it make any promise whatsoever. The agreement was not "closed by the buyer." The agreement is wholly unilateral, is wholly without consideration, and for that reason cannot be sustained as a contract of sale; neither can it be sustained as a contract of sale and purchase, for it lacks both consideration and mutuality; neither can it be sustained as an option contract, for there was neither consideration nor acceptance thereof within the

time named in it, and the same, according to the undisputed evidence of the defendant, was withdrawn immediately after its signing and the refusal of the plaintiff to pay any consideration therefor. *Ide v. Leiser*, 10 Mont. 5, 24 Pac. 695, 24 Am. St. Rep. 17; *Snider et al. v. Yarbrough et al.*, 43 Mont. 203, 115 Pac. 411; *Donlan v. Arnold*, 48 Mont. 416, 138 Pac. 775.

For the reasons herein stated, we recommend that the judgment and order appealed from be reversed, and the cause remanded to the district court, with directions to dismiss the action.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded to the district court, with directions to dismiss the action.

WILLIAMS v. MUTUAL LIFE INS. CO. OF NEW YORK. (No. 4447.)

(Supreme Court of Montana. Oct. 10, 1921.)

Insurance — 292—Concealment of prior medical treatment held fraud avoiding policy.

Concealment by applicant for insurance of the fact that in the preceding year he consulted two doctors, and during several months was treated by one of them, held fraudulent.

Appeal from District Court, Beaverhead County; Jos. C. Smith, Judge.

Action by Ruby R. Williams against the Mutual Life Insurance Company of New York. Judgment for plaintiff, new trial denied, and defendant appeals. Reversed and remanded, with directions.

Charles R. Leonard and F. C. Fluent, both of Butte, for appellant.

Rodgers & Gilbert, of Dillon, for respondent.

REYNOLDS, J. This action was commenced to recover of defendant the amount alleged to be due upon an insurance policy upon the life of the deceased husband of plaintiff. Trial was had before a jury, which rendered a verdict in favor of plaintiff. Judgment was entered in accordance with the verdict. Motion for new trial was made and overruled. Defendant has appealed from the judgment and from the order overruling the motion.

On January 10, 1917, the insured, Oscar H. Williams, made application to the defendant company for insurance upon his life. On January 23, 1917, he passed the medical examination, and on February 5, 1917, the policy was issued. Insured died on the 28th of June, 1917, as a result of tubercular laryngitis.

The defendant admits the execution of the policy, but makes two separate affirmative defenses: First, that the policy was procured through fraud; and, second, that insured was not in good health at the time of payment of first premium and at the time of the delivery of the policy, the same being alleged as conditions precedent to the policy taking effect. In our disposition of the case, it is only necessary to consider the first one of these defenses.

The policy contains this paragraph:

"This policy and the application therefor, copy of which is indorsed hereon or attached hereto, constitute the entire contract between the parties hereto. All statements by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement of the insured shall avoid or be used in defense to a claim under this policy unless contained in the written application herefor and a copy of the application is indorsed on or attached to this policy when issued."

At the time of the examination of insured, he was required to make answer to a number of questions submitted by the medical examiner as a part of the application. In making answer to some of these questions, he stated that the only illnesses, diseases, injuries, or surgical operations that he had had since childhood were a fracture of the right thigh in 1904, a slight cold in September, 1916, of a duration of only from two to three days, and with complete recovery in September, 1916, an injury to right eye in 1899. He also stated that the only physician who had prescribed for or who had treated him, or with whom he had consulted in the past five years, was Dr. McMillan, of Dillon, in September, 1916, for the cold above mentioned, and that he was at the time of his examination in good health. The undisputed testimony shows that these answers of insured did not correctly state the facts. It appears conclusively that he had received treatments not only from Dr. McMillan, but also from Dr. Thorkelson in September and October, 1916, and was present at a consultation over his case between these two doctors and Dr. Jones at about the same time; that the treatments he received were not for "cold" as that term is commonly understood, but for a serious ulcer in the throat. At the consultation between Drs. Thorkelson, McMillan, and Jones, the question was discussed as to whether or not this ulcer was syphilitic or tubercular in nature. At that time a smear was taken from his throat and examined to determine whether or not the ulcer was a specific one, which test showed negative. The Wasserman test was also made for the same purpose which showed negative. This latter test was made upon the suggestion of the insured on account of the history of his case. No test was made to determine whether or not it was tubercular. The testimony is disputed as to

whether or not it was tubercular at that time, although it is admitted that he died the following June of tubercular laryngitis. However, the facts were conclusively established that the malady was a serious one, much more serious than is implied by the term a "cold," and that the insured knew that the physicians who were treating him so considered it. These facts were very material as bearing upon the risk that the company was assuming in writing his insurance, and it is hardly conceivable that if the company had known the real situation, it would have accepted the risk without first satisfying itself that the ulcer was nothing more than a mere local infection that would quickly pass away.

Construing the paragraph of the policy above mentioned, in the light of these facts, it is for this court to determine whether or not such misrepresentations shall be deemed fraud and construed as warranties affecting the validity of the policy. This court had a similar question under consideration in the case of *Pelican v. Mutual Life Insurance Co.*, 44 Mont. 277, 119 Pac. 778, in which the rule applicable to this case was laid down as follows:

"That upon the payment of the first premium it [the policy] became a contract binding upon the defendant, unless the latter could show that it was induced to issue it by actual fraud practiced upon it by Pelican, in failing to answer fully and fairly each question propounded to him, according to his best information and belief. * * * This being so, the burden was upon defendant to show, not only that the representations were untrue, but were made with the intent to conceal the condition of Pelican's health, and that defendant would not have issued the policy but for the fraud thus practiced upon it. 'Each party to a contract of insurance must communicate to the other, in good faith, all the facts within his knowledge which are, or which he believes to be, material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty.' (Rev. Codes, § 5570.) Therefore, if the insured intentionally conceals facts which are material, or makes false representations with reference to them, intending to mislead the insurer, he is guilty of actual fraud, which, at the option of the latter, avoids the policy. Such a fraud, however, is always a question of fact for the jury (Rev. Codes, § 4980), and, unless the condition of the evidence is such that only one inference may be drawn from it, the court may not direct a verdict. The inquiry is: First, as to the truth of the representations; second, if untrue, whether they were intended to mislead; third, whether the adverse party accepted them as true and acted upon them; and, fourth, was he prejudiced? (Power & Bro. v. Turner, 37 Mont. 521, 97 Pac. 950.) The concealment of the material fact is equivalent to a false representation that it does not exist."

We cannot escape the conclusion that the insured made false statements with knowl-

edge of their falsity; that the defendant accepted his representations as true, acted upon them, and was prejudiced. The concealment on his part of the facts that he had been treated from May until October of 1916, a part of the time at least, for an ulcer which he knew was suspected to be either tubercular or syphilitic in nature, and that he had consulted Drs. Thorkelson and Jones and had been treated by Dr. Thorkelson, constituted misrepresentation as to material facts affecting the risk and was fraudulent, thereby justifying the insurance company in avoiding the policy. The evidence upon this feature of the case being uncontradicted and it being possible to draw only one inference from it, there is presented a question of law for the court and not a question of fact for the jury. The fraud being conclusively established, the evidence was insufficient to sustain a verdict in favor of plaintiff.

For this reason the judgment and order overruling motion for new trial are reversed, and the cause is remanded to the trial court with directions to enter judgment in favor of defendant.

Reversed.

BRANTLY, C. J., and COOPER, HOLLO-
WAY, and GALEN, JJ., concur.

STUDEBAKER BROS. CO. OF UTAH v. WITCHER et al. (No. 2400.)

(Supreme Court of Nevada. Nov. 4, 1921.)

Appeal and error \S 832(1), 833(5)—Rehear-
ing for purpose of modifying judgment denied.

The granting of a rehearing is not essential to procure a modification of a judgment, and petition therefor will be denied, with leave to apply for such modification, if necessary to protect appellants.

Appeal from District Court, White Pine County; C. J. McFadden, Judge.

On petition for rehearing. Petition denied with leave to apply for modification of order. For former opinion, see 199 Pac. 477.

A. Jurich, of Ely, for appellants.

Chandler & Quayle, of Ely, for respondent.

COLEMAN, J. A petition for rehearing has been filed, upon the ground that since we expressed an adherence in our former opinion to the views stated in Studebaker Brothers Co. of Utah v. Witcher et al. (No. 2399) 195 Pac. 334, we should have ordered a modification of the judgment, as in that case. If such an order be necessary to protect the appellants, the granting of a rehearing is not essential to that end. Hence the petition is denied, with leave to apply

within 10 days from service of a copy hereof for a modification of the order.

It is so ordered.

SANDERS, C. J., and DUCKER, J., con-
cur.

STATE v. CERFOGLIO. (No. 2501.)

(Supreme Court of Nevada. Nov. 4, 1921.)

1. Criminal law \S 1144(14) — In absence of bill of exceptions containing evidence, instructions presumed applicable.

In view of St. 1919, c. 232, § 73, requiring the incorporation of the evidence in a criminal case in a duly settled bill of exceptions, instructions complained of will not be considered in the absence of such bill, though themselves a part of the record; it being presumed they were applicable to the proof.

2. Criminal law \S 1090(14) — Judgment not reversed for misdirection of jury in absence of bill of exceptions.

Since no judgment will be reversed for misdirection of the jury unless it appears, after an examination of the entire case, that the error resulted in a miscarriage of justice, a judgment will not be reversed on such ground, in the absence of a bill of exceptions containing the evidence; an examination of the entire case being impossible.

Appeal from District Court, Washoe County; Thomas F. Moran, Judge.

A. Cerfoglio was convicted of perjury, and he appeals. Affirmed.

Frame, Morgan & Raffetto, of Reno, for appellant.

L. B. Fowler, Atty. Gen., Robert Richards, Deputy Atty. Gen., and L. D. Summerfield, Dist. Atty., of Reno, for the State.

COLEMAN, J. Appellant was convicted upon a charge of perjury. Six grounds for reversal are urged—one that the court erred in giving certain instructions, and the others based upon alleged erroneous rulings on objections to the admission of tendered evidence.

[1, 2] Section 73, c. 232, Stats. 1919, pp. 431, 432, provides what shall constitute the record on appeal in a criminal case. Pursuant thereto, the only way by which the evidence in the case can become a part of the record is to have it incorporated in a duly settled bill of exceptions. There is no bill of exceptions; hence there is nothing before the court for its consideration. True it is that the instructions complained of are a part of the record proper, but so far as appears they may have been given at the request of appellant. In view of the fact that there is no bill of exceptions before us, we must presume that the instruc-

tions were applicable to the proof. *State v. Keith*, 9 Nev. 16. Furthermore, as stated in *State v. Willberg*, 45 Nev. —, 200 Pac. 475, no judgment will be reversed for a misdirection of the jury unless it appears, after an examination of the entire case, that the error complained of resulted in a miscarriage of justice. In the absence of a bill of exceptions, there can be no examination of the entire case.

The judgment is affirmed.

SANDERS, C. J., and DUCKER, J., concur.

McCULLY v. McARTHUR. (L. A. 6222.)

(Supreme Court of California. Oct. 7, 1921.)

1. Deeds §56(2)—Delivery depends on intention to unconditionally transfer title.

No set form of delivery is necessary, and whether a delivery has been effected depends upon the intention of the parties to unconditionally transfer the title to the property.

2. Appeal and error §994(3), 995—Weight of evidence and credibility of witnesses for trial court.

It is the exclusive function of the trial court to weigh the evidence and determine the credibility of the witnesses.

3. Deeds §208(1)—Evidence held sufficient to sustain finding of delivery of deeds.

Evidence held sufficient to sustain a finding of delivery of deeds.

4. Cancellation of instruments §53—Finding that neither grantor nor her estate was owner of certain property at all times held correct.

Where there was a finding that grantor executed deeds and made a delivery of them, a further finding that neither she nor her estate was the owner of the property is correct, since delivery passed title from the grantor.

5. Cancellation of instruments §53—Finding that for sufficient consideration grantor of her own free will executed and delivered deeds supports finding that it is not true that deeds were without consideration.

A finding that for sufficient consideration the grantor of her own free will executed and delivered deeds upholds a finding to the effect that it is not true that the deeds were without consideration, since the execution of the deeds voluntarily with knowledge of their contents, and with intent to convey, makes consideration unnecessary to support the deeds, as valid conveyances of land, by Civ. Code, § 1040.

6. Appeal and error §1071(5)—Immaterial finding that deeds were not made in contemplation of death held not prejudicial.

Where the trial court made a finding that deeds were delivered during the lifetime of the grantor, and that title was in the grantee,

whether delivery was in contemplation of death is immaterial, and a finding that the deeds were not made in contemplation of death was not prejudicial.

7. Deeds §208(1)—Evidence held sufficient to support findings that delivery of deed had been effected.

Evidence of an unconditional delivery of deeds held sufficient to support findings that at the time of delivery grantor did not wish them returned, and that they were not returned to grantor.

8. Evidence §314(2)—Testimony of grantor as to what physician told her about her health was properly excluded.

Testimony of a grantor as to what a physician told her concerning the state of her health was hearsay and properly excluded.

9. Cancellation of instruments §43—Testimony as to whether grantor feared grantee where there was no claim of coercion, was properly excluded.

In an action to cancel deeds, testimony as to whether grantor feared the grantee where there was no claim of coercion, was properly excluded.

10. Witnesses §245—Questions which had already been asked and answered were properly excluded.

Testimony concerning destruction of deeds was properly rejected, where the same questions had already been asked and answered.

11. Judgment §251(2)—Relief to defendant not limited to that claimed by cross-complaint if within issues raised by complaint.

In an action to cancel deeds, where defendant set up cross-complaint, alleging that he was owner of a half interest in the property, he is not limited in relief to his affirmative defense claiming a half interest in the property, and a judgment that he was owner of all the property was within the issues made by the complaint asking a cancellation of the deeds.

12. Appeal and error §189(3)—Objection to dismissal of cross-complaint and separate defense must be made below.

Where at the end of the case defendant on motion dismissed his cross-complaint and separate defense, it cannot be attacked for first time on appeal.

13. Judgment §251(3)—Withdrawal of cross-complaint and separate defense carried with it its corresponding prayer for relief.

In suit to cancel deeds, where defendant set up cross-complaint and separate defense, alleging a half interest in the property, the withdrawal of the cross-complaint and separate defense carried with it the corresponding prayer for relief, and left only the general prayer of the answer, for such other and further relief as to the court may seem meet and proper.

In Bank.

Appeal from Superior Court, Los Angeles County; Fred H. Taft, Judge.

Suit by Earl J. McCully, executor of the estate of Lulu M. McArthur, deceased, against Clifford W. McArthur, also known as Clifford B. Whitmore. From judgment for defendant, plaintiff appeals. Affirmed.

Earl J. McCully and Robt. T. Linney, both of Los Angeles, for appellant.

John B. Haas and Gilbert F. Wyvell, both of Los Angeles, for respondent.

LAWLOR, J. This is an appeal by the plaintiff from a judgment in favor of the defendant, in an action for the cancellation of four deeds to real property located in several counties of the state, in which Lulu M. McArthur, the original plaintiff herein, was the grantor, and the defendant the grantee, and to quiet the title to the property. Lulu M. McArthur died prior to the trial of the action, and Earl J. McCully, executor of her estate, was substituted as plaintiff.

The facts about which there is no dispute are these: Mrs. McArthur and respondent had resided together in the relation of mother and son for 20 years preceding the execution of the deeds in question. No kinship existed between them, and Mrs. McArthur had not adopted respondent. She was 60 years of age and very ill at the time of the transaction. At that time she was living on a ranch at Rivera. Her deposition was taken prior to the trial. She testified therein that she was told by the nurse, Rose Morrison, that she might die before morning. The matter of transferring the property had been under consideration for some time previous to the day on which the deeds were executed, November 3, 1917. On that date respondent brought a notary, Estelle Le Sage, and his attorney, Mrs. Mabel Willebrandt, from Los Angeles to the ranch. Mrs. Willebrandt presented the deeds to Mrs. McArthur, who signed them while propped up in bed. The execution was witnessed by the notary and two other women, Mrs. McArthur declaring she did not desire to have the deeds recorded. It was discovered that Miss Le Sage had not brought her notarial seal along. The deeds were taken to Los Angeles the same day by respondent, Mrs. Willebrandt, and Miss Le Sage, where the seal was affixed, and the deeds given to respondent, who retained them and caused them to be recorded in April of the following year. Between November 3, 1917, and April, 1918, Mrs. McArthur destroyed what she believed at the time were the original deeds, but which proved to be copies. This action was brought on May 2, 1918. The facts which are involved in dispute will sufficiently appear in the summary of the evidence.

The complaint alleged the material facts, and prayed for a cancellation of the deeds, and that they be declared null and void, be released of public record, and that appellant

be declared the owner of the property. Respondent in his answer denied the allegations of the complaint. As a special defense and by way of cross-complaint he alleged that he was the owner of an undivided one-half interest in the property described in the complaint, and prayed that he be adjudged the owner of such interest. In a separate defense he alleged that he "since the 3d day of November, 1917, held and does now hold the said undivided one-half interest of the said Lulu M. McArthur in trust for said plaintiff." The allegation of the cross-complaint is that appellant was the owner of some interest adverse to respondent, and respondent prayed that appellant be required to set forth the nature of her several claims, and that the title to one-half of the premises be declared to be in respondent. At the conclusion of the trial the court granted respondent's motion to dismiss the cross-complaint and separate defense without prejudice, and gave judgment for the respondent, quieting his title to all the property.

The court found:

"That on the 3d day of November, 1917, for a sufficient consideration, the said Lulu M. McArthur, * * * of her own free will, made, executed, and delivered to the defendant * * * four grant deeds, deeding in fee simple the above-described property to the said defendant, * * * and that the title and fee in and to said property now stands in the name of Clifford W. McArthur; that all denials and allegations in defendant's answer are true."

1. Appellant contends that—

"The evidence in this case is clear and uncontradicted that there was no valid delivery of the deeds"; that "the judgment given was in excess of that demanded in the answer, and this in itself requires a reversal"; that the "court in our opinion, committed several errors in its rulings on the admission of testimony"; and that other findings beside those on the subject of delivery of the deeds are not supported by the evidence.

In answer to this contention respondent correctly states the rule and cites authorities to the effect that where the evidence is sufficient as matter of law, and presents a substantial conflict, the findings will not be disturbed on appeal. He also claims that from the testimony of appellant's own witnesses it might be properly contended that there is a sufficient conflict to justify an affirmance of the judgment.

As appellant asserts, "The defendant makes no claim that there was a delivery of the deeds at any other or subsequent time" than November 3, 1917, the day of their execution, and at the trial respondent's attorney expressly stated that no claim was made of a subsequent delivery. It therefore must be shown that a delivery was made on November 3, 1917.

[1] The question of delivery is essentially one of fact, and depends upon the intention of the parties to unconditionally transfer the title to the property. No set form of delivery is necessary, and whether a delivery has been effected in a particular case must be determined by the facts and the circumstances, including the conduct of the parties. In *Tiffany on Real Property*, volume 2, § 461, p. 1738, it is said:

"While, as before stated, the necessity of delivery in connection with the instruments last named [deeds and contracts under seal], and others of an analogous character, is still fully recognized, the crude conception of a manual transfer of the instrument as the only means of making it legally effective, which gave birth to the expression 'delivery' as used in this connection, has been superseded by the more enlightened view that whether the instrument has been delivered is a question of intention merely, there being a sufficient delivery if an intention appears that it shall be legally operative, however this intention may be indicated. * * * Such a transfer to a third person, if not made with the intention that the instrument shall be legally operative, does not constitute a delivery; nor does a transfer to the grantee himself, if the transfer is not with such intention, but is for another purpose, as, for instance, to enable him to examine the instrument."

In *Follmer v. Rohrer*, 158 Cal. 755, 112 Pac. 544, it is declared:

"A valid delivery is accomplished when the conduct and acts of a grantor manifest a present intent to dispose of the title conveyed by the deed. No particular form of delivery is necessary; but any act or thing which manifests such an intent is sufficient to establish it. It is always a question of fact, and must be determined by the circumstances surrounding each transaction." *Kenniff v. Caulfield*, 140 Cal. 34, 40 [citing other cases]. Manual tradition of the instrument is not enough; the transfer of possession must be with the intent of presently passing title, and must not be hampered by the reservation of any right of revocation or recall." "It is settled that delivery is not complete until the grantor has voluntarily surrendered all control over it." *Drinkwater v. Hollar*, 6 Cal. App. 117, 91 Pac. 684.

"The delivery is sufficient and complete if from any or all of the circumstances the grantor has made known his intention irrevocably to part with his dominion and control over the instrument, to the end that it may presently vest title in another." *Moore v. Trott*, 162 Cal. 268, 122 Pac. 462.

See, also, *Williams v. Kidd*, 170 Cal. 631, 151 Pac. 1, Ann. Cas. 1916E, 703; *Stone v. Daily*, 181 Cal. 571, 185 Pac. 665.

[2, 3] Considerable evidence was admitted on the issue of delivery. Respondent on cross-examination testified that—

"When the matter of making these deeds came up, I discussed that with her several weeks before."

Nellie Allen Bell, a witness for appellant, testified that—

She "heard defendant say to Mrs. McArthur before the papers were signed, 'Well, mother, we are ready to sign those papers,' and Mrs. McArthur said, 'All right; I suppose it is the thing to do.'"

Respondent testified:

"The signing took place in Mrs. McArthur's room; she was in bed at the time; I think Mrs. Willebrandt handed those deeds to Mrs. McArthur; and in detail Mrs. Willebrandt explained these deeds to her, when she handed them to her; those deeds were prepared under the request of Mrs. Lulu M. McArthur; the request was made to me, and the deeds were prepared by me and under my immediate direction; these deeds were handed to her one at a time, when they were signed; when she took the deeds she asked a number of questions about the deeds, and Mrs. Willebrandt explained each deed to her in detail."

He also testified that—

"She signed each deed separately, and handed it to me," that Mrs. McArthur said, "I would like to have her [Mrs. McArthur's sister] sign as a witness," so that there was no chance thereafter to make any trouble over the deeds."

Estelle Le Sage testified:

"Mrs. McArthur spoke to Mrs. Willebrandt about the deeds, and I said that I had to take them up and put the seal on them; she seemed to be very disappointed, and she said, 'Well, I wanted everything done up this afternoon,' she said, 'I wanted it all done right now;' * * * yes, she said she wanted—very anxious to see them, to see that everything was finished up on them; she was disappointed because I didn't bring my seal; * * * she said she wanted him to have all the property, but there was one that she wanted to hold for a while."

Respondent further testified:

"I put the deeds that night in my desk, in my room. Mrs. McArthur had access to my desk. They remained in the desk from November 3 until I brought them in and put them in the safety deposit box. I think it was several weeks afterwards; I don't remember just exactly the date. I had the box in the Hellman Bank. Why, Mrs. McArthur never demanded of me either the original deeds, during the time the deeds were on the ranch there; she never asked me for the deeds until a very considerable time, months afterwards, and I don't remember of her ever making a demand for the deeds; I can't—I would not say positively that she didn't—but I can't recollect of her having asked me for the deeds until the friction started months and months afterwards," and that she "tried to get me to record them at the time they were first made out"; that "when she handed the deeds to me, she said she wanted the property to stand in my title; she said she wanted it to go to me. She said that I had been instrumental in making all the property. It was understood be-

tween us that whichever one should pass out first, the other should get the property."

We quote further:

"The Court: What occurred at the bank the day you and Mrs. McArthur went there to get the deeds? A. The day Mrs. McArthur and I went?

"The Court: Yes. A. I never went to the bank with her to get the deeds.

"The Court: When and where did you deliver her the copies? A. I didn't deliver them; they were in the bank; I didn't know they were taken for—or a long time afterwards, I don't remember just how long."

Mrs. Willebrandt testified:

"Miss Le Sage placed the seal on the deeds, and handed them to Mr. McArthur, saying, 'Well, they are finished, that is your mother's wish.' * * * I don't think I mentioned about mailing the deeds to her. I don't think I stated that night that I would return the deeds to her to-morrow, after the notarial seal was put on. I didn't understand that she wanted them returned to her. I understood that she wanted it finished; didn't want them in the hands of the notary."

It is appellant's contention that the evidence clearly shows there was no delivery of the deeds. The testimony of his witnesses is set forth, and asserted inconsistencies in the testimony of respondent are pointed out. Appellant also contends that the testimony of respondent is not to be credited; that respondent was anxious to secure the property; that he had "had some words" with deceased at the time she asked him for the deeds; and that these facts make his testimony untrustworthy. He lays stress on the testimony of Mrs. McArthur, "I told her [Mrs. Willebrandt] I wanted the deeds returned to me by mail, and to remember that if I did not die that night I did not wish them delivered," and that Mrs. Willebrandt told her that she would return the deeds; on that of Mrs. Nellie Allen Bell, Mrs. Lottie Foster, and Estelle Le Sage, who testified that Mrs. McArthur requested Mrs. Willebrandt to return the deeds; on Mrs. Foster's further testimony that, "She [Mrs. McArthur] said there should not be a delivery of the deeds; I don't think she said anything further about that delivery; she said to the lady lawyer that they were not to be delivered," that Mrs. McArthur "wanted them back by mail and offered to pay the postage," and that "she said, 'The deeds are not to be delivered now.'" Appellant refers to the testimony of Estelle Le Sage that Mrs. McArthur said, "I don't want them recorded." He claims the testimony of respondent corroborates that of appellant's witnesses in many respects, that respondent testified Mrs. McArthur said she wanted the deeds back, and that she made the request of Mrs. Willebrandt that they be mailed to the ranch.

Appellant points to the happenings subsequent to the signing of the deeds and says:

"It appears from the testimony of other witnesses which need not be reviewed in detail that after the defendant had confessed to Mrs. McArthur that he had the deeds, she obtained from him what he led her to believe were the deeds that she signed; that in the presence of her friend, Alta I. Hitchcock, and Miss Prince, in charge of the safety deposit vault, she destroyed the deeds; that these deeds were in fact merely copies; that McArthur had kept the original deeds, and afterwards recorded them. From the foregoing review it appears that the testimony that Mrs. McArthur did not intend to deliver the deeds, or have them delivered to the grantee, the defendant, by any other person, is absolutely uncontradicted."

Because of the state of the evidence on the question whether Mrs. McArthur intended to and did deliver the deeds, and the apparent force of appellant's contention that the evidence fails to establish a delivery, we have deemed it proper to set it out at some length. It is strongly urged by appellant that, inasmuch as the evidence shows that Mrs. McArthur did not want the deeds recorded, but did want them returned to her after the notarial seal was affixed, and that she attempted to obtain the deeds from respondent, but that he deceived her by retaining the originals and giving her copies—thereby evidencing his recognition of her right to the deeds—it is clear she did not intend to deliver them, and that therefore the findings cannot be sustained.

It is the exclusive function of the trial court to weigh the evidence and determine the credibility of the witnesses. Keeping this rule in view, it must be held under the evidence that we are bound by the findings of delivery. There is evidence that Mrs. McArthur handed the deeds to respondent, and said she wanted the property to stand "in his title"; that she asked her sister to witness the conveyance that there might be no trouble over them, that she said she wanted the transfer completed at that time, and that later she requested respondent to have the deeds recorded. The evidence of the relationship and friendly feeling existing between Mrs. McArthur and respondent at the time of the making out and signing of the deeds, and that it was understood between them that one or the other should eventually get the property, may have been regarded as significant by the court in finding for respondent. The evidence that Mrs. McArthur did not wish the deeds recorded at the time they were delivered is not, of itself, necessarily inconsistent with a delivery. The court may have concluded from the evidence that the reason Mrs. McArthur did not desire the deeds recorded was because she did not wish respondent to trade one of the pieces of property at that time. Nor is the evidence that she later attempted

to recover the deeds necessarily conclusive of nondelivery, for the court may have decided that she changed her mind concerning the transfer when the "friction" developed between them. As the evidence relied upon by appellant is in greater or less degree involved in conflict, and the testimony of respondent alone, if accepted, is sufficient to sustain a finding of delivery, it cannot be held that the trial court could not have found from the evidence that Mrs. McArthur intended to and did deliver the deeds.

[4] 2. Appellant contends that certain findings other than those of delivery are not supported by the evidence. Finding 2, which is to the effect that neither Mrs. McArthur nor her estate was the owner of the property at all times, is one of these. Manifestly, this finding is correct, for upon the theory that there was a delivery on November 3, 1917, neither she nor her estate could have been the owner after that date.

[5-7] The other findings complained of are to the effect that it is not true the deeds were without consideration; that it is not true they were made in contemplation of death; that it is not true that Mrs. McArthur instructed Mrs. Willebrandt to return the deeds if she did not die; that it is true respondent had the deeds on November 8; that it is true they were returned to him by Mrs. Willebrandt, but not for the purpose of returning them to Mrs. McArthur; that it is not true respondent on November 8 said the deeds were in the safe deposit box in Los Angeles; and that it is not true that on November 8, or at any other time, respondent went with Mrs. McArthur to the safe deposit box and there delivered the deeds to her, and that she then placed them in her private safe deposit box. These findings are on the issues presented by the pleadings. As we have shown, the finding on delivery is to the effect that for a sufficient consideration Mrs. McArthur of her own free will executed and delivered the deeds. *Lieinan v. Golly*, 178 Cal. 544, 174 Pac. 33, was an action to set aside deeds for a lack of consideration. The court said:

"In his brief the appellant claims that the finding of the consideration is insufficient. The ninth finding states that each of said deeds 'was executed for a good consideration passing from defendant to said Annie M. Golly.' No further finding was necessary. On the contrary, since the findings also show that the deeds were executed voluntarily and with knowledge of their contents and the intent to convey, no consideration was necessary to support the deeds as valid conveyances of the land. Civ. Code, sec. 1040."

It is true the complaint alleged the transfer was made in contemplation of death, but in view of the finding that the deeds were delivered during the lifetime of Mrs. McArthur and that title was found to be in respondent, her motive—whether she delivered

the deeds in contemplation of death—is immaterial, and the finding could not have been prejudicial. As to the remaining findings Mrs. Willebrandt testified she gave the deeds to respondent, that she did not understand Mrs. McArthur wanted them returned to her, and respondent testified he told Mrs. McArthur, a short while after the deeds were signed, that he had them in his desk at the ranch. The finding that respondent did not return the deeds to Mrs. McArthur is supported by the evidence, for it is not disputed she secured only the copies. The finding that Mrs. McArthur, on or about November 27, learned for the first time that the copies of the deeds which she destroyed were not the originals is immaterial, for it having been found there was a delivery on November 3, whether she later learned that copies and not originals had been given to her, becomes unimportant.

[8-10] 3. There was no error in excluding the testimony concerning Mrs. McArthur's physical condition. Her testimony to the effect that she thought she was critically ill was admitted, and the statement of the doctor to her concerning her condition, since the doctor was not called as a witness, was hearsay. The testimony of Mrs. Foster, as to whether or not Mrs. McArthur was in fear of respondent, was properly excluded, for there was no claim that the deeds were delivered by reason of respondent's coercion. The testimony of Mrs. McCandless concerning the destruction of the deeds was properly rejected because the questions had already been asked and answered.

[11] 4. Appellant's contention that the judgment must be reversed for the reason that it exceeds the relief prayed for, in that in the separate defense and in the cross-complaint the respondent had alleged himself to be the owner of a one-half interest in the property and asked to be adjudged such owner, cannot be sustained. In *Zellerbach v. Allenberg*, 99 Cal. 57, 33 Pac. 786, it was contended the judgment was not authorized because it granted the defendant affirmative relief when no such relief was prayed for. The court said:

"There was no error in the action of the court complained of. The case was one in equity, and the court was authorized to grant any relief consistent with the case made and embraced within the issues, although not specifically prayed for."

In this case the relief granted was clearly embraced within the issues, for the complaint asked a cancellation of the deeds, and the court found that respondent was the owner of the property. Appellant argues further that the question presented here "is the effect in an answer of allegations the only effect of which, when the pleading is taken as a whole, is that of a disclaimer and admission against interest as to a part of the

subject-matter of the action." In *Billings v. Drew*, 52 Cal. 565, it was declared:

"They had the right to set up negative as well as affirmative defenses to the action, and the affirmative matter, separately pleaded, did not operate as a waiver or withdrawal of the denials contained in other portions of the answer."

In *Nudd v. Thompson*, 34 Cal. 39, a case involving a motion on the pleadings, it was said:

"We had occasion to consider that question in *Siter v. Jewett*, 33 Cal. 92, and we held that, 'where there are several answers, an admission made in one is not available in proof of issues raised by the others.'"

In *Meyers v. Merillon*, 118 Cal. 352, 50 Pac. 662, the court declared:

"As in separate defenses a denial in one is not waived by an admission of the same matter in another (*Billings v. Drew*, 52 Cal. 565; *Miles v. Woodward*, 115 Cal. 308), so here the denial of the answer is not waived or overcome by an averment in the cross-complaint of substantially the same facts as those which the answer denies."

It follows that respondent is not bound by the averments in the special defense and cross-complaint, and that the relief need not be limited to that prayed for.

[12] In *Southern Pacific R. R. Co. v. Du-four*, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92, it was stated:

"At the close of defendant's case he withdrew his special defense, and this action of counsel is assigned as error. Upon an examination of the record, we find no objection or exception taken to the withdrawal of this special defense from the answer, and hence do not perceive how it can be a proper subject for review. If plaintiff, relying on the allegations of the defense to cure a defective complaint, was surprised and misled by such action of counsel, upon a proper showing he would have been entitled to a continuance in order that he might amend his complaint or procure additional evidence, but there is nothing to indicate that he applied for such relief."

The question presented here is similar to the one in that case, with the additional fact that respondent moved also to dismiss the cross-complaint. No objection was made by counsel for appellant to the granting of these motions, so the question may not be raised for the first time on appeal.

[13] It follows that respondent's withdrawal of these pleadings, which admitted title to one-half of the property to be in appellant, carried with it the corresponding prayer for relief, and left only the general prayer of the answer, which was "for such other and further relief as to the court may seem meet and proper in the premises."

5. It having been decided that the findings

of delivery, as well as those on other material issues presented by the pleadings, were supported by the evidence, and that appellant's objections to the admission of testimony and to respondent's withdrawal of certain of his pleadings were without merit, it becomes unnecessary to consider respondent's contention that the bill of exceptions, which contains the entire record on appeal, not having been filed and served within the statutory period and that the application for relief from such failure under section 473 of the Code of Civil Procedure having been fatally defective, appellant is not entitled to a review of the evidence.

Judgment affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHURTLEFF, J.; SLOANE, J.; LENNON, J.

PEOPLE v. BISHOP. (Cr. 996.)

(District Court of Appeal, First District, Division 1. California. Sept. 2, 1921.)

1. Indictment and information § 110(17)—Information for murder of the second degree held sufficient, although not in statutory language.

An information charging that at a certain time and place one S. did kill and murder decedent in defendant's presence, and that he then and there aided and abetted the commission of the crime, was sufficient, as defendant was informed in a more precise and detailed manner than he would have been had the charge been general and in the language of the statute.

2. Criminal law § 407(1)—Testimony showing silence under accusation held admissible.

Where defendant was informed against for aiding and abetting S. in a murder, and S., in a statement to officers in defendant's presence, stated defendant had participated in the crime, testimony that defendant sat silent when the statement was being made was relevant when limited to showing an implied admission.

3. Criminal law § 338(6)—Evidence of statements by S. inconsistent with what witness testified were former statements by S. held inadmissible.

Where, on prosecution for homicide, witness testified to statements by S. tending to show defendant's participation with S. in the crime, testimony in defendant's behalf as to subsequent variant statements by S. was not admissible to show that the former statements of S. were not true; he not testifying.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

James Bishop was convicted of murder of the second degree, and he appeals. Affirmed.

Chas. B. Rosendale, of Salinas, for appellant.

U. S. Webb, Atty. Gen., and John H. Rordan, Deputy Atty. Gen., for the People.

RICHARDS, J. This is an appeal from the judgment upon conviction of the defendant upon a charge of murder in the second degree. The appellant's first contention is that the trial court was in error in overruling the defendant's demurrer to the information.

[1] The form of the information was unusual, in that its drawer did not content himself with following the language of the statute in relation to the charge of murder, but undertook to set forth the details of the homicide which was committed by one Walter Lee Smith upon the decedent, the murder of whom by said Smith the defendant was specifically charged with having aided and abetted. We think the objection which the defendant urged to the information in this form was hypercritical and unsustained by the cases which are cited by him in its support. The information expressly charges that at a certain time and place the said Walter Lee Smith did kill and murder the decedent in the defendant's presence and that he then and there aided and abetted the commission of the crime. The defendant was thus informed in a much more precise and detailed and definite manner than he would have been had the charge been general and in the language of the statute just what the accusation was which he was expected to meet, and the information was to that extent more favorable to him than it might have been had it been drawn in the language of the statute. His demurrer to it was therefore without merit, and was properly overruled.

[2] The appellant's next contention is that the trial court improperly overruled the defendant's objection to certain testimony offered by one J. A. Cornett. This testimony related to the acts and conduct of the defendant when, shortly after the crime and the detention of said Smith and himself upon suspicion of being the perpetrators, said Smith, in a statement to the officers of the law made in the presence of the defendant, stated that he, the defendant, had participated in the commission of the crime. The defendant sat silent when this statement was being made; and his act and conduct in so doing was the subject of Cornett's testimony to the admission of which the defendant objected. In support of his said objection the defendant's counsel asked and was accorded permission to examine the witness as to the circumstances immediately preceding and attending the statement of Smith, from which it appeared that the defendant, a few minutes previous to the taking of said Smith's statement, had been separately questioned by the officers of the law as to his knowledge of and part in the homicide, and had therein

denied that he had aided and abetted Smith in the perpetration of the crime. Immediately thereafter Smith was questioned in his presence and in the presence of some 12 or 15 other people, and then made the incriminating statements above referred to. After bringing out these facts by his examination of the witness Cornett the defendant objected to his testimony, and now urges error in the trial court in overruling said objection.

We think the point is not well taken. The rule is well established by a consistent line of cases in this and other jurisdictions that the acts and conduct of an accused person, when a statement of his guilty participation in the crime is made in his presence, may be presented to the jury as circumstances tending to show an implied admission of the truth of such statements. 1 Greenleaf on Evidence, §§ 197, 215; Joy on Confessions, 77; Rex v. Bartlett, 7 Car. & Payne, 832; People v. McCrea, 32 Cal. 98; People v. Ah Yute, 53 Cal. 614; People v. Mallon, 103 Cal. 513, 37 Pac. 512; People v. Luie Foo, 112 Cal. 24, 44 Pac. 453; People v. Amaya, 134 Cal. 531, 66 Pac. 794. It is to be noted in this connection that the trial court, in its charge to the jury, expressly limited the purpose of the statements of Smith, as testified to by Cornett, and the conduct of the defendant while such statements were being made, to that above stated. Clearly the testimony of Cornett for such limited purpose was admissible in the light of the above authorities; and hence the defendant's objection to the admission of this evidence was properly overruled.

[3] The appellant's next contention is that the trial court committed error in its refusal to admit in evidence the offered testimony of Leo F. Ferris and William Rambeau, two witnesses called on behalf of the defendant to testify to the making of certain statements by Walter Lee Smith at other times and places contradictory to and inconsistent with the statements made by said Smith in the defendant's presence and to which the witness Cornett had testified. The record discloses that Walter Lee Smith did not testify upon the trial of the defendant, having refused so to do upon the statutory ground. This being so the testimony of these two witnesses was offered, not to contradict or impeach Smith as to the truth of any testimony he had given as a witness in the case, but solely for the purpose of showing that Smith's former and extrajudicial statement as testified to by Cornett was untrue; but the truth or falsity of this statement of Smith was not an issue upon the defendant's trial, and was not material, since the sole purpose of its introduction, and to which it was strictly limited by the court's instruction was to show the conduct of the defendant when this statement of Smith made in his presence implicated him in the commission

of the crime. This being so, the offered evidence of these two witnesses as to the making of other and inconsistent statements by Smith was immaterial and was properly excluded by the trial court.

The appellant's final contention is that the evidence is insufficient to justify the verdict of the jury. We have carefully examined the transcript of the testimony, and are satisfied that this contention is without substantial merit.

The judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

**DUNBAR v. SAN FRANCISCO-OAKLAND
TERMINAL RYS. et al.** (Civ. 3856;
S. F. 8879.)

(District Court of Appeal, First District, Division 1. California. Aug. 15, 1921.

Hearing Denied by Supreme Court
Oct. 14, 1921.)

1. Negligence §93(2)—Husband's negligence imputable to wife.

Contributory negligence of husband in care of wife riding in a vehicle driven by him is imputable to the wife, and bars recovery by her for personal injuries.

2. Negligence §89(2)—Husband's negligence bar to wife's recovery.

If husband's negligence contributed proximately to injury to wife, the law will not permit him to benefit by his own wrong, and no recovery will be permitted to her, as a recovery for her injuries would be community property in which he would share.

3. Husband and wife §260—Damages for personal injuries to wife community property.

Damages recovered by wife for personal injuries are community property in which husband shares and over which he has control.

4. Street railroads §117(24)—Contributory negligence in driving vehicle at crossing for jury.

In an action by a wife for injuries in a collision between a street car and a horse-drawn vehicle driven by her husband, contributory negligence of the wife or husband in crossing the track held for the jury.

5. Negligence §136(9)—Question for jury.

Negligence ordinarily is a question for the jury to determine from the facts and fair deducible inferences, and it is only when the facts are without dispute or the deductions inevitable that the question is one of law for the court.

6. Street railroads §99(10)—Driver's vigilance at intersection need not be extreme.

A driver of a horse-driven vehicle need not exercise extreme and constant vigilance, in driving across street car tracks, and he may still be free from fault if in going forward he

used his eyes and ears, and either failed to see, or, having seen, miscalculated the danger.

On Hearing in Supreme Court.

7. Street Railroads §114(19)—Liability under last clear chance doctrine held not shown.

In an action to recover for injuries in a collision between a horse-drawn vehicle driven by plaintiff's husband and defendant's street car, evidence and facts held not sufficient to establish defendant's liability on the doctrine of last clear chance.

Appeal from Superior Court. Alameda County; T. W. Harris, Judge.

Action by Matilda J. Dunbar against the San Francisco Oakland Terminal Railways and another. Judgment for plaintiff, and defendants appeal. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

W. H. Smith and A. L. Whittle, both of Oakland, and Morrison, Dunne & Brobeck, of San Francisco (Chapman & Trefethen, of Oakland, of counsel), for appellants.

Ostrander & Carey, of Oakland, for respondent.

KERRIGAN, J. This is an action for damages for personal injuries sustained by the plaintiff in a collision between a street car of the corporate defendant and a horse-drawn vehicle driven by the husband of the plaintiff. The collision occurred in Oakland at the junction of Grand avenue and El Embarcadero, a thoroughfare emerging from said avenue. The first-named street runs in an easterly and westerly direction, and the other approximately north and south. The plaintiff alleges in her complaint that she was injured as the result of the negligence of the defendants in operating a street car at said junction at an excessive and dangerous rate of speed, and without giving any warning of its approach by gong or otherwise. Both the corporation and its codefendant—the motorman driving said car—deny the negligence charged, or any negligence; and as a separate defense they allege that the plaintiff's injuries were the result of her contributory negligence, consisting in the fact that she failed to ascertain whether or not a street car was approaching before attempting to cross the car track, or to warn the driver of the horse and buggy to do so, and that the plaintiff failed and neglected to display lights on said buggy, or to cause said vehicle to be driven on the right-hand side of the highway, as required by law. The cause was tried by a jury, and resulted in a judgment for the plaintiff in the sum of \$20,000. The defendants appeal.

The only questions in the case now pre-

sented are: (1) Was the plaintiff guilty of contributory negligence? and (2) If so, did the defendants have a last clear chance to avoid the collision?

The accident happened on the 2d day of August, 1916, at 9 o'clock at night. W. H. Dunbar, and his wife the plaintiff, were in an open one-horse buggy. Dunbar had driven the horse along what is called Lake boulevard and into El Embarcadero, intending to cross the car tracks on Grand avenue to reach the north side of that street and then proceed westerly. As he was approaching said car tracks an electric car of the corporate defendant was coming from the west on the right-hand track at a speed according to the testimony for plaintiff, of 30 miles an hour. Dunbar, without stopping or changing his course and going at the rate of 3 or 4 miles an hour, drove upon the track, and while in the act of crossing, his vehicle was struck by said car, resulting in serious injuries to the plaintiff. The eyesight and hearing of Dunbar and his wife were good; and while Dunbar looked up and down the track he states that he neither heard nor saw the approaching car. Mrs. Dunbar remembers nothing of the accident, not even the fact that she was driving with her husband that evening, nor the occurrences of previous days. Dunbar and his wife were very familiar with the conditions of the locality where the accident occurred. The former was called as a witness, and testified that coming into El Embarcadero he drove on the right-hand side thereof. He jogged along at the rate of 7 or 8 miles an hour to within 50 or 100 feet of the track; he then slackened up into a "roll" which is a little faster than a walk, and at least 4 miles an hour. He looked to the left and then to the right, when he was 40 or 50 feet from the track, and observed no car coming. He looked again when he was 10 or 12 feet from the track, and still saw no car. He knew nothing of the danger until he heard his wife scream, followed immediately by a crash, when he became unconscious. He did not see any street car nor the lights of any, headlight or otherwise, or hear a bell or the rumbling of the heavy car at any time. He had a clear view of Grand avenue to the left. When he looked in that direction there was nothing to obscure his view. From the time he entered El Embarcadero to the moment he heard his wife scream she did not give any expression of fear or caution, either by gesticulation or word, that he could remember. The horse was gentle and obedient and could be quickly stopped. The car struck the left front wheel of the buggy. The horse escaped injury. The buggy was equipped with a light fastened on the left-hand side with red, white, and blue lights, red on the left, blue on the right, and white in front.

Other witnesses to the accident, called on behalf of the plaintiff, were four occupants of an automobile which, like the plaintiff's vehicle, was proceeding along El Embarcadero toward Grand avenue, and which was thence to proceed easterly along the right-hand side of Grand avenue without crossing the track. The buggy had passed the automobile, heading for the track, and the occupants of the latter, fearing a collision, stopped their car about 40 feet from the track, and waited to see what might happen. They were William Glavin, Helen Glavin, W. J. Thorburn, and Helen Thorburn. They testified that they saw no lighted lamp on the buggy; that the street car was running at about 30 miles an hour from the moment they perceived it until the collision; that they heard no warning of the approach of the car; that the speed of the car was not slackened until after the impact; and that the hind wheels of the buggy were struck by the car. William J. Thorburn also testified that the horse approached the track trotting, and, as he neared it, slowed down, crossing it walking. The car was 150 feet away when he first saw it. When the automobile was stopped the horse's head was about 5 feet from the nearest rail. At that moment the car was about 150 feet away from the horse. At that time he saw the headlight of the car, which was what first called his attention to its approach. The light clearly illuminated the automobile. The light from the car from the moment he first perceived it gradually turned in towards the track as the car turned west. It might have illuminated the track for 30, 40 or 50 yards. He did not pay much attention to it. It did not shine on the track as it came around the bend. At no time did he see it playing upon the buggy. Dunbar was 4 or 5 feet from the track when he started to walk his horse across it. At this time the light was shining on the automobile. The street car continued 140 feet about, after it struck the buggy.

Mrs. Helen Thorburn testified that when the automobile stopped, the horse was just going on the track. At that time the car was a little farther than 84 feet away. The horse and buggy were on the track when the car came around the bend. The car was lighted, and had a burning headlight. The horse trotted until he got within about 10 feet of the track, and then he walked. At that time she had not seen the car. When the horse was 10 feet away from the near rail the car was 78 feet away. While the car was going that 78 feet the horse walked the 10 feet and crossed from one rail to the other before the collision. After the buggy was struck the car stopped in about two lengths.

William Glavin, driver of the automobile, testified that when he first observed the car

it was 50 or 75 feet from the horse and buggy, which, in their turn, were 10 or 15 feet from the track. The front of the car was not lighted, but it was equipped with a burning headlight. Referring to that part of his testimony where he said the car was about 50 or 75 feet from the buggy when he first observed the car, he stated that he must have misunderstood the question, and testified in that behalf that the car at that time was 200 feet south of El Embarcadero. From his testimony we quote:

"It looked just about 200 feet to me, that point, but I would not know just how to mark it here. I don't know the distance from that curve there.

"Q. But the horse and buggy had 110 feet to go while the car had from a point 200 feet south of the El Embarcadero up to the point of the accident to go, didn't it? A. Yes, if that is right, but I don't know whether it is just 110 feet or how many feet it is.

"Q. Well, it is as accurate as anything you can give, isn't it? A. I am not accurate on the measurements, but I could go over there and show you spot for spot on the scene of the accident."

There only remains of the occupants of the automobile Mrs. Helen Glavin. She testified that the car stopped about three car lengths after it struck the buggy. She noticed its headlight when it came around the corner. She saw no lights that illuminated the horse and buggy.

J. M. McCarthy, a witness called by the plaintiff, was a motorman in the employ of the defendant. He testified to having made three tests at the point of the collision to ascertain within what distance a car could be stopped by applying emergency pressure; that, running 20 miles an hour, it could be stopped in 105 feet; at 22½ miles an hour, 164 feet; at 25.7 miles an hour, 225 feet.

W. J. Griesbaum testified that he had had three years' experience in operating electric cars as a motorman; and that a car running at 30 miles an hour, under the circumstances present in this case, could be stopped in 75 or 80 feet.

Defendant Way, first called as a witness for the plaintiff, testified that, according to his best recollection, the speed of his car 100 feet from the point of the accident was 20 miles an hour, and when he was 50 feet away he had slightly checked it; that at 100 feet from that point he was ringing the gong as a signal to the automobile, and that it was at this time that he checked the speed of his car as a precautionary measure; and then when he perceived that the automobile had stopped he released the brakes. As a witness for himself and codefendant he testified that when he first saw the buggy it was revealed by the headlight of his car; that it was on the track and about a car's

length away, that he stopped the car in about its length, which was the shortest possible stop. On his cross-examination he testified that he saw Dunbar lean forward to urge his horse, but at that time the car was virtually upon him. When he leaned forward the horse lunged. The headlight enabled him to distinguish objects from 150 to 200 feet away. A number of photographs of the site of the accident were introduced in evidence by both sides.

It is not claimed that the evidence fails to support the verdict of the jury that the defendants were guilty of negligence, but it is earnestly contended that upon a full and fair consideration of all the evidence favorable to the plaintiff, and the logical deductions to be drawn therefrom, it appears that the plaintiff was guilty of contributory negligence, and that it does not appear that the defendants had a last clear chance of avoiding the collision after discovering that the plaintiff was in a position of peril. We will discuss both of these questions together.

[1-6] Under the facts of the case, if plaintiff's husband was guilty of negligence, such negligence is also imputable to the plaintiff. For a personal injury to a wife, who at the time of the injury is in the care of her husband, the latter's contributory negligence bars the right of recovery. But, regardless of whether or not she was in his care, if his negligence contributed proximately to her injury, the law will not permit him to benefit by his own wrong, and no recovery will be permitted, for under the law in this state a recovery for her injuries is community property, in which he shares and over which he has control. *Basler v. Sacramento Gas & El. Co.*, 158 Cal. 514, 518, 111 Pac. 530, Ann. Cas. 1912A, 642. There are some inconsistencies in the evidence for the plaintiff; but we cannot say that upon the whole evidence bearing upon the subject of negligence the jury was bound to conclude that the plaintiff failed to use reasonable care in attempting to cross the track. We cannot hold as a matter of law that the plaintiff was guilty of contributory negligence. Negligence ordinarily is a question for the jury to determine from the facts and fair deducible inferences. It is only when the facts are without dispute or the deductions inevitable that the court can say that no negligence was shown. We cannot say as a matter of law that Dunbar should have seen the approaching car. If in going forward he used his eyes and ears, and either failed to see, or having seen, miscalculated the danger, he may still have been free from fault. His vigilance does not have to be extreme and constant. *Clark v. Bennett*, 123 Cal. 275, 55 Pac. 908. Dunbar took observations when he was 40 or 50 feet away from the track, looking both to the right and the left. At

that time he was driving 7 or 8 miles an hour. He again looked both ways when he was 10 or 12 feet from the track. At that moment he was driving 3 or 4 miles, or 7 or 8 miles, an hour; and at neither of those times did he see or hear the oncoming car. In the meantime the car was coming around a curve in the track at the rate of 30 miles an hour, giving no notice of its presence by the ringing of a gong or otherwise. While the interior of the car was lighted its front was dark, except for the headlight, but it is probable that on account of the curve in the track this was not visible to Dunbar soon enough to enable him to perceive the danger of continuing on his course. The nearer his position to the track, the shorter was his range of observation to the left. If we bear in mind that the headlight of the electric car threw its reflection on the automobile, 40 feet from the track, before it illuminated the buggy; that it was this headlight becoming visible as the car came around the curve which first attracted the attention of some of those in the automobile; that its rays played on them first and only later warned Dunbar of his danger; that when William J. Thorburn first saw the lighted car it was 150 or 200 feet away from the point of collision; and that a car going 30 miles an hour would cover 44 feet in a second, so that a vehicle proceeding at a walk in the path of such car could cover but a short distance between the moment when the approach of the car became known and that in which they must inevitably meet if each should continue on its course unchecked—it becomes sufficiently clear that the question whether or not Dunbar failed to exercise ordinary care in undertaking to cross the car track as he did was one for the determination of the jury. Moreover, the jury might well have inferred that the buggy having been equipped with a lighted lamp on its left side, the motorman ought to have seen it in time to have averted the collision; or, independent of the lamp on the buggy, if the headlight on the car threw its illuminating rays far enough to enable the plaintiff to know of its approach in time to remain in a position of safety, as claimed by the defendants, the jury might well conclude that those rays from the headlight were sufficient to enable the motorman to see the buggy and its predicament in time to avert the collision by stopping the car or

checking its speed. If the headlight cast its rays upon the track and upon plaintiff's vehicle when the car was 150 feet away from the crossing, and as appears from some of the testimony, the car could have been stopped within 75 or 80 feet, it would indicate a clear chance on the part of the defendants to avert the collision. The motorman himself testified that he had felt out his car and checked its speed when he noticed the automobile approaching the crossing, and that he released the pressure when the automobile stopped. The jury might well have inferred from this testimony that the motorman should have seen the plaintiff's vehicle in its position of danger in time to slacken the speed or stop the car. From evidence introduced by the plaintiff it is a fair inference that the operator of the car could have slackened its speed sufficiently to have enabled the plaintiff to cross the track in safety.

Entertaining these views, it follows that, in our opinion, the evidence does not establish that the plaintiff was guilty of contributory negligence as a matter of law; and, the jury having resolved the question in the plaintiff's favor, this court cannot interfere with its conclusion.

The judgment is affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

Opinion of Supreme Court In Bank
Denying Hearing.

PER CURIAM. A majority of the justices failing to assent to the granting of the petition for a hearing in this court, the same stands denied.

[7] This court, however, is unanimously of the opinion that what is said in the opinion of the District Court of Appeal with relation to the last clear chance doctrine should not be affirmed. This was not necessary to the decision of that court. The jury were not instructed on that subject, and the facts stated in the opinion and shown by the evidence were not sufficient to establish defendants' liability on that doctrine. *Thompson v. Railway Co.*, 165 Cal. 754, 134 Pac. 709; *Arnold v. San Francisco-Oakland Terminal Ry. Co.*, 175 Cal. 4, 5, 164 Pac. 798; *Young v. S. P. Co.*, 182 Cal. 369, 190 Pac. 36.

WILBUR, SLOANE, SHURTLEFF, LAW-
LOR, and LENNON, JJ., concur.

CLARK v. WADE. (Civ. 3838.)

(District Court of Appeal, First District, Division 1, California. Sept. 7, 1921. Hearing by Supreme Court Nov. 8, 1921.)

1. Landlord and tenant §233(1)—Omission in finding in rent action held cured.

In action involving liability for rent, in which the court found that premises were so damaged by fire as to become uninhabitable, and that lessor did not put premises in habitable condition within 60 days after fire as required by the lease, failure to find that it would have been possible for lessor to so do held cured by express finding that lessee was released from liability under the lease by the lessor's failure to repair premises within such period.

2. Landlord and tenant §188(1)—Lessee held not to have retained possession as tenant after fire and failure to repair.

Lessee did not remain in possession of premises as a tenant so as to be precluded from denying liability under a lease because of the lessor's failure to repair premises within certain period after fire, as required by lease, where he merely kept an employee upon the premises for purpose of preserving the property under lessor's agreement to compensate him for so doing, and where such employee did not refuse lessor access thereto.

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by Meyer Clark against J. Holmes Wade. Judgment for plaintiff, and defendant appeals. Affirmed.

Hutchinson, Van Fleet & Christin, of San Francisco, for appellant.

John Francis Neylan, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in the plaintiff's favor in an action brought by him to recover the sum of \$613.35, which he alleges to be due for services rendered by him to the defendant in connection with the preservation, protection, and improvement of certain personal property of the defendant situate in the basement of certain premises known as 924 Market street, in the city and county of San Francisco. The defendant filed an answer denying the existence of any such agreement or indebtedness, and also filed a cross-complaint alleging that the plaintiff was indebted to him in the sum of \$1,750 as rent for the premises above referred to, and which he avers the plaintiff entered into the possession of as the assignee of a certain lease carrying a monthly rental of \$250, and remained in possession thereof as such assignee of the lessee from the 23d day of September, 1917, to the 23d day of July, 1918, during which time he failed to pay such stipulated rental.

Upon the trial and submission of the cause the trial court found that the defendant was indebted to the plaintiff in the sum of \$393.55 for the performance of the above-mentioned services, and for certain expenditures made by him under an agreement with the defendant that he should be paid for such services the reasonable value thereof, and also for his said expenditures in connection therewith. The court also found that the plaintiff had been a tenant under the defendant of the said premises prior to and on the 22d day of December, 1917, but that on said day the premises became uninhabitable by reason of a fire; that the defendant, under the terms of the lease between the parties, was bound to put said premises in a habitable condition if it were possible so to do within a period of 60 days after such fire, and that by reason of his failure so to do the plaintiff had been released of any further obligation to pay rent therefor under the terms of said lease.

The court thus found against the defendant upon his cross-complaint, and so finding ordered judgment in favor of the plaintiff for the sum of \$393.55, together with his costs.

The defendant has appealed from such judgment, urging several errors of the trial court as grounds for the reversal thereof. The first of these is that the evidence is insufficient to justify the finding of the trial court as to the existence of an agreement to pay plaintiff for the work, labor, and services which he was found to have rendered. In making this contention the appellant urges that the trial court held that the contract between the parties was in writing in which the work to be done by the plaintiff was limited to certain specified services. It is true that there was at the beginning some sort of writing between the parties which contained this clause:

"You are hereby authorized to have all sawdust and other refuse in basement at No. 924 Market street removed at our expense. Labor bills incurred in removing water in alleys will be paid by us."

It is also true that during the trial of the cause the court limited the evidence as to the services performed by the plaintiff, and also the expenditures made by him, within the range of this writing; but conceding this, it is apparent that this writing is elastic enough to cover all of the kinds of services which the plaintiff did render, and for which he presented an itemized account, and also to cover the expenditures made by him. In addition to this the evidence shows that the defendant frequently saw the plaintiff at work upon the premises, and the sort of work that he was doing, and that he was making the expenditures in question through the hiring of others to assist him in his work; and that the defendant urged him to keep working and keep

his men working, and that he would see that he was paid a fair daily wage. We think these proven facts were such as to amply justify the findings of the court as to what the agreement was between the parties, and what sum was due the plaintiff thereunder.

[1] Upon the other phase of the case presented by the defendant's cross-complaint, we think the evidence also upholds the findings and conclusions of the trial court to the effect that there was a lease between the parties; that the premises covered by the lease were so badly damaged by fire on December 22, 1917, as to become uninhabitable; that the defendant did not put said premises in a habitable condition within 60 days after said fire as under the terms of the lease he was bound to do in order to hold the lessee. It is true that the court does not expressly find that it was possible so to do; but this omission from the finding we think would be cured by the court's express finding that the plaintiff was released from liability under the lease by the defendant's failure within 60 days to repair the premises. There is sufficient evidence in the case to have justified a more express finding by the court in that regard.

[2] The appellant's contention that the proof showed that the plaintiff had remained in possession of the premises in the capacity of a tenant after the fire, and until notice to quit served upon him in July, 1918, and that during said time he had refused defendant access to the premises for the purpose of making necessary repairs, is not borne out by the evidence in the case, since it sufficiently appears that the plaintiff's presence upon the premises after the fire was in the capacity of a workman engaged in preserving the property, and not as a tenant; and that, while he kept the premises locked for the purposes of protection during such times as he was away, he did not refuse the defendant access thereto for any and all purposes when he was there.

Finding, therefore, no error in the record, the judgment is affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

PEOPLE v. WASHBURN. (Cr. 564.)

(District Court of Appeal, Third District, California. Sept. 2, 1921.)

1. Criminal law §1172(7), 1175—Instruction and conviction on lesser offense than that charged and proved held not prejudicial.

Where accused was charged with the offense of assault with a deadly weapon, which charge was amply supported by the evidence, he could not complain of an instruction on sim-

ple assault, nor of his conviction of the lesser offense.

2. Criminal law §822(15) — Refusal to instruct as to accused's testimony held not prejudicial in view of charge given.

In trial for assault with a deadly weapon, refusal of instruction that accused had a right to take the witness stand in his own behalf, and that his testimony should be weighed the same as the testimony of any other witness, held not prejudicial in view of other instructions.

3. Assault and battery §96(3)—Instructions on self-defense need only be clear.

In prosecution for assault with a deadly weapon, it was no objection to the instructions given on the law of self-defense that they "are not near as clear, near as convincing, do not set forth the facts as vividly as the instructions given by the defendant"; it being sufficient that the legal principles of self-defense were presented in clear and simple terms.

4. Assault and battery §96(3)—Instruction on apparent danger approved.

In prosecution for assault with deadly weapon, an instruction that "if from the evidence you believe beyond a reasonable doubt that without any overt act or physical demonstration upon the part of the complaining witness, P., sufficient to warrant the defendant as a reasonable man in believing that he was in great bodily danger," accused assaulted P. with a deadly weapon, such assault would be unjustified, held proper against the objection that the complaining witness' conduct and language and appearance might justify accused in acting without any overt act or physical demonstration.

5. Criminal law §1172(1) — Instruction requiring overt act or physical demonstration to justify self-defense held not prejudicial.

In prosecution for assault with a deadly weapon where the defense was based on the claim that prosecuting witness put his hand in his pocket and advanced toward defendant, an instruction, requiring an overt act or physical demonstration to justify self-defense, if erroneous, held not prejudicial.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

A. J. Washburn was convicted of assault and appeals. Affirmed.

Driver & Driver and Sheridan Downey, all of Sacramento, and G. W. Bedeau, of Marysville, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

BURNETT, J. Appellant was charged with the offense of assault with a deadly weapon and convicted of assault. There can be no doubt that the evidence would have amply supported a verdict for the greater offense. Indeed, it is contended by appellant that—

The evidence "shows clearly that if the defendant was guilty of anything at all he was guilty of assault with a deadly weapon and

nothing less. There is no evidence in the records of this case to show that the defendant was guilty of simple assault. * * * The prosecuting witness was hit with an irrigating shovel, $4\frac{1}{2}$ to $5\frac{1}{2}$ feet in length, weighing 8 to 10 pounds, with a steel blade. * * * The defendant admits this—admits he hit the prosecuting witness with an irrigating shovel—admits he broke his arm in 13 pieces, and his only defense for the doing of that act was that it was done in self-defense."

For the foregoing reason appellant contends that the court committed grievous error by instructing the jury as follows:

"The court has given you instructions covering the crime of assault with a deadly weapon; and also covering the crime of assault, which is included in the charge set forth in the amended information. * * * If you are satisfied beyond a reasonable doubt that the defendant did, as charged in said amended information, make an assault upon Pierce, but entertain a reasonable doubt as to whether the same was made with a deadly instrument, then you can return a verdict of guilty only for the crime of assault, or as it is sometimes called, simple assault."

[1] In support of his position various decisions are cited to the effect that under such a state of the record, there being no evidence tending to prove a lesser offense than the one charged, it is error for the court to instruct as to said lesser offense, or for the jury to find such a verdict. This is the rule not only in other jurisdictions but in this state as well. However, in California the law is held to be that such error is not prejudicial and does not justify the lower court in granting a motion for a new trial or the appellate court in reversing the judgment. The subject received very careful consideration by the Second Appellate district in the case of *People v. Tugwell*, 32 Cal. App. 520, 163 Pac. 508. In that case the evidence showed beyond question that the defendant was guilty of murder in the first degree, if guilty of any offense at all. Nevertheless, the court instructed the jury that the defendant might be convicted of manslaughter, and they followed this instruction and so found. In commenting upon this phase of the case, after declaring that the lower court erred in giving such instruction, the appellate court declared that—

"The error in giving the instruction, however, does not entitle defendant to a reversal of the order appealed from, for the reason that section 1404 of the Penal Code provides that a verdict shall not be set aside and a new trial granted on the motion of a defendant, except for some omission or error prejudicial to his substantial rights."

The court further said:

"The greater offense, that of murder, includes all of the elements of the lesser, that of manslaughter. The sufficiency of the evidence to prove that defendant unlawfully killed deceased is not and cannot be questioned. This

being true, and conceding, as claimed by appellant, that if defendant was guilty of the unlawful killing, such act was by the evidence conclusively shown to have been accompanied by malice aforethought, thus making it murder in the first degree, how can it be said that he was prejudiced because the jury, due to the erroneous instruction, did not, as it should have done, find him guilty of the greater offense?"

A hearing of said cause was denied by the Supreme Court and the decision is controlling upon this point. Of course, the crime of assault is included in the offense charged in the information herein, and since there was evidence of the greater offense, necessarily there was of the lesser. If the jury had found the defendant guilty of assault with a deadly weapon it could not be said that it was not supported, and he would not complain on this ground. His position really amounts to a criticism of the action of the jury in rejecting one of the serious elements of the crime charged and rendering a more favorable verdict than the record warranted. For we must assume that the jury believed that he was not justified in making the assault, and that if said instruction had not been given they would have found him guilty as charged. *People v. Tugwell*, supra. There can be no presumption that any of the jurors had any reasonable doubt of the guilt of the defendant, or that if said instruction had not been given, a verdict of not guilty or a disagreement would have resulted. We cannot impute any misconduct or want of integrity to any of the jurors, and we must hold that, while believing the defendant guilty of the greater offense, they found some circumstance of mitigation that inclined them to exercise this clemency. At any rate, it cannot be said that the error was prejudicial or resulted in a miscarriage of justice.

[2] Appellant complains because the court refused this instruction:

"This defendant, under the laws of California, has a right to take the witness stand in his own behalf. It is your duty to carefully weigh and consider his testimony as you would the testimony of any other witness. You should not reject and disregard his testimony merely because he is the defendant in this case, but you should apply to his testimony the same rules in determining the credence to which the same is entitled that you would apply to any other witness in the case." This instruction might well have been given, but its refusal was not prejudicial. It was not necessary to tell the jury that the defendant had the right to take the witness stand in his own behalf. The fact that he was permitted to testify would convince them of that right. Besides, no intelligent jury would need such instruction. Nor was the court required to call special attention to the defendant as a witness since from the general instructions given, the jury

must have understood that all the evidence in the case was to be carefully considered, and the same rules applied to all the witnesses for determining their credibility. Indeed the court directed the jury that the defendant "is to be accorded the benefit of the presumption of innocence," and that the evidence must be examined "in the light of this presumption." Moreover the jurors were expressly admonished that—

"The fact that the defendant has been arrested and has been charged with an offense and information has been filed against him creates no presumption whatever of his guilt."

In view of these special directions and the general instructions that they were the exclusive judges of the weight of the evidence and the credibility of the witnesses, that they were to consider all the evidence in the case and should not act arbitrarily in determining its weight and effect, he would have been a stupid juror that could fail to apply the same measure to the testimony of all the witnesses.

[3] Appellant criticizes the action of the court in refusing certain proposed instructions upon the law of self-defense. However, it is quite apparent that the law upon the subject was fully and correctly given, and this is all that can be required. Indeed, the point of the objection is that—

"The instructions given by the court upon the law of self-defense are not near as clear, near as convincing, do not set forth the facts as vividly as the instructions given by the defendant."

We are not concerned with the question of rhetoric, but it is sufficient for us to perceive that the legal principles applicable to self-defense were presented in clear and simple terms so as to be readily understood.

[4] The only other complaint worthy of notice is that the court erred in giving the following instruction:

"If from the evidence you believe beyond a reasonable doubt that without any overt act or physical demonstration upon the part of the complaining witness, E. A. Pierce, sufficient to warrant the defendant, as a reasonable man, in believing that he was in great bodily danger, he, the said defendant, assaulted the said Pierce with a deadly weapon, as charged in the amended information, then the court instructs you that such assault under such circumstances would not be justified."

The contention is that—

"It is not necessary for the prosecuting witness to make an overt act or physical demonstration before the defendant is justified in striking him. His conduct, his language and his appearance may be such that the defendant would be justified in striking him without any overt act or physical demonstration on behalf of the prosecuting witness."

It is difficult to perceive how there could be any reasonable ground for apprehending great bodily injury in the absence of any overt act or physical demonstration.

[5] Moreover, such an instruction was approved by the Supreme Court in *People v. Iams*, 57 Cal. 115. Therein the instruction was:

"If from the evidence you believe that, without any overt act, or physical demonstration upon the part of the deceased, sufficient to warrant the defendant as a reasonable man in believing that he was in great bodily danger, he, the defendant, fired the fatal shot at the deceased, and killed him, such killing under such circumstances was not justifiable."

Again, the theory of self-defense was based entirely upon the claim that the prosecuting witness put his hand in his pocket and advanced toward the defendant as though intending to assault the latter. This would constitute, of course, an overt act and a physical demonstration. If it did not occur there was no self-defense in the case. Hence, if the instruction, abstractly considered, had been erroneous, as applied to the evidence at the trial, it could not be prejudicial.

We find nothing in the record to justify a reversal of the cause, and the judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

HILTON v. HILTON. (Civ. 2339.)

(District Court of Appeal, Third District, California. Sept. 6, 1921.)

1. Divorce \Leftrightarrow 115—Husband may prove adultery by evidence wife bore child during time they had not cohabited.

The presumption of legitimacy of the issue of spouses living together, stated by Code Civ. Proc. § 1962, subd. 5, does not preclude a husband, where he and his wife have lived apart for four or five years, from proving in his divorce action, by his own testimony or that of others, that his wife, though he had no sexual relations with her, gave birth to a child within such period; the purpose of such testimony being, not to establish the child's illegitimacy, but to support the charge of adultery.

2. Divorce \Leftrightarrow 184(12)—Rejection of testimony, on issue of adultery, that defendant wife stated shortly after birth of child that she had not lived with plaintiff for four or five years, prejudicial error.

While, in view of Code Civ. Proc. § 2061, subd. 4, testimony of extrajudicial declarations or verbal admissions of a party is not regarded as very strong or reliable evidence, the rejection, in a husband's divorce action for adultery, of testimony as to statements of defendant a

few months after the birth of a child to her, that she and plaintiff had not lived together for four or five years, was prejudicial error, where plaintiff testified he had not during such time had sexual relations with her, while she asserted plaintiff had frequently visited her and maintained such relations.

3. Husband and wife \S 34—Evidence held to sustain finding that property settlement and deed from wife to husband were procured by undue influence.

In a husband's action for divorce, wherein he set up a prior property settlement with defendant, evidence held sufficient to sustain a finding that such agreement and a deed pursuant thereto from defendant to plaintiff were procured by undue influence.

4. Husband and wife \S 48(1)—In transfer of property by one to the other, husband must act in highest good faith.

The relation between husband and wife being of a confidential nature, Civ. Code, \S 158, 2228, require that in a transaction involving the transfer by the one to the other of property of value the husband shall act in the highest good faith toward his wife, to the end that he may not obtain any unfair or unconscientious advantage over her.

5. Husband and wife \S 48(1)—Before transfer of property to husband, wife should have benefit of preliminary conference with adviser.

In transactions involving the transfer of property between husband and wife, the latter should have the benefit of a full, free, and private preliminary conference with a competent lawyer or business man employed and paid by her, in whom she has confidence, and who would be devoted to her interest only.

6. Deeds \S 70(5)—Inadequacy of consideration may be considered as tending to show fraud or undue influence inducing transfer of property by wife to husband.

While the want of a valuable consideration for a contract or agreement between husband and wife involving a transfer of property by one to the other is not sufficient to raise the presumption of fraud or undue influence, where the consideration, in view of the confidential relation existing between them, is so small as to shock the conscience, its inadequacy may be considered as tending to establish fraud or undue influence.

7. Husband and wife \S 279(2)—Wife held not estopped to rescind contract with husband by laches or failure to repay amounts received thereunder.

Where a wife, by reason of undue influence exerted by her husband and family physician, agreed to a property settlement with her husband prior to the institution of a suit for divorce by him, and to deed their home place to him, to be paid for in installments, she did not lose the right to rescind by delay or by her failure to return or tender the payments received by her, where she did not know of her right to rescind until advised by her attorney in the divorce action, and the money received under the contract was used in defraying the living expenses of herself and children.

Appeal from Superior Court, Tulare County; J. A. Allen, Judge.

Action by Albert Hilton against Celia E. Hilton. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

J. E. Greene, of Dinuba, for appellant.
Middlecoff, Scott & Ham, of Visalia, for respondent.

HART, J. The plaintiff brought this action to secure a divorce from the defendant, and as grounds therefor charged as a first cause of action that the defendant had on divers occasions committed acts of cruelty upon and toward him, and as a second cause of action that she had been guilty of adultery. As to the last charge, the amended complaint alleges:

That three children have been born since said marriage, to wit, Laura Hilton, a daughter, aged 13 years; Edwin Hilton, a son, aged 7 years, and Clarence Hilton, aged about 5 months; "that [paragraph IV of second cause of action] plaintiff and defendant separated in the county of Tulare, state of California, in the month of September, 1914, and ever since said time have continued to live separate and apart; * * * that plaintiff is informed and believes, and upon such information and belief alleges the fact to be true, that defendant did, during the months of June, July, and August, 1918, on the ranch of the plaintiff, in the county of Tulare, * * * and on divers days and times between said month of August, 1918, and the time of the commencement of this action, commit adultery; that the name of the man with whom said act was accomplished is unknown to plaintiff; that the said child Clarence Hilton is not the issue of the marriage of said plaintiff and defendant, but is an illegitimate child of defendant and the man with whom said acts of adultery were hereinbefore alleged to have occurred."

It is further alleged that on the 15th day of December, 1917, and prior to the commencement of this action, the plaintiff and the defendant "entered into an agreement settling their property status, a copy of which agreement is hereunto attached and made a part of this complaint," etc.

By the terms of the agreement referred to, the defendant agreed to execute and deliver to the plaintiff a deed to about 100 acres of land, on which there were improvements—in fact, the home place of the parties, and where they were residing at the time of the making of the agreement—and all the appurtenances of said land, for and in consideration of the sum of \$3,500, payable \$500 at the time of the execution of the agreement and \$500 yearly thereafter until the full sum of \$3,500 was paid, no interest chargeable or payable on deferred payments. The agreement provided:

"Until said sum of \$3,500.00 is paid in full, said second party [defendant] shall have the right to live in the dwelling house, where she now resides, on the land above described, without the payment of rent therefor, but upon the full payment of said sum of \$3,500.00 she agrees that she will give possession and remove from said real property within thirty days after receiving notice so to do from said party of the first part, or his assigns."

It was further covenanted that all the household furniture and the wearing apparel in said dwelling house were to be the sole property of the wife and "all said real property, including farming implements and live stock, is the sole and separate property of said party of the first part [plaintiff]."

The following further provisions were contained in said agreement:

"Said party of the second part is to have the exclusive custody and control of the two minor children of the parties hereto, Laura Hilton, now aged 12 years, and Edwin Hilton, now aged 6 years, but said party of the first part is to have the right to visit said children at any and all reasonable times.

"The payment by said party of the first part to said party of the second part of the sum of thirty-five hundred (\$3,500.00) dollars as herein above provided shall be in full payment of every claim and demand of whatsoever kind or nature which said party of the second part now has or may hereafter claim against said party of the first part, including maintenance of herself, of the minor children above mentioned, and so long as said party of the first part shall make such payments as above specified, said party of the second part shall pay all of her own bills and expenses of every kind and nature and shall not incur or cause to be incurred any liability against the said party of the second part."

The defendant's answer specifically denied each and every act of cruelty alleged against her in the complaint, and denied the charge of adultery and that the said Clarence Hilton is her illegitimate son; denied that plaintiff "has not lived with the defendant or cohabited since the times alleged in paragraph IV" of the second cause of action.

Defendant also filed a cross-complaint in which she charged and specifically set forth a series of acts of cruelty, occurring on divers occasions, on the part of the plaintiff towards and upon her. She further alleged in said affirmative pleading that she is, "and at all times mentioned herein," the owner of the land described in the agreement between her and plaintiff whereby she agreed to quitclaim, by a deed of conveyance to the latter, her interest therein. In this connection she charged that the plaintiff and cross-defendant, with the intent to defraud and deprive her of her right to be supported by said cross-defendant, persuaded her to execute the agreement mentioned, that said agreement was entered into by cross-plaintiff without consideration "and was obtained

from this cross-plaintiff by said cross-defendant by undue influence, and the same is fraudulent and void as to this cross-plaintiff and the three children of plaintiff and defendant above named, and that said contract should be annulled; and this cross-plaintiff alleges that, on or about said 15th day of December, 1917, said cross-defendant, by the same means by which he obtained said agreement from said cross-plaintiff, and without any consideration received by this cross-plaintiff or parted with by said cross-defendant, obtained from this cross-plaintiff a quitclaim deed to said 100 acres of land, which said quitclaim deed this cross-plaintiff alleges was and is fraudulent and void as against this defendant and said minor children." It is further alleged by cross-complainant that at the time she signed and so executed said agreement and said deed she had no property of her own, nor any way of supporting herself other than by being supported by her said husband, "and these facts were known to plaintiff"; that at said time she had been married to plaintiff for more than 11 years, and that at that time the sum of \$500 was not sufficient to support said two children, then born and living, and cross-complainant; that when she executed said agreement and said deed she had no independent advice; that the negotiations leading to the execution by her of said instruments were conducted by the family physician of the parties, and that she did not know at that time, or while said negotiations were pending and being so carried on, that she was entitled to independent advice, and was not informed of her right to such advice or of any of her rights; that since the execution of said instruments she has been compelled to borrow the sum of \$150 "in order to supplement said \$500 per year as aforesaid"; that "said family physician at said time was interested in said settlement provided by Exhibit A [the agreement], in that he had been told by said plaintiff that, if said physician would procure this cross-complainant to sign said paper, then said plaintiff would pay to said family physician an indebtedness due from said plaintiff to said family physician, consisting of several hundred dollars, but neither said physician nor plaintiff informed cross-complainant of such fact."

The prayer of the cross-complaint is that the cross-plaintiff be granted a divorce; that the agreement and the quitclaim deed mentioned in the pleadings be annulled and set aside; that the custody of the minor children be awarded to cross-complainant; and that there be an award of such alimony for the support of herself and children as the equities of the case might warrant.

The cross-complaint was met by specific denials in an answer thereto by plaintiff, both as to the allegations of cruelty and the charge in the cross-complaint, that the agree-

ment and the deed in question were obtained from cross-complainant by means of undue influence and fraud.

The court found that the allegations of cruelty in both the complaint and the cross-complaint were untrue, and that the charge in the complaint that defendant had been guilty of adultery was not sustained by the evidence, and that said charge was baseless. It was also found, in connection with the finding upon the charge of adultery against the defendant, that the plaintiff and defendant did not separate in the month of September, 1914, or any other time prior to April, 1919; "although said parties occupied two different and separate cottages located on the lands of the plaintiff described in the complaint, said cottages were only a few rods apart, and said parties continued marital relations until after the conception of said Clarence Hilton."

It was further found that the land described in the complaint and in the agreement referred to was, at the time of the execution of the latter instrument and the deed from defendant quitclaiming said property to plaintiff, of the value of \$23,000, and contained a house which was the home of and was a suitable home for said plaintiff and defendant and their children, "and was then improved with productive vineyards and orchards; that on said 15th day of December, 1917, said real property was incumbered with a mortgage for the sum of \$11,000," the same still subsisting on said property at the time of the commencement of this action; "that at said time defendant was without means and was absolutely dependent upon said plaintiff for support and maintenance for herself and her said minor children; that since said time said real property has increased until at the time of this action it was of the value of \$50,000, and the annual income therefrom was \$4,800."

The court found that the agreement and the deed in question were procured from defendant by means of undue influence and were unsupported by a consideration, and that they were hence fraudulent and void as to the defendant and the minor children of the plaintiff and the defendant, and that the same should be annulled; that at the time of the execution of said instruments the defendant had no property of her own, and no way of supporting herself, but was solely dependant upon her husband (plaintiff) for support, all of which was then known to plaintiff; that, in the transaction resulting in the execution by her of the two instruments mentioned she was without independent advice, and was ignorant during the pendency of said transaction of her right to such advice therein, and was not informed of her rights in that particular. The court found, precisely as the cross-complaint al-

leges, that the negotiations culminating in the execution by her of the agreement and the deed in question were conducted by the family physician of the parties hereto, and that said physician was personally interested in the success of said negotiations for the reasons set forth in the cross-complaint as hereinabove stated.

A decree was framed in accord with the findings upon all the vital issues of fact, awarded plaintiff the custody of the minor child Laura Hilton, and the defendant the custody of the minor children Edwin Hilton and Clarence Hilton, and also a monthly allowance of \$75 for the support of defendant and the minor children of the parties whose custody was awarded to her, and \$175 to be paid by plaintiff to defendant for the purpose of liquidating a loan made by the latter at a certain bank for the support of herself and children after the instruments in question were executed. The appeal is from said decree.

The assignments of error are: (1) That error was committed in the rejection of certain testimony offered by the plaintiff in the support of the charge of adultery; (2) that the finding as to the date of the separation of the parties and the finding that the agreement in question and the deed, which was the culmination thereof, and whereby the defendant quitclaimed to plaintiff whatever interest she had in the land described in said instruments, were procured by means of undue influence, are without sufficient support in the evidence.

1. The assignment first above stated is important because the court found, as we have seen, that neither the allegations of cruelty as set forth in the complaint nor those of cruelty as pleaded in the cross-complaint were sustained by the proofs, thus leaving as a live issue (since there then remained in the case no defense by way of recrimination [Civ. Code, § 122]), the charge made by the plaintiff that the defendant had been guilty of acts of adultery. The said assignment arose from an effort by the plaintiff to prove by the witness Freeman that, in the presence of his wife and himself, on several different occasions within a few months subsequently to the date of the birth of the last child born to the defendant, the latter stated that she and the plaintiff had not lived together or had anything to do with each other "in four or five years." Objection was interposed to the proffered testimony on the ground that it was incompetent as in proof of the charge of adultery. After considerable argument of the point, and counsel for plaintiff had named several other witnesses by whom (so he asserted) he could prove the same declaration by defendant, made within the same period of time,

the objection was sustained. The theory upon which the objection was made by counsel for defendant and sustained by the court was that the testimony proposed would necessarily tend to prove the illegitimacy of the child Clarence, the last born to defendant, thus contravening the established policy of the law against the bastardizing of issue born in wedlock upon the statements or declarations or testimony of the parents, or a man and woman living together or cohabiting ostensibly as husband and wife. The objection was based and sustained upon the provisions of subdivision 5 of section 1962 of the Code of Civil Procedure, viz.:

"That the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate."

The theory of said rule is stated as follows by Jones on Evidence, vol. 1, § 98:

"It is well settled on grounds of public policy affecting the children born during the marriage, as well as the parties themselves, that the presumption of legitimacy as to children born in wedlock cannot be rebutted by the testimony of the husband or the wife to the effect that sexual intercourse has or has not taken place between them, nor are the declarations of the husband or wife competent as bearing on the question."

See, also, 2 Greenleaf on Evidence, § 1; Estate of Mills, 137 Cal. 298, 302, 70 Pac. 81, 92 Am. St. Rep. 195; Estate of Walker, 180 Cal. 478, 181 Pac. 792; Estate of McNamara, 181 Cal. 82, 183 Pac. 552, 7 A. L. R. 313.

In the two cases last named the whole subject of the presumptions, both conclusive and disputable, applicable to the question of the legitimacy of issue born in wedlock, is learnedly and exhaustively considered by Mr. Justice Olney; and it seems to have been the view of counsel for defendant in objecting to, and that of the court in excluding, the testimony referred to, that it is by those cases held that the presumption of the legitimacy of issue born in wedlock or during coverture is conclusive even where the husband and wife, although living separate and apart, have, within the period of probable conception and gestation, had opportunity only for coition between each other; that therefore evidence tending to establish the illegitimacy of such issue is wholly incompetent and inadmissible. The cases mentioned do not so hold. Those cases declare, as it was held in the Mills Case, *supra*, that the word "cohabiting," as used in subdivision 5 of section 1962 of the Code of Civil Procedure, "means the living together of a man and woman ostensibly as husband and wife (1 Bishop on Marriage, Divorce, and Separation, § 1669, note 1)," and that where the parties are so living together the issue of the wife is indisputably presumed to be legitimate,

but that, on the other hand, "it is always permitted to show that it was not possible by the laws of nature for the husband to be the father, as by showing impotency on his part, want of intercourse during the possible period of conception, or that the child is of a race or color such that it could not have been conceived by the husband." Estate of Walker, *supra*, 180 Cal. 491, 181 Pac. 797. In the Estate of Mills, *supra*, however, the following language is used and it is probable that upon that language the counsel for defendant principally relies to support his position:

"Illegitimacy may be proved; but it cannot be proved by the evidence of a husband or wife that while living together they did not have sexual intercourse."

But this language, or the rule as thus stated, while perfectly consistent with the provision of subdivision 5 of section 1962, Code of Civil Procedure, as the word "cohabiting" as therein used is interpreted by the decisions, does not preclude or declare as incompetent the testimony of either the husband or wife, upon the issue of the legitimacy of a child born in wedlock, of nonintercourse, where they have not "cohabited" or not lived together at the time and during the period of conception and gestation.

The evidence very plainly discloses that the present case does not fall within the result reached in the Mills Case. The testimony of both the plaintiff and the defendant was as one upon the proposition that they had not, for a number of years prior to the birth of the last child, Clarence, born to Mrs. Hilton, lived together in the same house or dwelling. The plaintiff stated that the period of time during which the separation between them had existed down to the date of the trial was between five and six years. The defendant, while candidly admitting that they had not lived together for a number of years, was not able to give the exact period during which they lived separate and apart, giving it as her opinion, however, that it was three or four years. The evidence without conflict shows that at some date several years before the birth of said child the plaintiff left the dwelling in which he and defendant had been living together and took up his abode in a cabin on the same land on which the dwelling was situated and about 100 yards distant from said dwelling, and there slept and had his meals, preparing them himself, for a period of several years prior to the date of the birth of the child; that during that period of time he never on any occasion slept or had a meal in said dwelling; that defendant during said period never had a meal or slept in the cabin so occupied by the plaintiff; that they often met, but seldom, if ever, spoke to or exchanged greetings with each other. Besides this evidence, there is

the agreement dated and presumably executed on the 15th day of December, 1917, whereby the defendant agreed for the consideration therein specified to relinquish to plaintiff all her right and title in and to the land described in said instrument, and which contained, among other things, this recital:

" * * * That the parties hereto are now and for several years last past have been living separate and apart, and it appearing that there is no reasonable prospect of their effecting a reconciliation and resuming the marital relation: * * * Now, therefore, it is mutually agreed," etc.

[1] But the case at bar is wholly different from the cases above referred to. The issue submitted for decision was entirely different. In those cases the question of the legitimacy of the child was directly in issue; it was, indeed, the principal issue, and directly affected the status of the child with respect to an inheritance. Here the question or issue tendered by the pleadings is not whether the child last born to defendant was legitimate, but whether the defendant had been, as charged in the complaint, guilty of having sexual relations with some person other than the plaintiff, her husband. In other words, as has been shown, the plaintiff sought a decree of divorce from the defendant on the ground, among others, that the latter had committed the marital offense of adultery, and he was entitled to prove his case precisely as any other issue of fact may be proved—that is to say, that he may prove it by any relevant fact or circumstance which he may in a competent manner be able to present—and if, as is the theory of the plaintiff in this action, the evidence offered to prove the fact of the adultery of the wife must, in the very nature of the situation, disclose that a child born to the wife is not the child of the husband, or is, in other words, an illegitimate child, that fact is only, so far as the child is concerned, an unfortunate incident of competent proof essential to the establishment of the ultimate fact. At any rate, as before stated, where, as appears to be the uncontroverted fact here, the husband and wife have lived separate and apart for a period of four or five years, it is undoubtedly competent, in an action for divorce on the ground of the adultery of the wife, for the husband, either by his own testimony or that of other witnesses, to prove that, although he has had no sexual relations with his wife during such period of time, she has nevertheless conceived and given birth to a child within said period; the dominant purpose of such testimony not being to establish the fact of the illegitimacy of the child, but solely for the purpose of supporting the charge of adultery against the mother of the child, as alleged in the complaint. Obviously no more forceful or persuasive testimony of

the fact of the wife's adultery in a case like the present as to the facts than that disclosing that she had conceived and borne a child within a period of time during which the husband had never had sexual relations with or access to her can be imagined.

The conclusion necessarily following from the foregoing views is that the court below committed error in its action disallowing the proposed testimony, and that the ruling rejecting said testimony was prejudicial, for reasons now to be considered, there can be no doubt.

[2] While testimony of the extrajudicial declarations or verbal admissions of a party is not regarded as very strong or very reliable evidence (see Code Civ. Proc. § 2061, subd. 4), still, under the circumstances of this case, the rejected testimony proposed by the plaintiff that the defendant had made statements from which it could justly be inferred that there had been no sexual relations maintained between herself and the plaintiff for a period of four or five years prior to and down to the date of the birth of the child last born to her would be of singular or unusual importance and significance upon the issue of adultery, since it appears that the plaintiff with apparent positiveness testified that he had not at any time from the date of their separation, some four or five years prior to the date of the birth of said child, down to the happening of said event, had sexual relations with the defendant, while, on the other hand, the defendant asseverated that, notwithstanding that they had lived separate and apart for a number of years, the plaintiff had frequently during said period of separation visited her house in the daytime and maintained such relations with her. There was no other testimony from either side addressed to that question, and hence it is manifest that thereon a direct and pronounced conflict was presented, and thus the importance of the testimony which plaintiff unavailingly attempted to place before the court and into the record becomes plainly apparent. If said testimony is to be believed (a matter for the trial court to determine), and the statements thus attributed to the defendant are to be interpreted to mean, as with much reason they might be so interpreted, that she, during the period of time alleged to have been mentioned by her, had not sustained sexual relations with the plaintiff, then it would obviously be sufficient to turn the scale upon the issue of adultery in favor of the plaintiff.

[3] 2. The finding that the agreement and the deed in question were procured by means of undue influence is sustained by the evidence.

It was shown that the property described in the instruments in question was at the time of the execution of said instruments of

the value of \$23,000; that part of the land was devoted to the growing of grapes and other fruits, and that the annual proceeds from the sale thereof were amply sufficient to maintain the family; that the defendant at the times mentioned was not aware of the value of the property or the income derived therefrom; that, having had a disagreement with the plaintiff and been mistreated by the plaintiff's children by a former wife, and having also a large part of the time been ill, her mind was so unsettled that she actually was incapable of exercising such judgment in the transaction as would enable her to protect her rights. It was also shown, as the court found, that the negotiations resulting in the execution of the agreement and the deed were conducted by the family physician, who admitted upon the witness stand that the plaintiff promised him that he (plaintiff) would pay said physician a debt of several hundred dollars due from plaintiff to said physician in the event that he (the physician) succeeded in inducing the defendant to make the agreement and execute the deed. It is made to appear that the wife was without independent advice or advice from some disinterested party or some one employed by her for that purpose, who could have explained to her the importance of the transaction and the consequences thereof.

[4, 5] The relation between a husband and wife is of a confidential nature, and the law requires that, in a transaction involving the transfer by the one to the other of property of value the husband shall act in the highest good faith toward his wife, to the end that he may not obtain any unfair or unconscientious advantage over her in such transaction. Civ. Code, §§ 158, 2228. In other words, as is said by Mr. Greenleaf in his work on Evidence (section 688), there must be in such case no such constraint imposed upon the wife by the husband as to prevent her from exercising her free will with relation to the transaction. Moreover, the rule is that in transactions involving the transfer of property between the husband and wife the latter should have "the benefit of a full, free, and private preliminary conference with a competent lawyer or business man, who was employed and paid by her, and in whom she had confidence, and who would be devoted to her interest and hers only." *Pironi v. Corrigan*, 47 N. J. Eq. 157, 20 Atl. 227; *Yordi v. Yordi*, 6 Cal. App. 20, 91 Pac. 348, and cases therein cited.

[6] While it is true that the want of a valuable consideration for a contract or agreement between husband and wife involving a transfer of property by one to the other is not of itself sufficient to raise the presumption of fraud or undue influence in the procurement of such agreement, yet Where, as here, there is a valuable considera-

tion for the agreement which, when viewed by the light of the confidential relation existing between the parties, is so small as to "shock the conscience," the fact of the inadequacy of the consideration may be considered as a circumstance tending to support the claim that the consummation of the transaction has not been free from fraud or undue influence. In this case it is obvious that the consideration is wholly inadequate. The fact is that the amount which the wife appears to have agreed to take in consideration of her relinquishment of all her rights in the property, and indeed her right to support by the plaintiff, is ridiculously small—in fact, hardly sufficient to support herself and children in a proper manner for a period of two years—and when this is considered together with the other circumstances to which we have above adverted, it is clear that the finding of the court that the agreement and the deed were procured by means of undue influence is sufficiently supported. Indeed, it may justly be said that upon its face the agreement is as to defendant so improvident as to give it little, if any, standing in a court of conscience.

[7] It is contended, however, that the defendant is not entitled to a rescission of the agreement for the reason that she postponed rescinding the same for a long period of time after its execution, and that she had borrowed the sum of \$150, hypothecating the agreement as security for the loan, and that she had received the payments due under the agreement up to the time of the commencement of this action and had not returned or offered to return the same or any amount which she had received under the agreement. The evidence shows that she was not informed or knew of her right to rescind until after she had been so advised by her attorney at the time she employed him to defend the present action. But manifestly this is not a case requiring the defendant to restore or offer to restore any money she received from the plaintiff under the terms of the agreement to entitle her to a decree rescinding the same. The money she received under the agreement she used in defraying the living expenses of herself and two children, and she thus received from the plaintiff nothing more than she would have been entitled to receive from him before the agreement was executed. The plaintiff, therefore, could not have been injuriously affected by a failure on the part of the defendant to restore the money he paid to her under the contract. Besides, the plaintiff knew, or at least he must have known, that the money he paid to her under the agreement would be used by her for her support, and therefore was fully aware of the fact that, in case she did rescind or attempt to

rescind the agreement, she would be unable to repay the money paid thereunder; she having no other property or money with which she could repay the amounts received by her. See *More v. More*, 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76; *Gatje v. Armstrong*, 145 Cal. 370, 78 Pac. 872; *Cal. Farm & Fruit Co. et al. v. Schiappa-Pietra*, 151 Cal. 732, 91 Pac. 593; *Richards v. Farmers', etc., Bank*, 7 Cal. App. 387, 94 Pac. 393.

The judgment must be reversed because of the ruling of the court above considered, excluding testimony offered by the plaintiff of alleged admissions by the defendant that she and her husband had not lived together and had had nothing to do with each other for a number of years prior to the date of the birth of the child last born to her. Accordingly the judgment is reversed, with directions to the trial court to try de novo and so determine the single issue of adultery.

We concur: FINCH, P. J.; BURNETT, J.

PELOIAN et al. v. WALDMAN. (Civ. 3916.)

(District Court of Appeal, First District, Division 1, California. Aug. 31, 1921.)

1. Vendor and purchaser ⇨334(4)—Demand that purchaser should sign contract not in accord with memorandum of sale a withdrawal of vendor's acceptance of offer.

Where a vendor demanded that purchasers should sign a contract for a deed containing conditions not in accord with the provisions of a memorandum of sale, which constituted the original contract, his action amounted to a withdrawal of his acceptance of the offer of the purchasers, and entitled them to a return of a deposit of part payment on the purchase price.

2. Vendor and purchaser ⇨102—"Rescission of contract" accomplished by acts indicating intention.

A vendor rescinding a contract need not use the word "rescind," since any appropriate words or any definite acts by which he indicates that he will not further proceed with fulfillment of the contract, and that he will not permit the vendees to proceed further with the performance of their obligation, will amount to a "rescission" or abandonment of the contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Rescission.]

3. Vendor and purchaser ⇨334(4)—Money paid as a deposit or as a forfeit on a contract may be recovered by vendees on rescission by vendor.

A vendee's deposit on a contract of sale even if it is referred to as a forfeit, upon rescission of the contract by the vendor, remains as money had and received to the use of the vendees, subject to be recovered in appropriate action.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by John Pelolian and another against P. H. Waldman. From judgment for plaintiffs, defendant appeals. Affirmed.

Williams & Fenstermacher, of Fresno, for appellant.

C. K. Bonestell, of Fresno, for respondents.

WASTE, P. J. The plaintiffs brought this action in assumpsit to recover \$1,000 alleged to have been received by the defendant for their use. The defendant answered, denying the indebtedness, and by way of a further defense, set up a contract for the purchase and sale of real estate, entered into by the plaintiffs, the payment of \$1,000 as a deposit and part of the purchase price, the violation of the terms of the agreement on the part of the plaintiffs, and the retention by defendant of the \$1,000 as liquidated damages because of the breach of the contract. The lower court found the facts to be as alleged in the answer, except that it determined that it was the defendant who breached the agreement for the purchase of the real property, and that it was he who had not performed the conditions of the contract. It held that plaintiffs were entitled to recover the money paid, and entered judgment accordingly. Defendant has appealed.

[1] The facts upon which the court based its decision are few and without apparent conflict. On December 20, 1919, through the medium of a real estate agent, the plaintiffs entered into an agreement with the defendant for the purchase by them from him of 20 acres of land in Fresno county, together with sundry personal property, for the sum of \$21,000, \$1,000 of which was paid in cash, the receipt of which was acknowledged by the defendant, the balance to be paid in accordance with the terms of the memorandum of agreement prepared by the real estate agent which was in writing, approved and accepted by both plaintiffs and defendant. The memorandum called for a further payment of \$3,500 and a note for \$1,000, on delivery of a contract setting forth certain covenants and conditions upon which the sale was to be made, and provided that a contract for a deed in the usual form, and containing the usual clauses, warranties and covenants between the vendor and vendees, should be executed. The contract was also to provide that the payments for the land should be made by the retention by the vendor of 60 per cent. of all crops produced on the land until such time as the balance of the purchase price, \$15,500 and interest, should be paid.

Several proposed contracts were drawn by the defendant and submitted to the plaintiffs, all of which contained provisions objectionable to them and not in keeping with the

terms of the memorandum. Plaintiffs refused to sign. On January 20, 1920, the defendant presented another contract, signed by himself and wife, to the plaintiffs and at the same time delivered to them a written notice which required them to sign the proposed agreement by 6 o'clock of that day. Failure to comply with the demand, the notice stated, was to be construed as a breach of plaintiffs' offer to purchase, and the \$1,000 deposit would thereupon be forfeited as liquidated damages. This contract, like the others tendered by the defendant, contained additional covenants not provided for by the preliminary agreement, and not in accordance with its terms. One of these conditions required that the 1920 crop of raisins grown on the premises should be delivered to the California Associated Raisin Company, instead of being applied in payment of the purchase price. Another provision of the tendered contract was that the land was sold subject to a crop mortgage for \$300, also subject to an agreement between the seller and one Peter Musto, the exact nature of which does not clearly appear in the proposed agreement, but which is foreign to the terms of the memorandum. The provision for the payment of taxes was not in accord with the original understanding. The plaintiffs refused to sign the agreement upon the ground that the objectionable features not contemplated by the original agreement were included, and demanded a return of their deposit. Defendant took the stand that the contract was at an end, and retained the money. The lower court found that the acts of the appellant amounted to such a withdrawal of his acceptance of the offer of the respondents as to entitle them to the return of the money paid as a deposit and part payment on the purchase price. It held, in effect, that the contract was rescinded by the appellant. Its conclusion, we think, was correct.

[2] It was not necessary for the appellant to use the word "rescind" in order to accomplish what is meant by that term. Any appropriate words, or any definite acts by which a vendor indicates that he will not further proceed with the fulfillment of the contract, and that he will not permit the vendees to proceed further with the performance of their obligation on their part to be performed, will be taken to amount to a rescission, or an abandonment of the contract, so far as the vendor is concerned, and will be held to entitle the vendees not in default to their choice of remedies for the breach, one of which is to sue for the return of the money already paid on the contract. *Pearson v. Brown*, 27 Cal. App. 125, 131, 148 Pac. 956.

[3] The money paid as a deposit, or even "as a forfeit" remains in the hands of the vendor as money had and received to the use of the vendees, subject to be recovered

by them in an appropriate action for that purpose. *Cleary v. Folger*, 84 Cal. 316, 321, 24 Pac. 280, 18 Am. St. Rep. 187; *Drew v. Pedlar*, 87 Cal. 443, 452, 25 Pac. 749, 22 Am. St. Rep. 257; *Heilig v. Parlin*, 134 Cal. 99, 102, 66 Pac. 186; *Burmester v. Horn*, 35 Cal. App. 549, 552, 170 Pac. 674.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

PEOPLE v. ZARI. (Cr. 945.)

(District Court of Appeal, First District, Division 1. California. Sept. 3, 1921.)

1. Homicide §237—Accused must prove insanity by preponderance of evidence.

Accused, charged with murder and pleading insanity, must establish insanity by a preponderance of the evidence.

2. Homicide §253(4)—Evidence held to show murder in first degree.

In prosecution for wife murder, evidence held to show the killing was without considerable or any provocation, and under circumstances showing an abandoned and malignant heart, so that a verdict of murder in the first degree, rather than manslaughter, was justified.

3. Criminal law §48—Irrationality not test of insanity.

Although one may be irrational, yet if he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, and to know that it is wrong and criminal, and will subject him to punishment, he must be held responsible for his conduct.

4. Homicide §286(1)—Instruction as to presumption of intent from act held proper.

In a murder trial, an instruction that the law conclusively presumes a malicious and guilty intent from the deliberate commission of an unlawful act for the purpose of injuring another was proper, under Code Civ. Proc. § 1963, subd. 2.

5. Criminal law §858(4)—Statute permitting written instructions to be taken to jury room construed.

In a murder trial, where, during its deliberations, the jury returned to the courtroom and asked further explanation of the term "malice," and the court read to the jurors Pen. Code, § 188, it was proper, at the request of one of the jurors, to have the Code section copied to be taken into the jury room, as against the objection that, under section 1137, if this were done, all of the instructions should be reduced to writing and handed to the jury.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Angelo Zari was convicted of murder in the first degree, and appeals from the order

overruling his motion for new trial and from the judgment. Order and judgment affirmed.

Ernest B. D. Spagnoli, of San Francisco, and V. L. Hatfield, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and John H. Rordan, Deputy Atty. Gen., for the People.

WASTE, P. J. The appellant was convicted of the crime of murder in the first degree, and sentenced to a term of life imprisonment. He appeals from the order denying his motion for a new trial, and from the judgment.

The facts are few and simple. On May 17, 1920, in a dispute over the possession of certain bank books, the defendant cut his wife's throat with a pocketknife, inflicting injuries from which she died instantly. There were no eyewitnesses to the homicide. Neighbors who heard sounds of the disturbance in the Zari home summoned the police officers. When they arrived the wife lay dead upon the floor, and the defendant was lying near, face downward, with a long cut, described by the surgeons as "more of a superficial wound," across his neck. He had the knife in his hand. When removed to the emergency hospital for treatment the defendant told a representative of the district attorney's office that he "had some trouble with her [his wife], and he killed her with a knife." Later, on the same day, a police officer asked him, "Why did you kill your wife?" and he replied, "I killed her because she had the bank books and wouldn't give them back to me."

[1, 2] The defendant interposed and sought to sustain the defense of insanity. It was incumbent upon him to establish such insanity by a preponderance of the evidence. In the estimation of the jury he did not do so, and it therefore properly disregarded the plea. *People v. Willard*, 150 Cal. 543, 552, 89 Pac. 124. He now contends that he was improperly convicted of murder, upon facts which show nothing more than manslaughter. We have carefully scrutinized the record, and are fully satisfied that this contention cannot be upheld. It is very evident that the jury was not impressed with the story told by the defendant in the light of other compelling features of the case. The circumstances surrounding the brutal killing of the defendant's wife, and the events leading up to it, confirm his own admissions made immediately following the commission of the crime. The record amply supports the theory of the prosecution, which was manifestly accepted by the jury, that the killing was without considerable, or any, provocation, and under such circumstances as to show an abandoned and malignant heart on the part of the defendant.

[3] The appellant complains of the refusal of the trial court to give certain instructions, but we find no error was thus committed.

The requested instruction that absence of proof of motive is a circumstance tending to show innocence, and might in itself create a reasonable doubt of guilt, was properly covered by an instruction given by the court. The requested instruction that, if the jury believed from the evidence that the defendant's mind was irrational at the time of the homicide, even though caused by the continual or excessive use of alcoholic or intoxicating beverages, it was its duty to find the defendant not guilty by reason of insanity, was properly refused. It is not a correct statement of the law on the matter. Although one may be irrational, yet if he has reasoning capacity sufficient to distinguish between right and wrong as to the particular act he is doing, and to know that it is wrong and criminal, and will subject him to punishment, he must be held responsible for his conduct. *People v. Willard*, supra, 150 Cal. 554, 89 Pac. 124. The question of insanity and its relation to this case was amply covered by the court's charge. The defendant submitted two instructions relating to manslaughter which the court might properly have given. The omission however, was cured by another instruction, and the submission to the jury of a form of verdict by which it might have returned a verdict of manslaughter, had it been so disposed.

[4] Appellant also complains of the giving of certain instructions. The precise instruction, given in the case—to the effect that the jury should not be governed by sympathy—was approved in *People v. Borjorquez*, 35 Cal. App. 350, 353, 169 Pac. 922. The instruction that the jury was not to consider whether or not the defendant was insane at the time of the trial, but was to consider him then sane, was proper. The instruction that if the jury believed that the evidence proved to a moral certainty and beyond a reasonable doubt that the acts of the defendant were inspired by hatred and revenge, and were not those of an insane person, it was its duty to find the defendant guilty, when read with the other instructions, was not error. The instruction that the law conclusively presumes a malicious and guilty intent from the deliberate commission of an unlawful act for the purpose of injuring another, was also proper. Code Civ. Proc. § 1963, subd. 2; *People v. Bushon*, 80 Cal. 160, 165, 22 Pac. 127, 549; *People v. Boling*, 83 Cal. 380, 382, 23 Pac. 421.

[5] The giving of written instructions was waived by both sides, and the court delivered its charge orally. During its deliberations the jury returned to the courtroom and requested a further explanation of the meaning of the word "malice." The court thereupon read to the jurors section 188 of the Penal Code. One of them requested that the Code section be copied, and delivered to the foreman, to be taken into the jury room. The

defendant objected unless all of the instructions were reduced to writing and handed to the jury. The objection was overruled. The section was copied and delivered to the jury as requested. The appellant now assigns this conduct as prejudicial error. He bases his contention upon his construction of section 1137 of the Penal Code, which provides that upon retiring, the jury may take with it, "the written instructions given." We do not think it was ever contemplated by the Legislature that the court might not, if requested by the jury, reduce to writing a portion of the oral instructions, and submit it to them for consideration, just as it might if the instructions had, in fact, been part of a written charge. To hold that under such circumstances as those here reviewed it was incumbent upon the trial judge to reduce a lengthy charge to writing, in order to allow one short Code section to be copied and taken into the jury room for the instruction of the jurors, who asked for nothing more, would result in working an absurdity. The point is absolutely devoid of merit.

The order denying a new trial and the judgment are, and each is, affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

MEISTER v. LAWRENCE. (Civ. 3963.)

(District Court of Appeal, First District, Division 2. California. Sept. 7, 1921. Hearing Denied by Supreme Court Nov. 3, 1921.)

Vendor and purchaser \S 228(5, 6)—Principal defrauded by agent of half interest in property entitled to entire interest as against purchaser with notice.

Where purchaser's agent and third person misrepresented to purchaser that vendor required a cash payment of \$13,000, instead of \$5,000, induced purchaser to permit third person to contribute \$6,500 and receive an undivided half interest in the property, and retained the \$1,500 excess paid by purchaser, the transaction was fraudulent, and entitled purchaser to entire interest in the property as against one who purchased third person's interest, without consideration and with knowledge of fraud.

Appeal from Superior Court, Contra Costa County; R. H. Latimer, Judge.

Action by Charles E. Meister, also called Charles Meister against Joe Lawrence, in which the defendant filed a cross-complaint. Judgment for defendant on his cross-complaint, and plaintiff appeals. Affirmed.

Meredith, Landis & Chester, of Sacramento, for appellant.

Aram & Carraghar and Clifford A. Russell, all of Sacramento, for respondent.

NOURSE, J. Plaintiff commenced this action in ejectment involving the ownership of an undivided one-half interest in certain property situated in Contra Costa county. Defendant answered and filed a cross-complaint, attacking plaintiff's title as having been founded on fraud. Judgment went for defendant on this cross-complaint, quieting his title to the entire interest in the property, and from this judgment plaintiff appeals.

The facts of the case material to the opinion are that prior to the 8th day of February, 1918, defendant employed one Curtis as his agent to negotiate the purchase for him of the property in suit from one Kirk. The agent arranged with the owner for the purchase of the property for the full price of \$43,768.40, of which amount the sum of \$5,000 was to be paid down, and the balance was to be secured by a deed of trust upon the property. He then, in conjunction with one Goggins, fraudulently represented to defendant that the full purchase price of the property was \$52,800, of which amount \$13,000 must be paid down. Through the connivance of Curtis and Goggins the defendant was then induced to agree to permit Goggins to join in the purchase of the property upon the fraudulent terms which were thus presented to him, and for this purpose defendant, on February 8, 1918, entered into a written agreement with Goggins, reciting that, whereas each of them had deposited the sum of \$6,500 on account of the purchase price of \$52,800 for the property, and that the deed therefor was to be delivered in defendant's name, and Goggins had agreed to sign and execute a joint note and deed of trust for the balance of the purchase price of the property, he (Goggins) was declared to be the owner of an undivided one-half interest in the property. When defendant discovered that the purchase price of the property was but \$43,768.40, that but \$5,000 was paid to the owner, that Goggins paid in nothing, and that he and Curtis retained \$1,500 of the \$6,500 which defendant had paid as his half of the first payment, he immediately complained of the fraud, procured a warrant for the arrest of Goggins, and employed counsel to adjust the difficulties and protect his rights. About this time Curtis died, and Goggins transferred his interest, evidenced by the paper of February 8, 1918, to one Wright. Plaintiff, who was a creditor of a partnership composed of Goggins, Curtis, and one other, on the 14th day of October, 1918, took a deed from Wright, conveying all the right, title, and interest in this property which he had received through the transfer from Goggins. No consideration was paid by plaintiff for this conveyance, but either a partial or complete adjustment of plaintiff's claim against

the Goggins partnership was made through the transaction. It is upon this chain of title that plaintiff relies as evidence of his ownership of the property in suit.

The court found that Curtis and Goggins, who were business associates, made the false representations to the defendant herebefore recited, and that these acts were a fraud upon defendant; that on the 16th day of August, 1918, plaintiff for the first time discovered the fraud; that he immediately sought both Curtis and Goggins, but he was unable to see Curtis because he was at that time sick in the hospital and died on the 18th day of August; that after diligent search he located Goggins, and confronted him with the information which he had, but that he ran from him and has not since been found; that in the early part of September, 1918, plaintiff sought out defendant and inquired of him as to the interest of said Goggins in said property; that defendant thereupon informed plaintiff that Goggins had no interest therein, and explained to him all the details of the fraud which had been practiced upon him; that thereafter and on the 24th of September, 1918, Goggins purported to assign all his interest in the property to one O. H. Wright, but that said transfer was without consideration and that on the 14th of October, 1918, said Wright purported to transfer his interest in the property to plaintiff, but that said transfer was also without consideration. Finally, the court found that when plaintiff took the transfer from Wright he was fully informed of all the fraudulent acts which have been detailed, and that neither plaintiff nor Wright were bona fide purchasers of said property.

The evidence amply sustains every material portion of the findings of the trial court. As to the good faith of plaintiff, it is made plain by the testimony of numerous witnesses that before he took the transfer from Wright he was fully informed regarding the fraud, that he was told that a warrant had been issued upon a complaint charging Goggins with embezzlement in the transaction, and that Goggins had no enforceable claim against defendant or any interest in the property. It also appeared that Wright was merely a tool in the hands of Goggins, used for the purpose of covering his fraud. From all the circumstances surrounding these latter transfers, the inference could fairly be drawn that no consideration passed to Wright. The circumstances were sufficient to put any reasonable person on notice. There is no error in the record.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

PEOPLE v. FRITZ. (Cr. 1001.)

(District Court of Appeal, First District, Division 1, California. Sept. 6, 1921. Rehearing Denied Oct. 6, 1921. Hearing Denied by Supreme Court Nov. 3, 1921.)

1. Indictment and information \S 143—Defect waived by defendant's failure to move to have information set aside.

Defendant, by failure to move to set aside information not subscribed by district attorney under Pen. Code, §§ 809, 905, waived the defect under section 906, and was thereafter precluded from taking advantage thereof.

2. Criminal law \S 1035(2), 1166(1)—Failure to furnish testimony in lower court before trial in superior court held not ground for reversal.

In prosecution for violation of state Medical Practice Act, § 17, that defendant when case was called for trial in the superior court had not received a copy of the transcript of testimony taken in the lower court, demanded when defendant was arraigned, held not ground for reversal, where no continuance was asked and no objection made to proceeding with the trial, and no showing or claim made that defendant was prejudiced, and where the transcript was furnished during the trial and was used by defendant's counsel with apparent familiarity.

3. Criminal law \S 1166½(6) — That court proceeded to impanel jury though some of regular jurors did not respond to roll call held not ground for reversal.

That court proceeded to impanel jury though some of the jurors upon the regular panel failed to respond upon roll call held not ground for reversal, in absence of showing that any objectionable juror was forced upon defendant after she had exhausted her peremptory challenges.

4. Criminal law \S 811(5)—Instruction as to weight to be given testimony of hired detectives or state agents held improper.

In prosecution for violation of State Medical Practice Act, § 17, instruction as to the weight to be given testimony of hired detectives or state agents held improper in that it singled out the testimony of a particular class of witnesses for comment.

5. Criminal law \S 1172(2)—Improper instruction not ground for reversal where evidence clearly established defendant's guilt.

In prosecution for violation of State Medical Practice Act, § 17, instruction on the weight to be given testimony of hired detectives or state agents held not ground for reversal, where the evidence clearly established defendant's guilt.

6. Criminal law \S 811(1)—Instructions singling out testimony of particular witness for comment improper.

Instructions should not single out the testimony of a particular witness for comment, or comment on the weight to be attached to a particular piece of evidence.

7. Criminal law §811(6)—Instructions singling out defendant's testimony for comment improper.

In prosecution for violation of State Medical Practice Act, § 17, instruction that no greater presumption attaches in favor of defendant's testimony than attaches in favor of that of any other witness *held* improper, in that it singled out the testimony of a particular witness for comment.

8. Criminal law §1172(2)—Improper instruction not ground for reversal where evidence clearly established defendant's guilt.

In prosecution for violation of State Medical Practice Act, § 17, instruction that no greater presumption attaches in favor of defendant's testimony than attaches in favor of that of any other witness, though improper, was not ground for reversal, where the evidence clearly established defendant's guilt.

9. Criminal law §655(5)—Court's discussion before jury with defendant's counsel, as to the effect of his argument to jury, improper.

Court's discussion with defendant's counsel, in jurors' presence, as to the import and effect of his argument to the jury, *held* improper.

10. Criminal law §1166½(13)—Impropriety of court's discussion with defendant's counsel, in jurors' presence, as to effect of counsel's remarks to jury, held cured by instructions.

Impropriety of court's discussion with defendant's counsel, in presence of jury, as to effect of counsel's remarks to jury, *held* cured by instructions charging jurors not to consider the conversation between defendant's counsel and the court.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Rose Fritz was convicted of violating the State Medical Practice Act, and she appeals. *Affirmed.*

Edwin V. McKenzie, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., John H. Riordan, Deputy Atty. Gen. (Harry A. Encell, of San Francisco, and Frank M. Smith, of Los Angeles, of counsel), for the People.

WASTE, P. J. The appellant was convicted in the superior court of the city and county of San Francisco of the crime of misdemeanor, to wit, a violation of section 17 of the State Medical Practice Act (St. 1917, p. 93), and was sentenced to pay a fine of \$300, or, in default thereof, to be confined in the county jail for a term of 60 days. She appeals from the judgment of conviction and sentence.

[1] The information in the case is not subscribed by the district attorney or any one acting in his behalf, for which reason the appellant contends that there is no valid information on file. It is undoubtedly the

law that an information in this state must be subscribed by the district attorney (Pen. Code, § 809), and that the information must be set aside by the court in which the defendant is arraigned upon his motion, if it be not so subscribed (Pen. Code, § 995). But if the motion to set aside the information is not thus timely made, and none was made in this case, the defendant will be held to have waived the objection, and is precluded from afterwards taking advantage of the defect. Pen. Code, § 996; *People v. Johnston*, 48 Cal. 549, 550; *People v. Villarino*, 66 Cal. 228, 230, 5 Pac. 154.

[2] When the case was called for trial the defendant's counsel stated to the court that he had never received a copy of the transcript of testimony taken in the lower court which, he asserted, he had demanded when the defendant was arraigned, and asked that the record show the fact. He asked for no continuance of the matter, and made no objection to proceeding with the trial. There is nothing in the record to show, and appellant does not now assert, that she suffered any prejudice by reason of the alleged failure to receive the transcript. During the trial such a transcript was present, and was used by counsel for the appellant with apparent familiarity.

[3] At the inception of the trial upon the call of the roll of the regular jury panel, some of the jurors did not answer to their names. The appellant objected to proceeding unless the court should compel the missing talesmen to be brought into court. The court overruled the objection and directed the clerk to proceed with impaneling the jury, in the process of which the defendant exhausted all of her peremptory challenges. She now contends that she was deprived of the right to have all of the jurors upon the panel present in court. We do not think there is any merit in this contention, for the defendant is only entitled to a fair and impartial jury, not a jury composed of any particular individuals. *People v. Durant*, 116 Cal. 179, 199, 48 Pac. 75; *People v. Schafer*, 161 Cal. 573, 577, 119 Pac. 920; *People v. Kromphold*, 172 Cal. 512, 520, 157 Pac. 599. It is not shown in the record, nor suggested by appellant in her briefs, that any objectionable juror was forced upon her after she had exhausted her peremptory challenges.

There is nothing in the contention of the appellant that the verdict rendered is at variance with the allegations of the information, which charges the defendant with violating the provisions of section 17 of the Medical Practice Act of the State of California, setting out the facts. The verdict follows the charging part of the information, which is sufficient. The proof that the defendant held herself out as a practitioner, that she examined patients, and prescribed

for their ailments, is in accord with the allegations of the facts alleged in the information on which the charge of violation of the section of the Medical Practice Act is predicated.

[4-6] The court instructed the jury that it should not disregard the testimony of hired detectives, or state agents, who testified in the case, solely and only for the reason that they had been thus employed, but should give their testimony the same consideration as any other testimony in the case, giving it such weight as, considering its nature, the opportunity for knowing the facts to which the witnesses testified, their appearance and demeanor upon the witness stand, and all other elements which might go to their credibility, including their interest and bias, and should give to their testimony such weight as, under the circumstances, the same in their judgment was entitled to receive. The giving of this instruction was not reversible error, although it rarely happens that a trial judge is warranted in charging the jury respecting the credibility of any witness, or particular class of witnesses, or the manner in which their testimony should be received. It were far better to charge the jurors generally concerning such matters, and let the subject rest there. Instructions which single out the testimony of a particular witness for comment, and instructions bearing on the weight to be attached to a particular piece of evidence, should not be given. *People v. Converse*, 28 Cal. App. 687, 689, 153 Pac. 734.

[7, 8] The defendant took the stand in her own behalf. The court instructed the jury as follows:

"You are instructed that while the defendant in a criminal action is not required to take the stand and testify, yet if she does so, her credibility and the value and effect of her evidence are to be weighed and determined by the same rules as the credibility and effect and value of the evidence of any other witness is determined. If a defendant elects to take the stand and testify in her own behalf, her testimony is to be weighed in the same manner, and measured according to the same standard, as the testimony of any other witness, and the tests for determining credibility of witnesses as given you in another part of the instructions are to be applied to her testimony alike with that of all other witnesses. *No greater presumption attaches in favor of her testimony than attaches in favor of that of any other witness.*"

Appellant complains of the instruction, particularly that portion which is underscored. It has been repeatedly pointed out that it is bad practice for the trial judge to single out the testimony of any witness, especially if the witness be the defendant, and instruct with particular reference to his testimony. While an instruction as to the defendant's testimony, which is not a departure from instructions that have been allowed

to pass by the Supreme Court, does not furnish sufficient ground for reversal, attention has been repeatedly called to the criticism of similar instructions in the more recently decided cases (*People v. Anderson*, 105 Cal. 32, 35, 38 Pac. 513), and it has been emphatically held that justice would be more surely accomplished if no such instructions were given, and the credibility of the defendant were left entirely to the jury (*People v. Boren*, 139 Cal. 210, 215, 72 Pac. 899; *People v. Van Ewan*, 111 Cal. 144, 153, 43 Pac. 520). As was said in both of those cases, it is difficult to logically attribute the giving of any instruction whatever on the subject of a defendant's testimony to anything else than a purpose to expressly disparage the witness before the jury.

[9, 10] At the conclusion of the argument of counsel for the defendant, the court asked what he meant by certain remarks addressed to the jury. Thereupon there ensued a colloquy between the court and counsel, which ended by the counsel being adjudged in contempt of court and fined \$50, with an alternative of spending two days in jail. Appellant took an exception to the action of the court, and now assigns the episode as prejudicial misconduct of the trial judge, entitling her to a reversal of the judgment. We are very candidly of the opinion that the trial court was guilty of a most serious invasion of the rights of the defendant, when it entered into the discussion with counsel before the jurors, as to the import and effect of the latter's argument. But, with apparent realization of its own error, the court instructed the jurors that the conversation which occurred between the attorney for the defendant and the court was not to be considered by them as bearing in any way upon the case, and that they were to entirely disabuse their minds of everything that occurred relative to the issue that had arisen between the court and counsel, and decide the matter as indicated in the instructions, on the evidence presented to them. While the episode is regrettable, and should not have occurred, we must deem its effect to have been cured by the action of the trial court in admonishing the jurors to clear their minds of any impression it might have left. *People v. Ruef*, 14 Cal. App. 578, 600, 114 Pac. 48, 54; *People v. Overacker*, 15 Cal. App. 620, 628, 115 Pac. 756.

From our examination of the entire cause, including the evidence which so clearly establishes the guilt of the appellant of the offense with which she was charged, we are of the opinion that none of the errors complained of resulted in a miscarriage of justice in the case.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

COOPER v. VUCINICH. (Civ. 3807.)

(District Court of Appeal, First District, Division 2, California. Sept. 7, 1921.)

1. Appeal and error ⇨1011(1) — Findings on conflicting evidence not disturbed.

Findings of fact will not be disturbed for a mere conflict in the evidence.

2. Municipal corporations ⇨706(7)—Contributory negligence of truck driver struck by motor bus at street intersection held for jury.

Contributory negligence of truck driver, who slowed down before crossing intersecting street containing railroad tracks running parallel with curve, and who was struck by defendant's jitney bus approaching on truck driver's left on intersecting street at excessive rate of speed when bus swerved to wrong side of street in attempt to pass in front of truck, held for jury.

3. Municipal corporations ⇨705(1) — Driver of vehicle should slow down before crossing street containing railroad tracks.

Driver of motor vehicle should slow down upon entering intersecting street containing railroad tracks.

4. Municipal corporations ⇨705(2) — Vehicle has right of way over other vehicle approaching on intersecting street on its left.

Under Motor Vehicle Act, § 20(e), truck had right of way over jitney bus approaching on its left on intersecting street.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by F. A. Cooper against S. Vucinich. Judgment for plaintiff, and defendant appeals. Affirmed.

Rose, Silverstein & Collier, of Oakland, for appellant.

Dixon L. Phillips, of Oakland, and Esther P. Phillips, of San Francisco, for respondent.

NOURSE, J. This is an action for damages for injuries to person and property resulting from a collision between an automobile truck owned and operated by plaintiff and a seven-passenger touring car belonging to defendant and operated by him, through his agent, as a jitney bus. The collision occurred September 14, 1919, at the southwest corner of the intersection of Castro and Seventh streets in the city of Oakland. Judgment was rendered in favor of plaintiff for the sum of \$500. Defendant appeals, attacking certain findings, as not supported by the evidence, to the effect that plaintiff was not guilty of contributory negligence, but was driving carefully on the right-hand side of Castro street, and that defendant was negligent, which negligence was the cause of the damage.

Defendant states:

"Our sole contention of plaintiff's contributory negligence is based upon the fact testified to by him that when he reached the intersection of Seventh and Castro streets he came almost to a stop, and then proceeded to cross Seventh street at a rate of approximately seven miles per hour directly in the path of the jitney automobile."

He argues from this that when he (plaintiff) came almost to a stop the driver of the jitney was entitled to assume that the truck was stopping to allow him to pass and to continue on his course along Seventh street; that when, instead of stopping, the truck proceeded to slowly cross Seventh street, the emergency then arising, necessitated the driver of the jitney to turn to the south (his left) side of the street in an effort to pass in front of the truck and avoid a collision, because the north side was blocked by the truck (which was 15 feet long) and to continue on his course between the tracks would place him in the direct path of the truck; that when the jitney swerved to the south side to pass in front of the truck the driver of the truck had ample opportunity to stop it and avoid the collision, and his failure to do so amounted to negligence.

[1, 2] The findings referred to will not, of course, be disturbed on appeal for a mere conflict in the evidence. The question raised by defendant is whether the evidence relied on constitutes negligence on the part of plaintiff as a matter of law.

Castro street extends in a general northerly and southerly direction, and Seventh street extends in a general easterly and westerly direction. Seventh street is 60 feet wide. Two sets of railroad tracks of the Southern Pacific Company run along the middle parallel with the curb. The distance between each curb and the outer rail of the track is 20 feet, the track is 5 feet wide and the space between the two tracks 10 feet. The truck was traveling slowly in a southerly direction on the west or right-hand side of Castro street. Plaintiff's version of the circumstances leading up to the accident was that just as he went on Seventh street he came almost to a stop, slowing down to between 6 or 8 or 8 or 10 miles an hour, and proceeded at that rate to cross Seventh street; that he looked to see that the way was clear, and when he was just going on the first rail of the northerly track he saw the jitney about 150 feet away in the space between the two sets of tracks, coming toward him; that when he was just crossing the second or southerly track he looked up and saw it about 50 or 60 feet away, traveling at least 45 or 50 miles an hour, and just as the truck left this track the bus swung towards the south or left side to pass in front of the truck, striking it a glancing blow on the left side near the front, swinging the truck

around and hurling its occupants to the pavement, causing the injuries complained of. The jitney continued to the next corner on the left-hand side of Seventh street before stopping. There was no obstruction on the north side of Seventh street, and it was in good repair.

[3, 4] The rule as to the care which the driver of a vehicle must use before crossing a railroad is well established. An omission to slow down upon entering this street might well have been a breach of duty amounting to negligence. The truck being on defendant's right as the vehicles approached the intersection, plaintiff, prima facie, had the right of way under section 20 (e) of the Motor Vehicle Act. Deering, General Laws, p. 931. That plaintiff did not act negligently in this matter, but acted with care and caution, seems to be a reasonable interpretation of the evidence. On the other hand, the evidence shows that defendant was violating the law as to speed, and that he himself produced the emergency complained of; that he then turned to his left side of Seventh street at its intersection with Castro street, although the road to the right was clear, passed in front of the truck, striking it in passing, and traveled to the corner beyond on that side of the street before stopping. This is in accordance with the finding that he was traveling "along the south side of Seventh street at its intersection with said Castro street."

The findings are amply supported by the evidence, and the judgment is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

BARQUIN et al. v. HALL OIL CO. *

(Supreme Court of Wyoming. Oct. 25, 1921.)

1. Libel and slander §139—Lessee not liable for special damages caused by refusal to cancel of record leases rightfully recorded.

Lessees' failure to cancel of record oil and gas leases following forfeiture did not entitle lessors to special damages sustained in action for slander or defamation of title; there being no publication, since leases were in the first instance rightfully recorded.

2. Libel and slander §130—Publication essential to defamation of title.

To constitute defamation of title there must be publication.

3. Libel and slander §139—Attorney's fees not recoverable in action for defamation of title.

Lessor suing lessees for defamation of title following refusal to cancel leases of record following forfeiture could not recover attorney's fees.

4. Libel and slander §139—Petition in action for defamation of title held insufficient for failure to specify special damages.

In lessors' action for defamation of title against lessees for refusal to cancel leases of record following forfeiture, petition held insufficient in that it failed to specify the special damages sustained.

5. Libel and slander §139—Petition in action for defamation of title must specify special damages.

In action for defamation of title, the petition must specify the special damages sustained; special damages being the gist of such action.

6. Mines and minerals §59—Lessors could not rescind lease for default and recover damages.

Where oil and gas lease required lessee to drill within specified time, but contained no forfeiture clause, lessors, having rescinded the lease on lessee's default, could not recover damages sustained by reason of such default; the two remedies being inconsistent.

7. Election of remedies §2—Doctrine not confined to cases of fraud.

The doctrine of election of remedies is not confined to cases of fraud, but applies whenever a party takes an inconsistent position, whether arising from claims that carry a different measure of damages or otherwise.

8. Mines and minerals §121—Facts held not to entitle lessors to damages caused by lessees' development of wells on adjoining lands.

In action by lessors, following rescission of oil and gas lease for lessees' failure to drill well to depth of 3,000 feet as required by the lease, to recover damages sustained by reason of the development, by such lessees, of wells on adjoining lands, thereby draining oil from under lessors' lands, facts held insufficient to entitle lessors to relief in that it did not appear that the drilling of a well to the depth of 3,000 feet on their land would have produced oil, or that a reasonable time had elapsed in which lessees could have completed the drilling of a well on lessors' land.

9. Mines and minerals §78(1)—Reasonable time for completion of oil well implied where time is not specified.

Where oil and gas lease does not specify the time within which a well shall be completed, a reasonable time for completion thereof will be implied.

10. Evidence §20(1)—Judicial notice not taken of what constitutes a reasonable time for completion of oil well.

The court will not take judicial notice of what constitutes a reasonable time for the completion of an oil well in view of the varying fortunes in oil fields, the differences existing in the strata of the earth in different localities, and the accidents and contingencies arising.

11. Mines and minerals §59—Lease held to have been mutually rescinded.

Where lessors rescinded lease without reservation of any rights following lessees' de-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied January 10, 1922.

fault, there was a mutual rescission precluding lessors from recovering damages sustained by reason of default.

12. Contracts \Leftrightarrow 253—Rescinded by mutual consent where one party rescinds and the other does not object.

If one party rescinds a contract and the other consents thereto or does not object, the rescission is by mutual consent, and the claims of the parties against each other arising out of the contract, unless reserved, are generally barred.

Error to District Court, Fremont County; Charles E. Winter, Judge.

Action by James Barquin and another against the Hall Oil Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

John J. Spriggs, of Lander, for plaintiffs in error.

Hagens & Murane, of Casper, for defendant in error.

BLUME, J. The plaintiffs in error, plaintiffs below, bring this action against the defendant in error, defendant below, to cancel of record two oil and gas leases held by defendants on 80 acres of land in Fremont county, and for damage in the sum of \$400,000 for failure to cancel said leases of record and for failure to drill. A demurrer was sustained to the original petition. An amended petition was filed. From this, on motion, were stricken all matters relating to damage. The plaintiffs complain of this action here. However, they filed a second amended petition, asking in the first two causes of action for the cancellation of the lease, and in the third and fourth causes of action for damages. The leases were canceled by decree in the court below. A demurrer was sustained to the causes asking damages, and this action of the lower court is here for review. The material facts, as shown by the petition, are as follows: The first lease, executed by the predecessors in interest of plaintiffs, is dated June 9, 1914, is for the term of 10 years, and contains the usual clauses, without, however, containing special covenants on the part of the lessees. Nothing was done under the lease, but on July 11, 1916, it was by plaintiffs, who had bought the land in the meantime, "ratified" in consideration of \$500 paid to them. In this ratification agreement defendants agree to erect a standard rig on the premises within 90 days in order to drill a well of 3,000 feet, unless oil or gas is reached at a shallower depth, and further to drill offset wells. In case that no oil was found in the first well, defendants agree to drill other wells, or deliver the lease up for cancellation; no other forfeiture clause is contained in the lease. Plaintiffs charge in substance

that nothing was done thereunder by defendants; that immediately after the expiration of the 90 days they considered the lease as void, and refused to grant an extension or to give another lease; that they thereupon "elected to and did rescind the same," and notified the defendant in writing, among other things, that, "by reason of the defaults in the terms of said lease by said lessee and his assigns, the same has become and is null and void, forfeited, of no force and effect, and not binding on the undersigned, who have elected to and have declared the same forfeited"; and that thereupon defendants admitted that it had no further rights in said lease or said premises and that it had forfeited the lease, but maliciously refused to cancel it of record. The second lease in question, given originally to G. H. Paul, finally assigned to defendants, was dated September 11, 1915, and plaintiffs charge that it was executed by mistake and in ignorance of the existence of the first lease; that it was null and void ab initio; that defendants, upon demand, failed and refused to cancel this lease of record; that this refusal was "malicious"; that in the meantime defendants were drilling and developing wells on adjoining premises, thereby fraudulently draining oil from plaintiff's land without paying royalty therefor; that plaintiffs, not being able to develop the land themselves, and with the lease as a cloud on their title, were compelled to sell the land for \$10,000, which is less than its value; that they have a binding contract with Martel and Lee for the sale of the land, and agreed to convey a good and marketable title, but they cannot consummate the sale until the cloud is removed. For how much more the land could have been sold, in the absence of said cloud of title, is not stated. Plaintiffs also claim in general terms that they have been compelled to go to expense and trouble and pay attorney's fees in order to cancel said lease and remove the cloud from the title. \$200,000 is claimed for actual and \$200,000 for punitive damages.

[1, 2] 1. We are cited to *Vaught v. Pettyjohn & Co.*, 104 Kan. 174, 178 Pac. 623, *Kelly v. First State Bank*, 145 Minn. 331, 177 N. W. 347, 9 A. L. R. 929, and other cases which hold that, where a party maliciously puts of record a void instrument affecting title to property, he is guilty of slander or defamation of title and liable for special damages arising therefrom. Counsel for plaintiffs desire us to extend that rule to a case of a mere failure to release an instrument which was rightfully recorded, but should have been canceled of record by reason of subsequent events. They call our attention to no authority where that has been done; and, despite the fact that questions of like kind must naturally have arisen time and again in some of the older states, we have

found no case holding such rule. In order to constitute defamation of title, it is essential that it be published. *Arnold v. Producers' Oil Co.* (Tex. Civ. App.) 196 S. W. 735; *Potosi Zinc Co. v. Mahoney*, 36 Nev. 390, 135 Pac. 1078; *Coffman v. Henderson*, 9 Ala. App. 553, 63 South. 808; *Schoen v. Casualty Co.*, 147 Ga. 151, 93 S. E. 82; 25 Cyc. 559. The leases in this case were in the first instance rightfully recorded; that act constituted the publication; and we fail to see how by the failure thereafter to execute a release an additional publication can be said to have been made. The point herein raised was mooted, but not decided, in *Rogers v. Milliken Oil Co.*, 62 Okl. 147, 161 Pac. 790. In the case of *Mickie v. McGehee*, 27 Tex. 135, the only case on record, so far as we have been able to discover, directly deciding part of the points raised by counsel of plaintiffs, a demand was made for the release of a chattel mortgage, and it was alleged that the refusal to release "was malicious, and for the purpose of vexing and harassing the plaintiff, who had been thereby compelled to employ attorneys at great expense, etc., for which he claimed damages." The court, without saying what it would hold where special damages were shown, held that plaintiff was entitled to a decree of cancellation together with costs, and to nothing more. In *Pettengill v. Mather*, 16 Abb. Prac. (N. Y.) 399, and *Kruidler v. Hillman*, 57 Misc. Rep. 209, 107 N. Y. Supp. 727, it was held that, before the plaintiff in a suit to compel the cancellation of a lien can recover his costs, it must appear that the person demanding a cancellation piece must offer the instrument to be executed, as well as the expenses of the execution. In the case of *Morrill v. Title, etc.*, 84 Wash. 258, 267, 162 Pac. 360, 163 Pac. 733, 734, it was stated that no damages were recoverable at common law for the failure to satisfy a mortgage—and the same rule would obtain in the case of other releases—and that the only right of action was in equity. That this is undoubtedly true is clearly shown by the absence of decisions allowing damages under the common law and by the course of legislation in the United States. In at least 34 states statutes have been passed, requiring, under penalty the release of record of mortgages or other liens after they have been satisfied or otherwise discharged. The case of *Rogers v. Milliken Oil Co.*, supra, discloses that the Oklahoma Legislature in 1915 required the cancellation of void oil and gas leases, and the case of *Elliott v. Oil Co.*, 106 Kan. 248, 187 Pac. 692, shows that the Legislature of Kansas passed a similar act in 1909. Hence to approve of the rule contended for by counsel for plaintiffs would be nothing less than to engage in judicial legislation, which we must refuse to do. If any remedy is needed, that must in such case be asked at the hands of the Legislature.

[3-5] Aside from this, we might add that the second amended petition in this case falls in other respects to state a cause of action for defamation of title. Attorney's fees are claimed, but these are not recoverable in any event. *Mickie v. McGehee*, supra; *Cohen v. Minzesheimer* (Sup.) 118 N. Y. Supp. 385; *Hubbard v. Scott*, 85 Or. 1, 116 Pac. 33, and cases there cited. This is in consonance with the general rule that ordinarily attorney's fees are not recoverable. 15 C. J. 114. The special damages which plaintiffs apparently claim by reason of such defamation is that they were prevented from leasing or selling the land to parties other than Martel and Lee without setting out the names or the price; that they were compelled to enforce their rights at great expense and loss of time; that they could have sold the land to Martel and Lee for a greater sum in the absence of the cloud of title, without naming the sum, and therefore without naming the damages sustained thereby, since the additional amount would, of course, in such case be the damages sustained. Now defamation of title of property was not considered harmful at common law, and not actionable unless special damages were shown. And, since these special damages are the gist and heart of the action, a peculiar strictness governs in respect to the pleadings and evidence. As was said in *Griffin v. Isbell*, 17 Ala. 186:

"There is perhaps no other civil action which has been treated so strictly by the courts."

Hence the special damages must be specifically pointed out or the petition is demurrable. It is not sufficient to allege in general terms that the plaintiff has been damaged or that he has been prevented from making a sale; if the property could have been sold for more than its value, or for more than it actually brought, the amount thereof must be stated and the parties must be named. It is clear, therefore, that on this issue the pleadings of plaintiffs are not sufficient against a demurrer. *Stevenson v. Love*, 106 Fed. 466; *Arnold v. Oil Co.* (Tex. Civ. App.) 196 S. W. 735; *Hill v. Ward*, 13 Ala. 310; *Burkett v. Griffith*, 90 Cal. 532, 27 Pac. 527; *Wilson v. Dubois*, 35 Minn. 471, 29 N. W. 68; *Linden v. Graham*, 1 Duer (N. Y.) 670; *Hubbard v. Scott*, supra; *Ebersole v. Fields*, 181 Ala. 421, 62 So. 73. In the case of *Stevenson v. Love*, supra, the court said:

"The action, then, being in the nature of one for slander of title, special damages is its gist and substance, and it must be pleaded with particularity. *Odgers, Lib. & Sland.* p. 137. An allegation of loss in general terms is not sufficient. 13 Enc. Pl. & Prac. p. 97, and cases there cited. It will be observed that the declaration in this case fails to set out the name of the person to whom or the parties at which the sale of the bond and mortgage could have been made if the alleged false state-

ments had not been made by the agents or attorneys of the defendant, or to state either the name of the subsequent purchaser or the price actually obtained at the sale afterwards made. All of these are necessary averments. 'If the special damage was a loss of customers, or of a sale of property, the persons who ceased to be customers or who refused to purchase must be named, and, if they are not named, no cause of action is stated.' *Linden v. Graham*, 1 Duer. (N. Y.) 670; *Wilson v. DuBois*, 35 Minn. 471, 29 N. W. 68, 59 Am. Rep. 335.

2. The ratification agreement of the first lease contains, as stated, a covenant to erect, within 90 days, a standard rig in order to drill a well 3,000 feet deep if necessary; also to drill offset wells, without providing when this should be done, presumably, therefore, whenever required. These covenants, it is charged, were not complied with, and counsel for plaintiff, relying upon the maxim, "Ubi jus ibi remedium"—"Where there is a right, there is a remedy"—claims that damages follow as a matter of course. We have no fault to find with the maxim. "Remedium" is, however, in the singular, not in the plural, as counsel seems to read it. And it may be further said in passing, since counsel for plaintiffs apparently desire to stretch the maxim to the limit, that—

"Wherever the common law gives a right, or prohibits an injury, it also gives a remedy by action. 3 Bl. Com. 123. Yet this is to be understood of legal right and injury, and not that legal relief is to be had for every species of loss or injury that individuals sustain by the acts of others." *Haldeman v. Chambers*, 19 Tex. 1, 52.

We are cited, further, to the case of *Lavery v. Oil Development Co.*, 62 Okl. 206, 162 Pac. 737, L. R. A. 1917D, 231, which was an action for damages on a covenant to drill. But in that case the plaintiff was satisfied with one remedy, and he did not seek the additional remedy of having the lease canceled. A number of other cases are cited wherein the plaintiff was content with the one remedy of rescission or termination of the contract.

[8] In this case plaintiffs seek two remedies—one in damages; the other in rescission and cancellation. Plaintiffs upon default of defendant promptly rescinded the lease or declared it forfeited and null and void, and proceeded to sell the land, not subject to the lease, but as though it were of no force; and this, too, without a distinctive forfeiture clause contained in the lease. The defendant failed to drill; responsibility of some kind for this to the plaintiffs followed. How was this failure satisfied, paid for? The obvious answer is that satisfaction was made by the rescission, the forfeiture, the cancellation, and termination of the lease. If this cancellation was not a satisfaction, what was it given for? If damages must

still be paid, though the lease was rescinded and decreed in the lower court to be canceled, then the cancellation and rescission were clearly without consideration, and impose upon the delinquent defendant a double liability. If the land was valuable for oil and gas, then, it is clear, the defendant, by this termination, paid a heavy penalty; if, on the other hand, the land contains no oil or gas, then the plaintiffs sustained no damage. It may be true that the cancellation of the lease does not completely satisfy the just claim of the plaintiffs, but the law does not attempt impossibilities, and aims only at substantial justice. For how much of the damage is the cancellation to stand? Clearly there is no way to measure that, and hence, when plaintiffs chose to pursue this remedy, it must necessarily stand for satisfaction in its entirety. As was said in *International Harvester Co. v. Tjentaland*, 181 Iowa, 940, 165 N. W. 180:

"If the defendant was entitled to recover any damages, he was entitled to recover all his damages. If he recovered any damages, the amount recovered must be deemed all his damages. If he should receive all his damages, he would be made whole, and there would be no occasion for awarding rescission. The defendant has his election of two remedies; either to denounce the contract and rescind it, or to affirm it and claim damages. To take one remedy was to waive the other. Having declared upon a rescission, he was entitled to be put in statu quo, and to recover back whatever of the purchase price he had paid. * * * But, the rescission being awarded, such remedy must be deemed complete. He cannot have rescission without repudiating the contract, nor damages without affirming it."

[7] The quotation is from a case where rescission was made on the ground of fraudulent representations. But the doctrine of election of remedies is not confined to cases of fraud. *Pickle v. Anderson*, 62 Wash. 552, 114 Pac. 177. It applies whenever a party takes an inconsistent position, whether arising from claims that carry a different measure of damages or otherwise. A claimant cannot "blow both hot and cold." When a party in a case like this sues upon a covenant, he affirms the contract as valid, and that position is inconsistent with rescission, termination, and disaffirmance thereof. The principle herein announced has been applied in numerous cases and under various conditions. Thus in case of ordinary contracts a party cannot rescind it and also sue for a breach thereof. 13 C. J. 623; *Chesley v. Coal Co.*, 19 N. D. 18, 121 N. W. 73; *Seymour v. Warren*, 47 Misc. Rep. 316, 93 N. Y. Supp. 651; *Genet v. Canal Co.*, 28 App. Div. 323, 51 N. Y. Supp. 377; *Tyler v. Bldg. Co.* (Cal. App.) 190 Pac. 209; *Timmerman v. Stanley*, 123 Ga. 850, 51 S. E. 760, 1 L. R. A. (N. S.) 379; *Hubbardston Lumber Co. v. Bates*, 31 Mich. 158, 169. A vendor cannot ordinarily

forfeit a contract and also recover for unpaid installments due thereunder. 39 Cyc. 1904; *Rose v. Rundall*, 86 Wash. 422, 150 Pac. 614; *Lemle v. Barry*, 181 Cal. 1, 183 Pac. 150, 152; *Stinson v. Sneed* (Tex. Civ. App.) 163 S. W. 989. In case of a sale of personal property, the purchaser cannot both rescind the sale and also recover on a warranty, which would be akin to attempting recovery on a covenant. 35 Cyc. 160; *Williston on Contracts*, § 1464; *Houser & Haines Mfg. Co. v. McKay*, 53 Wash. 337, 101 Pac. 894, 27 L. R. A. (N. S.) 925. A similar rule obtains in cases generally where defendant refuses to perform, preventing thereby performance by plaintiff. *Graves v. White*, 87 N. Y. 463; *White & Co. v. Remick & Co.*, 198 Mass. 41, 84 N. E. 113; *U. S. v. Behan*, 110 U. S. 338, 345, 4 Sup. Ct. 81, 28 L. Ed. 168; *Meacham v. Gardner*, 27 Pa. Super. Ct. 296; *Davis v. Tubbs*, 7 S. D. 488, 492, 64 N. W. 534; *Blair v. Refining Co.*, 35 Cal. App. 394, 170 Pac. 160. In the case of *Chesley v. Coal Co.*, *supra*, where the contract was rescinded by plaintiff on account of breach of contract and fraudulent representations, the court said:

"What was the status of the contract and of the parties thereto after plaintiff had rescinded it? The rescission of it wiped out the contract, so far as basing any affirmative action on it relating to its enforcement, or for damages for its breach. It destroyed all its vitality, and the relation of the parties thereto as an express contract was the same as though it never had been entered into."

In the case of *Rose v. Rundall*, *supra*, plaintiff, the vendor, commenced an action to recover an installment due under a contract. Thereafter he declared the contract forfeited for the nonpayment of an installment falling due subsequently, and, similar to the proceedings in the case at bar, pursued an action for termination of the contract to final judgment and decree before obtaining judgment in the first action. The court said:

"But clearly, whenever the vendor elects to declare the contract forfeited by the vendee, and does so, and procures a final judicial decree fully and finally abrogating the contract, all other undetermined and coexisting rights cease and are determined. If the contract is abrogated, it is not 'in a sense deadened,' to use appellant's words, but it is absolutely dead. It is *functus officio*. If it is so as to one party, it is so as to the other. It cannot thereafter be revived and made a live contract by one party alone. The vendor alone cannot breathe the breath of life into it. All unpaid balances not liquidated in judgment are waived from the instant that the contract is declared extinct. The appellant elected and chose to formally and solemnly disaffirm and declare forfeit the unexecuted provisions for the benefit of the respondent, by bringing, prosecuting, and pursuing to judgment his cause No. 98871, for the judicial termination thereof. That constituted an abandonment of the action then pending for the recovery of any unpaid

purchase money under the contract. By that election he must abide."

The same principle has been stated in a number of cases involving oil leases. *Ray v. Gas Co.*, 138 Pa. 576, 20 Atl. 1065, 12 L. R. A. 290, 21 Am. St. Rep. 922; *Agerter v. Vandergrift*, 138 Pa. 593, 21 Atl. 202; *Willis v. Gas Co.*, 130 Pa. 222, 18 Atl. 721, 5 L. R. A. 603; *Woodland Oil Co. v. Crawford*, 55 Ohio St. 161, 44 N. E. 1093, 34 L. R. A. 62; *Allen v. Narver*, 178 Cal. 202, 172 Pac. 980. In the last case cited, the defendant had agreed to drill a well, or to pay \$100 per month. The court, speaking of the right to recover the amount agreed to be paid and the alternative right of rescission, says:

"It is quite true that by another provision of the lease it was provided that a failure on the part of the lessees to comply with the conditions thereof, or their failure to diligently prosecute the work of drilling and producing oil, would render the lease null and void and of no effect. This provision constitutes an option given to the lessor, which in lieu of insisting upon the payment of the one hundred dollars per month as provided in that portion of the lease hereinbefore quoted, he might or might not exercise at his election."

The case of *Wolf v. Guffey*, 161 Pa. 276, 28 Atl. 1117, is, we think, decisive of the case at the bar. In that case the defendant had agreed to drill and complete a well within six months, and in case of failure to do so to pay to plaintiff \$260 within three months thereafter. Upon the expiration of the nine months, plaintiff forfeited the lease, but subsequently brought his action for damages. The court held that the right to damages was lost, and said in part:

"In this case it was the act of the lessor which rendered the lease null and void and without effect between the parties. Within 6 days after his right of action accrued, and without demanding payment of the sum sued for, he let the premises to the Philadelphia Company for a term of 20 years. This was a prompt, plain, and decisive election by him to enforce the forfeiture clause, and thenceforth the lease was a nullity and the rights and liabilities arising from it were extinguished."

[8, 9] In the case of *Indiana Oil, etc., Co. v. McCrory*, 42 Okl. 136, 140 Pac. 610, to which we are cited, damages were claimed for improper drilling on a developed piece of oil land. That case, therefore, has no bearing on this. The case of *Kleppner v. Lemon*, 176 Pa. 502, 35 Atl. 109, and 197 Pa. 430, 47 Atl. 353, presents an action for specific performance to compel the drilling of future wells and for damages arising by reason of draining oil from the land in question by other wells placed within a few feet of the dividing line. The land was known to contain oil and had one producing well thereon. After all the oil had been drained from the land, the lessee surrender-

ed the lease, and the court held that the lessor should be compensated for the oil that had been drained away by the wells on the adjoining land. It will be noted that the lessor did not ask any rescission, but that this was in fact made by the lessee, and the decision can probably be further explained on the theory, if on no other, that the court allowed the damages in order to put the parties in statu quo—a principle generally applicable in cases of rescission. And this brings us to that phase of the case wherein the plaintiffs allege that defendant drilled and developed wells on adjoining lands, thereby draining oil from under the lands of plaintiffs, and we must inquire as to whether or not a state of facts has been presented which might require an allowance of damage by reason thereof in order to put the plaintiffs in statu quo. We think not, for several reasons, and without reference to the fact as to whether any proper method of measuring damages exists in a case like this, and without deciding as to whether under the proper pleadings such damages might be recovered where lessor rescinds the lease. In the first place, it is evident that it must appear, in order to recover any damages at all, that the land contains oil or gas which could and would have been obtained and utilized by putting down a well. *Springer v. Gas. Co.*, 145 Pa. 430, 436, 22 Atl. 986; *Duff v. Bailey*, 96 S. W. 577, 29 Ky. Law Rep. 919. There is no direct allegation in the pleadings of plaintiff that the land in question is oil-bearing, but if we concede that, for the purposes of a demurrer, the allegation that defendant drained oil therefrom should be considered sufficient for that purpose, still the other requisite facts above mentioned do not appear. Without a covenant to drill the defendant could not, of course, be held liable in any event, but, further, drilling does not necessarily mean that oil or gas will be found. Defendant, under the agreement, was not compelled to drill, at least the main well, beyond a depth of 3,000 feet. There is nothing in the pleadings that informs us as to whether or not oil or gas could have been obtained at that depth, or in fact whether it was at all feasible to obtain and utilize it by drilling to any depth whatever. Again, the covenant did not specify the time within which the well or wells should be completed. In such case the law would imply a reasonable time, and it is too clear to need argument that defendant could in no event be held responsible until such reasonable time had elapsed. It had 90 days from July 11, 1916, in which to erect a derrick. We are left absolutely in the dark as to what would have been a reasonable time in which to have completed the well.

[18] From all that we know from the rec-

ord before us, that time might not yet have elapsed. We cannot take judicial notice of such reasonable time. The varying fortunes in the oil fields, the differences existing in the strata of the earth in different localities, the accidents and contingencies arising which must be taken into consideration, necessarily forbid. Hence we have nothing before us from which we could say that the plaintiffs have been damaged.

[11, 12] Finally, the plaintiffs allege, in substance, that after the default of defendant the parties considered the lease as void, and defendant attempted to get another lease, which plaintiffs refused to give, that plaintiffs rescinded and forfeited the lease, and that thereupon plaintiffs stated that it had "forfeited" the lease, and had no further rights therein. The plaintiffs, in thus rescinding, reserved no rights. It would seem that these facts, although defendant did not release the leases of record, present a case of mutual rescission without reservation of any rights. If one party rescinds a contract, and the other consents thereto, or does not object thereto, the rescission is by mutual consent. *Ralya, Adm'r, v. Atkins & Co.*, 157 Ind. 331, 61 N. E. 726; *Bannister v. Read*, 1 Gilman (Ill.) 92; *Shaffner v. Killian*, 7 Ill. App. 620; *Cromwell v. Wilkinson*, 18 Ind. 365. And in such case the claims of the parties against each other arising out of the contract, unless reserved, are generally barred. *Fullager v. Reville*, 3 Hun (N. Y.) 600; *McCreery v. Day*, 119 N. Y. 1, 23 N. E. 198, 6 L. R. A. 503, 16 Am. St. Rep. 793; *Eames v. Prosser*, 157 N. Y. 289, 51 N. E. 986; *Thomas v. Smoot*, 2 Ala. App. 407, 56 South. 1; *Ralya, Adm'r, v. Atkins & Co.*, supra. In the case of *McCreery v. Day*, cited above, the court said:

"When a contract is rescinded while in the course of performance, any claim in respect to performance, or of what has been paid or received thereon, will ordinarily be referred to the agreement of rescission, and in general no such claim can be made unless expressly or impliedly reserved upon the rescission."

It follows, from what we have said, that the allegations claiming damages in the first amended petition were properly stricken out (*Timmerman v. Stanley*, supra), if that is material at all on this hearing, and that the demurrer was properly sustained as to the third and fourth causes of action of the second amended petition.

The judgment rendered in the court below should accordingly be, and the same is hereby, affirmed.

Affirmed.

POTTER, C. J., and KIMBALL, J., concur.

**In re MUSKOGEE GAS & ELECTRIC CO.
MUSKOGEE COUNTY et al. v. MUSKOGEE
GAS & ELECTRIC CO.**

(No. 11335.)

(Supreme Court of Oklahoma. Oct. 11, 1921.)

(Syllabus by the Court.)

1. Appeal and error ¶1—Right of appeal statutory.

The right of appeal exists only where expressly given by constitutional provision or legislative enactment, and the right cannot be extended to cases which do not come within the Constitution or statute.

2. Appeal and error ¶150(1) — Interest in subject-matter authorizing appeal must be pecuniary and direct.

The interest in the subject-matter of litigation which will authorize an appeal from an order or decree therein must be a direct and pecuniary interest in the subject-matter of the particular case.

3. Taxation ¶493(6) — Party employed by county commissioners to discover property not assessed lacks interest to authorize his appeal from dismissal of petition by state board.

A person employed by the board of county commissioners of a county to discover property not listed and assessed for taxation has not such an interest in the subject-matter as to authorize him to prosecute an appeal from an order of the state board of equalization dismissing his petition seeking an increase of the assessed valuation of the property of a public service corporation, and praying the assessment of certain alleged omitted property of such corporation; neither is such person authorized to prosecute such appeal as a citizen and taxpayer.

4. Taxation ¶493(6)—County attorney cannot appeal from order of state board of equalization dismissing petition to increase valuation of public service corporation.

A county attorney is not authorized to prosecute an appeal from an order of the state board of equalization dismissing his petition seeking an increase in the assessed valuation of a public service corporation, and praying assessment of certain property of such corporation alleged to have been omitted from taxation.

(Additional Syllabus by Editorial Staff.)

5. Taxation ¶493(1)—Certain statutory provisions for appeal held not applicable to proceeding to tax omitted property.

Rev. Laws 1910, § 7368, providing for appeals from the county board of equalization, Sess. Laws 1910-11, c. 152, § 15, providing for appeals from all county boards of equalization to district and superior courts, and to the Supreme Court if from the state board, relate to appeals from the county board's increasing assessment and to the state board of equalization increasing the assessment of any public

service corporation, but not to omitted property taxes pursuant to Rev. Laws 1910, § 7449.

6. Appeal and error ¶151(2) — "Aggrieved person" within tax assessment act defined.

An aggrieved person, within the meaning of Laws 1915, c. 107, art. 1, subd. B, § 3, authorizing an appeal from a tax assessment by the aggrieved person, is the one who is directly interested in the assessment—the one whose pecuniary interests are or may be adversely affected—the one whose property has been assessed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Aggrieved Party.]

Appeal from State Board of Equalization.

Petition by W. M. Gulager and others, in behalf of Muskogee County, before the state board of equalization for the assessment of omitted property of the Muskogee Gas & Electric Company. The board dismissed the petition and amended petition, and petitioners appeal. Appeal dismissed.

Ross & Thurman, of Oklahoma City, for appellants.

Rainey & Flynn, of Oklahoma City, for appellee.

NICHOLSON, J. On the 27th day of September, 1919, appellants filed with the state board of equalization their petition, alleging that the appellee had property in the following years and amounts not listed for taxation and omitted from the tax rolls of Muskogee county for said years:

"For 1912, bills receivable, cash, stock, bonds, securities, notes, mortgages, choses in action, \$105,000.00.

"For 1913, bills receivable, cash, stock, bonds, securities, notes, mortgages, choses in action, \$225,000.00.

"For 1914, bills receivable, cash, stock, bonds, securities, notes, mortgages, choses in action, \$217,000.00.

"For 1915, bills receivable, cash, stock, bonds, securities, notes, mortgages, choses in action, \$231,000.00.

"For 1916, bills receivable, cash, stock, bonds, securities, notes, mortgages, choses in action, \$254,000.00.

"For 1917, bills receivable, cash, stock, bonds, securities, notes, mortgages, choses in action, \$254,000.00.

"For 1918, bills receivable, cash, stock, bonds, securities, notes, mortgages, choses in action, \$271,000.00.

"For 1919, bills receivable, cash, stock, bonds, securities, notes, mortgages, choses in action, \$338,067.15."

—and praying said board to assess said omitted property. On October 16, 1919, citation was issued and served on appellee. On November 10, 1919, a hearing was had, at which evidence was offered in support of said petition; such evidence consisting of the annual balance sheets of

appellee, its annual returns for the years mentioned, and the minutes of the board for such years. The hearing was then continued until December 10, 1919. Thereafter the further hearing on said petition was continued from time to time until March 16, 1920, on which date the board of equalization granted the appellants leave to file an amended petition more particularly specifying the items of property of appellee omitted from taxation, as shown by the evidence introduced. In said amended petition it is alleged:

"That the respondent, Muskogee Gas & Electric Company, for the tax years of 1912 to 1919, inclusive, made and filed with said state board of equalization, or the state auditor, what purports to be returns of all of its taxable property for the said years, respectively; that the said respondent consistently failed and refused to make said returns upon the blanks which were prescribed by the state board of equalization and furnished to all public service corporations by the state auditor, which blanks contain spaces for such corporation to make return of all of their assets, including stocks, bonds, securities, working assets, cash, accounts receivable, bills receivable, and materials and supplies, as well as their physical property, but that the said respondent used in lieu thereof, and made its various tax returns upon, forms prepared by it, which forms did not provide for the listing of stocks, bonds, securities, working assets, cash, accounts receivable, or material and supplies; that the said tax auditor of Muskogee county, in the performance of his duties under his contract with the board of county commissioners, by investigation learned that the said respondent, for the tax years 1912 to 1919, inclusive, wholly failed to report the above-mentioned items of property which it had during the said tax years, and that large amounts of property belonging to said respondent were therefore omitted in determining the assessed valuation of the property of the said company and therefore escaped taxation entirely for said tax years."

It is further alleged that appellee had assets and property (specifically set out in said amended petition) which were omitted from assessment and taxation, as follows:

"For the tax year 1912, and on February 1, 1912, property of the total value of \$639,542.28; for the tax year 1913, and on February 1, 1913, property of the total value of \$444,978.86; for the tax year 1914, and on February 1, 1914, property of the total value of \$383,711.16; for the tax year 1915, and on February 1, 1915, property of the total value of \$355,647.06; for the tax year 1916, and on February 1, 1916, property of the total value of \$441,020.44; for the tax year 1917, and on February 1, 1917, property of the total value of \$421,977.61; for the tax year 1918, and on February 1, 1918, property of the total value of \$470,037.75; for the tax year 1919, and on February 1, 1919, property of the total value of \$409,796.45. Total, \$3,566,713.60."

It is further alleged that the appellee is a public service corporation, and under the

law it is the duty of the state board of equalization to cause the assessed valuation of omitted property and assets of the appellee to be certified to Muskogee county, to be entered upon the assessment rolls and tax rolls for the several years in which said property and assets were omitted from assessment and taxation, that the same may be extended on the tax rolls for the current year for all arrearage of taxes properly accruing against said property and assets, including interest thereon at the rate of 6 per cent. per annum from the time the taxes should have become delinquent, and praying that the board determine the value of such omitted property for each of said tax years, and cause the assessed valuation thereof to be certified to the proper official of Muskogee county for taxation as required by law.

On the same day the state board of equalization made and entered its order dismissing the petition and amended petition, to which the appellants excepted and prayed an appeal to this court, which was granted. Appeal was duly lodged in this court, and the appellants insist that the state board of equalization erred as a matter of law in dismissing the amended petition.

At the threshold of this case we are confronted with the question of whether or not this court has jurisdiction of this proceeding. It is alleged in the petition that the appellant W. M. Gulager is the regularly employed representative of Muskogee county, under contract with the board of county commissioners of said county, as provided for by section 7449, Rev. Laws 1910, and he attempts to appeal in such capacity and as a citizen and taxpayer of said county, and joins in said appeal the county attorney of said county.

[1] It is the general rule that the right of appeal exists only where expressly given by constitutional provision or legislative enactment, and the right cannot be extended to cases which do not come within the Constitution or statute. *Cleal et al. v. Higginbotham et al.*, 49 Okl. 362, 153 Pac. 64; *Lowe et al. v. Consolidated School Dist.*, 79 Okl. 115, 191 Pac. 737; *Brown v. Holloway's Estate*, 47 Colo. 461, 108 Pac. 25; *Ex parte Sharp*, 15 Idaho, 120, 96 Pac. 563, 18 L. R. A. (N. S.) 886; *State v. District Court*, 38 Mont. 119, 99 Pac. 139; *Garcia v. Free*, 31 Utah, 389, 88 Pac. 30; *State v. Chittenden*, 127 Wis. 468, 107 N. W. 500; *Sullivan v. Haug*, 82 Mich. 548, 46 N. W. 795, 10 L. R. A. 263; 2 R. C. L. 27; 3 C. J. 297; 37 Cyc. 1113; 2 Cooley on Taxation, p. 1393.

In *Board of Commissioners of Kingfisher County v. Guaranty State Bank*, 27 Okl. 736, 117 Pac. 216, this court says:

"Appeals from orders of boards of equalization are entirely of statutory origin, and when not authorized by some statutory or constitu-

tional provision, the right thereto does not exist."

Therefore it is necessary to determine whether there is any constitutional provision or legislative enactment authorizing an appeal from the action of the state board of equalization in dismissing the petition of appellants.

Section 21, art. 10, of the Constitution, creates the state board of equalization, and defines its duties, among which is to assess all railroads and corporation property, but this section contains no reference to an appeal.

Section 7449, Rev. Laws 1910, under the provisions of which the appellant Gulager was employed, provides, in substance, that the board of county commissioners of any county in this state may contract with any person or persons to assist the proper officials of the county in the discovery of property not listed and assessed. Before listing and assessing property discovered, the county treasurer is required to give the person in whose name it is proposed to assess the same ten days' notice thereof by registered mail, fixing the time and place when objections in writing to such proposed listing and assessment may be made. An appeal may be taken to the county court from the action of the county treasurer in listing and assessing said property within ten days, by giving notice of such appeal in writing and filing an appeal bond as in cases appealed from the board of county commissioners to the county court, and by said section, as amended by the act of the Legislature of 1915 (Session Laws 1915, p. 386), appeals may be taken from the final judgment of the county court to the Supreme Court. This section relates solely to the listing and assessing of omitted property by the taxing authorities of the county, and contains no provision for listing and assessing of alleged omitted property of public service corporations whose property is assessed by the state board of equalization.

[5] By the provisions of section 7368, Rev. Laws 1910, appeals may be taken from the action of the county boards of equalization to the county court wherein the assessment was made, and by section 15, c. 152, Session Laws 1910-11, it is provided that appeals may be taken from all county boards of equalization to the district or superior courts of the county wherein the assessment is made, and to the Supreme Court if from the state board, and appeals may be taken from the district and superior courts to the Supreme Court as provided by the Code of Civil Procedure. These sections of the statute relate to appeals from actions of the county board of equalization in increasing the assessment of any person, and to the action of the state board of equaliza-

tion in increasing the assessment of any public service corporation or in equalizing the assessment, and do not relate to omitted property placed on the tax rolls pursuant to section 7449, supra, which provides for an appeal to the county court from the action of the county treasurer in placing such property on the tax rolls.

Section 7309, Rev. Laws 1910, as amended by chapter 177 of Session Laws 1915, under which appellant brought this proceeding to place the omitted property of the appellant on the tax rolls, reads as follows:

"If any real or personal property be omitted in the assessment of any year or years, and the property thereby escape just and proper taxation, at any time and as soon as such omission is discovered, the county assessor or the state board of equalization whose duty it is to assess the class of property which has been omitted, shall at any time, cause such property to be entered on the assessment rolls and tax books for the year or years omitted, and shall, after reasonable notice to the parties affected, in order that they may be heard, assess such omitted property and cause to be extended against the same on the tax list for the current year all arrearage of taxes properly accruing against it, including therein interest thereon at the rate of six per cent. per annum, from the time such tax should have become delinquent. If any tax on any property liable to taxation is prevented from being collected for any year or years, by reason of any erroneous proceedings, or failure to give notice, or otherwise, the amount of such tax which such property should have paid or should have been paid thereon shall be added to the tax on such property for the current year, and if for want of sufficient time or for any other cause such assessment cannot be entered on the tax books, and the tax thereon extended on the tax lists for the current year, the same shall be done the following year; provided, however, that whenever any real or personal property, on account of same being grossly undervalued on account of false representations or concealments made by the owner or owners or their agents in rendering the same for assessment, and in the assessment made in any year or years, the property thereby escapes just and proper taxation, at any time within three years thereafter the county assessor or the state board of equalization, whose duty it is to assess the class of property which has been so undervalued, shall, within three years from the date of such undervaluation, cause such property to be entered on the assessment rolls and tax books for the year or years so undervalued, and shall, after reasonable notice to the party affected in order that he may be heard, reassess such undervalued property and cause same to be extended against said property on the tax lists or rolls for the current year with all arrearage of taxes thus properly accruing against it, including interest thereon at the rate of six per cent. per annum from the time such tax should have become delinquent; and provided further, that as to such property so grossly undervalued in assessment, no contract shall be made with any one by either the state board of equalization, or the board of

county commissioners, to pay any one a commission for in any way causing same to be reassessed; but it shall be the duty of the state board of equalization, with the assistance of the Attorney General, and the county assessor, with the assistance of the county attorney, to make and cause such reassessment to be made, as aforesaid; provided, however, this shall not be construed to prevent boards of county commissioners from making contracts for the discovery of omitted property, as provided by section 7449 of the Revised Laws of Oklahoma 1910."

No appeal is provided for by this section of the statute. By section 2 of the subdivision B, art. 1, c. 107, Session Laws 1915, it is provided that any taxpayer feeling aggrieved by the assessment as made by the assessor, or the equalization as made by the county board of equalization, may appeal to the district court of the proper county in the manner provided by said act, and by section 3 of said subdivision of said act it is provided:

"A complaint in like manner may be filed before the state board of equalization by the aggrieved person, as to any acts of assessment, or the county attorney for the entire tax paying public of the county as to the equalization during its session or within ten days after its adjournment, which the board shall consider by hearing pertinent evidence adduced through or by any interested person, and for this purpose authority to compel by subpoena the attendance of necessary witnesses, and the production of necessary books and papers is given. The auditor shall cause such evidence to be taken and preserved, shall cause such complaint and evidence, and full transcript of the action of the board thereon to be transcribed, and shall certify to the same. Such transcript may be filed by any interested person in the Supreme Court, and shall complete the appeal allowed by law, which transcript shall, in due course, be examined and reviewed by said court and affirmed, modified or annulled as justice may demand."

[2, 6] It will be observed that by the provisions of section 3, supra, the aggrieved person is given the right to appeal from all actions of assessment, and the county attorney is given such right for the entire taxpaying public of the county as to equalization. "The aggrieved person," within the meaning of said act, is the one who is directly interested in the assessment—the one whose pecuniary interests are or may be adversely affected—the one whose property has been assessed.

This court held in the case of *In re Stewart Bros.*, 53 Okl. 153, 155 Pac. 1124, that—

"The interest in the subject-matter of litigation which will authorize an appeal from an order or decree therein must be a direct and pecuniary interest in the subject-matter of the particular case.

"A tax ferret has not such an interest, in the

subject-matter involved in a proceeding to discover property not listed and assessed for taxation and to list and assess the same, as to authorize him to prosecute an appeal from a final order of the county treasurer to the county court, or from the county court to the Supreme Court."

[3, 4] This case is controlling as to the right of appellant Gulager, as tax ferret, to appeal, and he as a citizen and taxpayer has not such a direct or pecuniary interest in the subject-matter as will authorize him to prosecute this appeal. The joining of the county attorney is of no benefit, as he is authorized to appeal for the entire taxpaying public of the county only as to the equalization, and not as to matters of assessment.

There being no constitutional or statutory provision authorizing the appeal, this court is without jurisdiction, and the appeal is dismissed.

HARRISON, C. J., and PITCHFORD, McNEILL, and ELTING, JJ., concur.

WOODARD v. SANDERSON. (No. 10202.)

(Supreme Court of Oklahoma. Oct. 11, 1921.)

(Syllabus by the Court.)

1. New trial \S 75(4)—Statute held to prevent new trial for smallness of verdict for damages.

Section 5084, Rev. Laws 1910, which provides that a new trial shall not be granted on account of the smallness of the damages, in an action for an injury to the person or reputation, nor in any other action where the damages shall equal the actual pecuniary injury sustained, denies the right to grant a new trial in the kind of actions therein named on account of the smallness of the damages awarded.

2. Statute preventing new trial unless for miscarriage of justice set out.

Section 6005, Rev. Laws 1910, provides: "No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

3. Appeal and error \S 1170(6) — Error in separation of juror held not ground for reversal.

After a careful examination of the entire record, held, that in the opinion of the court it does not appear that the errors complained

of in the second assignment of error probably resulted in a miscarriage of justice, or constitute a substantial violation of a constitutional or statutory right.

4. Appeal and error §1170(6) — Irregularity not affecting impartiality, purity, or regularity of a verdict does not warrant setting it aside.

While it is undoubtedly true that no communication whatever affecting the decision of the cause ought to take place between the judge and the jury after the cause has been presented to them, unless in open court in the manner prescribed by the statute, it is also true that it is not every irregularity which will render the verdict void, and warrant setting it aside. This, as we have seen, depends upon another and additional consideration, namely, whether the irregularity is of such a nature as to affect the impartiality, purity, and regularity of the verdict itself.

Miller, J., dissenting in part.

Appeal from District Court, Tulsa County; N. E. McNeill, Judge.

Action by John R. Woodard against Charles A. Sanderson. Verdict for plaintiff for \$1 and costs, and plaintiff appeals. Affirmed.

William F. Tucker and Hulette F. Aby, both of Tulsa, for plaintiff in error.

George E. Reeves, of Tulsa, for defendant in error.

KANE, J. This was an action to recover damages for malicious assault and battery, commenced by the plaintiff in error, plaintiff below, against the defendant in error, defendant below. Hereafter the parties will be designated "plaintiff" and "defendant" respectively, as they appeared in the trial court.

The petition prayed for damages in the sum of \$25,000. The answer was a general denial and allegations to the effect that the injuries received by the plaintiff, if any, were inflicted by the defendant in repelling an attack upon him by the plaintiff, and that in repelling such attack he used no more force than was necessary to restrain the plaintiff from committing and continuing an assault upon him. The reply was a general denial of the new matter alleged in the answer. Upon trial to a jury there was a verdict for the plaintiff in the sum of \$1 and costs, to reverse which this proceeding was commenced by the plaintiff.

There are two grounds for reversal argued by counsel for plaintiff in their brief: First, the smallness of the damages awarded by the verdict; and, second, misconduct of the jury.

[1] The first ground for reversal has been decided adversely to the contention of counsel for plaintiff in error in *M. K. & T. Ry. Co. v. Lindsey*, 198 Pac. 1000, recently hand-

ed down, but not yet officially reported. In that case an appeal was taken by the plaintiff from the action of the trial court in granting a new trial upon the sole ground that the damages awarded by the verdict were too small. The court, after reviewing the authorities, and particularly the case of *Metropolitan Street Ry. Co. v. O'Neill*, 68 Kan. 252, 74 Pac. 1105, reached the conclusion that section 5034, R. L. 1910, which provides that a new trial shall not be granted on account of the smallness of the damages, in an action for an injury to the person or reputation, nor in any other action where the damages shall equal the actual pecuniary injury sustained, denies the right to grant a new trial in the kind of actions therein named on account of the smallness of the damages awarded, and to grant one is error.

While it is true that because the question was briefed only on one side in that case the court contented itself with reversing the judgment under a rule of court, after reconsidering the question in the case at bar, where it is fully and ably briefed on both sides by eminent counsel, we are convinced that the conclusion reached in the former case is correct and is supported by the great weight of authority.

[2, 3] The second ground for reversal is stated by counsel in their brief as follows:

"Where one juror, at the request of the jury, absents himself from the jury and jury room and returns to the courtroom and holds a whispered conference with the judge who tried the case, in which the judge is advised that the jury is not agreed and how the jury stands, and such juror asks for and receives certain instructions with reference to the law or the deliberations of the jury, all without the knowledge of the plaintiff or his attorneys, the instruction not being given in writing or preserved, and such juror thereupon returning to the jury room and jury and delivering what he says were the instructions given him by the court, the plaintiff has not had a trial by jury as provided for by the laws of the state of Oklahoma, and is entitled to a new trial."

The precise facts upon which this assignment of error is predicated may be briefly summarized as follows:

After the trial was completed the jury retired in charge of a bailiff for deliberation. After several ballots had been taken the foreman of the jury asked the bailiff to take him before the court which was then in session in the trial of another case. In pursuance of this request the bailiff locked the remaining jurymen in the jury room and accompanied the foreman into court, where the following transpired according to the testimony of the foreman, which was not disputed:

"Q. State what the conversation was with Judge McNeill. A. Why, if I remember right, I asked—we had balloted a time or two, and

it was a tie, and it kept coming out the same thing and no change. I think I asked Judge McNeill if I would have to make a hung jury, and he requested that I go back and see if we couldn't render a verdict of some kind. That is my best remembrance of it. I never talked about anything.

"Q. Judge McNeill didn't tell you to find a verdict in favor of either party? A. No; he kind of smiled and asked me to go back and bring in a verdict; he would rather we would bring in a verdict, but he never hinted at such a thing.

"Q. What did you tell the jury when you got back? A. Just exactly what he told us.

"Q. State what you said to the jury. A. I went back; I just reported exactly what the judge told us, that he would a heap rather we would try to come to a decision one way or the other. That was just exactly the words, and then everything was silent for a quarter of an hour, I reckon."

It is contended: First, that the foreman violated the law in separating himself from the jury; second, that he again violated the law in discussing the case with the court and receiving instructions in reference to the case upon any phase thereof, either of law or fact, whether material or immaterial; third, the law was again violated in transmitting the instructions, or his interpretation of them, to the jury for their consideration and action.

The statutes relied upon to support these various contentions (sections 5005-5007, R. L. 1910) provide, respectively, that when the jury retires they must be kept together until they agree upon a verdict or are discharged by the court, subject to the discretion of the court to permit them to separate temporarily at night and at their meals, and that after the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court where the information on the point of law shall be given in writing, etc.

It is conceded that these sections of the statute were not strictly followed, but counsel for defendant say that errors of this sort cannot work a reversal of the judgment unless it appears that the rights of the complaining party have been prejudiced thereby. There can be no doubt of the correctness of this proposition.

Section 6005, R. L. 1910, provides:

"No judgment shall be set aside or new trial granted by any appellate court of this State in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of jus-

tice, or constitutes a substantial violation of a constitutional or statutory right."

The assignment of error now under consideration clearly comes under the purview of this section, and by the provisions of this section we are precluded from granting a new trial or setting aside the judgment, unless, after an examination of the entire record, it appears that the error complained of has probably resulted in a miscarriage of justice or constitutes a substantial violation of a constitutional or statutory right. It would be an unprofitable and a tedious task to undertake to review the many cases wherein under various circumstances this section of the statute has been applied by the appellate courts of the state in upholding judgments of the trial courts where the errors complained of related solely to some matter of pleading or practice. While we are unable to recall a case where the circumstances were precisely the same as in the case at bar, the following seem to us to be closely in point by analogy:

[4] In *Shivers v. State*, 13 Okl. 466, 74 Pac. 890, it was contended that there was an unauthorized separation of the jurors after they had retired for deliberation. The Supreme Court in overruling this contention held:

"It is not every technical separation of a jury during deliberation that will vitiate their verdict. In order to warrant the court in setting aside a verdict of conviction on account of the separation of the jury 'without leave of court after retiring to deliberate on their verdict,' it must appear that there was such a separation as that the rights of the defendant might have been prejudiced thereby."

In the case of *Carter v. State*, 12 Okl. Cr. 236, 154 Pac. 337, the facts are sufficiently stated in the following excerpt from the opinion. It was held:

"The fact that the trial judge went to the courtroom where the jury were deliberating and cautioned the bailiffs against permitting the jury to separate, and the jury that they would speak to nobody either concerning the case or on any other subject, and that they must keep themselves together as a body of jurors, and not communicate to the outside world, except through their bailiffs or by permission of the court. That this was in the absence of the defendant and his counsel and was not in open court is no ground for a reversal where it affirmatively appears that the judge did not speak about the case, and that it was not discussed or referred to by him."

So the question for decision in its last analysis is not so much, Was there error? as, Did the error complained of probably result in a miscarriage of justice? The jury, as we have seen, found in favor of the plaintiff, and of course this action is not complained of. The only ground of complaint in this respect is that the verdict was too small,

and this, as we have seen, is not a ground for granting a new trial. In the case at bar we know precisely what occurred, and we are wholly unable to perceive how either the action of the foreman in temporarily leaving his fellows locked in the jury room or the action of the court could possibly have had any influence upon the jury in fixing the amount of recovery. While it is undoubtedly true that no communication whatever affecting the decision of the cause ought to take place between the judge and the jury after the cause has been presented to them, unless in open court in the manner prescribed by the statute, it is also true that it is not every irregularity which will render the verdict void and warrant setting it aside. This, as we have seen, depends upon another and additional consideration, namely, whether the irregularity is of such a nature as to affect the impartiality, purity, and regularity of the verdict itself.

For the reasons stated, the judgment of the trial court is affirmed.

HARRISON, C. J., and JOHNSON, KENNAMER, and ELTING, JJ., concur.

MILLER, J., concurs in all the principles of law announced except the conclusion that it does not appear from the record that the error complained of in the second assignment of error probably resulted in a miscarriage of justice, from which he dissents.

KRUMM v. EL RENO STATE BANK. (No. 10292.)

(Supreme Court of Oklahoma. Oct. 11, 1921.)

(Syllabus by the Court.)

1. Bills and notes \S 243—One signing otherwise than as maker, drawer, or acceptor is deemed indorser.

Under the applicable provisions of the Negotiable Instruments Law (sections 4067, 4113, 4114, Rev. Laws 1910), a person placing his signature upon an instrument otherwise than as maker, drawer, or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity, and whether he signs the instrument before or after its delivery does not affect his legal status as such.

2. Held that errors were without merit or harmless, and that no evidence tended to show affirmative defense.

Record examined, and held: (1) That the other errors complained of are either without merit or harmless under section 6006, Rev. Laws 1910; (2) that there was no evidence adduced at the trial tending to support the affirmative defense set up by the defendant that he indorsed the note sued upon for the

accommodation of the payee, who was plaintiff below.

Appeal from District Court, Canadian County; John W. Hayson, Judge.

Action by the El Reno State Bank against O. H. Krumm and another. Directed verdict for plaintiff, and the defendant named appeals. Affirmed.

W. M. Wallace, of El Reno, for plaintiff in error.

Fogg & Bennett, of El Reno, for defendant in error.

KANE, J. This was an action upon a promissory note, commenced by the defendant in error, plaintiff below, against J. I. Dennison, as principal, and the plaintiff in error, O. H. Krumm, as surety.

The petition was in the usual form and admittedly stated a cause of action. The answer was: (1) A general denial; (2) that said note was executed and delivered by the maker thereof to the plaintiff long before the defendant indorsed his name thereon, and that said indorsement was made at the special instance and request of the plaintiff and for the benefit of the plaintiff, and was made without consideration for the accommodation of the plaintiff herein; (3) that the defendant was and is an irregular accommodation indorser of said note, for the benefit of said plaintiff, and without a valuable consideration, or any consideration to this defendant, and without any promise or agreement made prior to the execution and delivery of said note.

The reply was a general denial of new matter and allegations to the effect that the note sued upon was executed and delivered by the defendants as maker and indorser respectively for the purpose of renewing another note which had fallen due, theretofore given by said defendants, on which said C. H. Krumm was an indorser.

At the close of the evidence the defendant filed a demurrer thereto which was overruled, whereupon both plaintiff and defendant moved the court for a directed verdict, whereupon the court sustained the motion of the plaintiff and directed the jury to return a verdict in favor of the plaintiff upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

[1] The first assignment of error presented for review, the court erred in overruling the demurrer to the evidence filed by the defendant, is based upon the assumption that inasmuch as the evidence adduced by the plaintiff did not show that the signature of the defendant upon the back of the note, which was admitted, was placed thereon before the delivery of the note, there was a failure of proof under section 4114, R. L. 1910, which provides:

"Where a person, not otherwise a party to an instrument, places thereon his signature in blank before delivery he is liable as indorser in accordance with the following rules:

"First. If the instrument is payable to the order of a third person, he is liable to the payee and to all subsequent parties.

"Second. If the instrument is payable to the order of the maker or drawer or is payable to bearer, he is liable to all parties subsequent to the maker or drawer.

"Third. If he signs for the accommodation of the payee, he is liable to all parties subsequent to the payee."

The contention seems to be that, conceding the legal status of the plaintiff in error to be that of an indorser, it not being shown that the indorsement was made before delivery of the note, the plaintiff in error is not liable to the defendant in error who was the payee of the note sued upon. In our opinion, whether the plaintiff in error indorsed the note before or after its delivery is not very material to a decision of the case.

Counsel for plaintiff in error seems to assume that under section 4114 an indorser is not liable to any one except parties subsequent to the payee, unless it is affirmatively shown that he signed the instrument before delivery. This is not the law. Other applicable provisions of the Negotiable Instruments Law (sections 4067, 4113, R. L. 1910) provide, respectively in substance as follows: Where a signature is so placed upon an instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed an indorser; a person placing his signature upon an instrument otherwise than the maker, drawer, or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.

[2] So it is now settled beyond controversy by the express provisions of the Negotiable Instruments Law that the plaintiff in error who admits that he placed his signature in blank on the back of the instrument sued upon is liable on the note as an indorser, and that whether he signed the instrument before or after its delivery does not affect his legal status as such. The only remaining question is: Is he in the state of the record liable to the payee? This question must be answered in the affirmative. It is true that the plaintiff in error in his answer alleged as an affirmative defense that he signed the note for the accommodation of the plaintiff who is the payee; but, assuming that this, if proven, would constitute a defense to the note as against the indorser, there was no evidence whatever introduced to establish the same. Indeed, on the contrary, all of the evidence tended to show that the note was indorsed for the accommodation of the maker or for the accommodation of the indorser himself for the purpose of procuring

the renewal of another note which had fallen due upon which the defendants were maker and indorser respectively. While there are other assignments of error, we are convinced from an examination of the record that they are either without merit or are harmless under section 6005, R. L. 1910.

In the view we take of the law the uncontradicted evidence before us clearly discloses that the defendant in error was entitled to recover.

For the reasons stated, the judgment of the trial court is affirmed.

HARRISON, C. J., PITCHFORD, V. C. J., and JOHNSON, McNEILL, ELTING, and NICHOLSON, JJ., concur.

MACKEY v. AYCOCK et al. (No. 10252.)
(Supreme Court of Oklahoma. Oct. 11, 1921.)

(Syllabus by the Court.)

1. Nuisance \Leftrightarrow 72—Private person specially injured may sue.

Section 4250, Rev. Laws 1910, provides that a private person may maintain an action for a public nuisance if it is a special injury to himself, but not otherwise.

2. Highways \Leftrightarrow 159(1)—Abutting owner suffering special injury may enjoin obstruction.

The owner of land abutting upon a public highway one end of which is obstructed in front of his premises so that he cannot have free egress and ingress over it to and from his land suffers a special injury which entitles him to maintain an action to enjoin such public nuisance.

3. Highways \Leftrightarrow 159(1)—Abutting owner may enjoin obstruction though there is another road.

The mere fact that there is another road not adjoining his land which affords the plaintiff ingress and egress will not prevent him from maintaining his action where the obstruction complained of is in front of his land or in such close proximity to it that his use and enjoyment of his property is greatly interfered with.

4. Highways \Leftrightarrow 159(2)—Facts held to show special injury on abutting owner complaining of obstruction.

In the case at bar we are of the opinion that the facts found by the trial court show that the plaintiff has a special interest in the obstructed highway, and that the closing thereof will inflict upon him special injury not sustained by the general public.

Appeal from District Court, Bryan County; Jesse M. Hatchett, Judge.

Action by J. F. Mackey against Jack Aycock and another for injunction. Judgment

for defendants, and plaintiff appeals. Reversed and remanded, with directions.

McPherrren & Cochran, of Durant, and C. H. Elting, of Oklahoma City, for plaintiff in error.

Hayes & McIntosh, of Durant, for defendants in error.

KANE, J. This was an action commenced by the plaintiff in error, plaintiff below, against the defendants in error, defendants below; for the purpose of enjoining the obstruction of a public highway. Upon trial to the court there was a judgment in favor of the defendants denying the relief prayed for, to reverse which this proceeding in error was commenced.

From the findings of fact of the trial court, to which no exceptions were filed by any of the parties, it appears the road in controversy was a public highway upon which the plaintiff's lands abutted, and that the same was obstructed by the defendant constructing a fence across it in which he placed a gate near the northeast corner of plaintiff's land. The court held "that the plaintiff cannot maintain this suit under the authority of *McKay v. City of Enid*, 28 Okl. 275 [109 Pac. 520, 30 L. R. A. (N. S.) 1021]." This ruling was based upon one of the findings of fact of the court to the effect that there was another road leading from near plaintiff's land, which was generally traveled, over which his egress was unobstructed, "but as to whether it is a better road than the one in controversy, or traveled more than the one in controversy, I am unable to find from the evidence."

In our judgment the trial court was in error in holding that in the circumstances the case at bar is controlled by the *McKay Case*. In the *McKay Case* it appears that the plaintiff owned land just south of the limits of the city of Enid, and that immediately south-east of his property, but separated from it by the intersection of two public highways, is an addition to the city of Enid. From the intersection of the highway separating plaintiff's property from the addition there were three streets running into the city. The railroad company by permission of the city constructed its tracks across two of the streets leading across the addition to the city of Enid. This obstruction was not adjacent to the property of the plaintiff, being separated therefrom by the intersection of the highways above referred to, and each of the streets obstructed terminated before reaching the property of the plaintiff. The action was for the recovery of damages from defendants city of Enid and the St. Louis & San Francisco Railway Company caused by the obstruction of said streets by the railroad company. It was held:

"That, in the absence of averment in the petition showing that the streets obstructed were plaintiff's only means of access to his

property which did not abut upon said streets, his petition failed to state sufficient facts to show that he had suffered an injury special to himself and different in kind from that suffered by the general public. * * *

In the opinion delivered by Mr. Justice Hayes the circumstances in which the obstruction of a public highway may be considered as specially injurious to a private landowner are divided into three general classifications, as follows: First, where the obstruction is in front of the abutting owner's property and interferes with his ingress or egress; second, where the obstruction is not in front of the abutting property, but in such proximity to it upon the street or highway upon which the property abuts that the abutting owner's use and enjoyment of the property is destroyed or greatly interfered with and its value depreciated; third, in cases where property the access to which has been interfered with by an obstruction is not adjoining the highway or street upon which the obstruction exists, if such street or highway is the owner's only means of access to the property.

The court very properly held that the facts in the case then under consideration did not bring it within any of these classes.

In the case at bar, it will be observed, the plaintiff's land abutted upon the obstructed highway. The court found that at the time this suit was brought, and now, plaintiff owned 20 acres of land abutting on the section line south of the gate at the south end of the road in controversy. According to this finding of fact the gate which caused the obstruction was situated at the northeast corner of plaintiff's 20 acres of land, and the closing of the same obstructed the road which led not only from the point which abutted on the property of the plaintiff, but obstructed a section line highway which ran on past and in front of plaintiff's property. This state of facts brings the case at bar within both the first and second classifications set out in the *McKay Case*. In the case at bar, unlike the *McKay Case*, there were no intersecting roads between plaintiff's property and the obstruction. The road leading in front of plaintiff's property intersected with no other road running in any other direction except the one running east and west to the north of plaintiff's property and which plaintiff was prevented from using by the obstruction made by defendant.

[2] While it is true that the court found that there was another road near the land of the plaintiff over which he might have ingress and egress to and from his premises, the facts show that plaintiff's land did not abut on this other road. In these circumstances the mere fact that there is another unobstructed road will not prevent the landowner from maintaining his action where the obstruction complained of is in front of his property or is in such proximity to it that

his use and enjoyment of his property is greatly interfered with. *McKay v. City of Enid*, supra.

[1] Section 4259, R. L. 1910, provides that a private person may maintain an action for a public nuisance if it is a special injury to himself, but not otherwise.

[3] While it is often difficult to determine whether the injury caused by a public nuisance is or is not so specially injurious to a private person as to give him a right of action, we think this case is reasonably free from any such perplexity.

Many authorities are cited by counsel for plaintiff in error which seem to sustain the conclusion reached. In 6 *Ballard on Real Property*, § 46, the rule is stated as follows:

"The owners of land abutting upon a street or alley, one end of which is obstructed so that he cannot have egress from his property to other streets in that direction, suffer an injury peculiar to them by reason of a public nuisance and may recover nominal damages upon that fact alone."

The following are some of the cases cited supporting our conclusion: *Venard v. Cross*, 8 Kan. 249; *Martin v. Marks*, 154 Ind. 549, 57 N. E. 249; *Strunk v. Pritchett*, 27 Ind. App. 582, 61 N. E. 973; *Pearsall v. Eaton County*, 74 Mich. 558, 42 N. W. 77, 4 L. R. A. 193; *Bannon v. Murphy* (Ky.) 38 S. W. 889; *Hayden v. Stewart*, 71 Kan. 11, 80 Pac. 43.

[4] In the case at bar we are of the opinion that, under the law and the facts found by the trial court, it is reasonably clear that the plaintiff has a special interest in the obstructed highway, and that the closing thereof inflicts upon him special injury not sustained by the general public.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded, with directions to enter judgment in accordance with the views herein expressed.

HARRISON, C. J., PITCHFORD, V. C. J., and JOHNSON, MILLER, NICHOLSON, and KENNAMER, JJ., concur.

WALTON, Mayor, v. DONNELLY, Com'r of Finance and Accounting, et al.
(No. 12265.)

(Supreme Court of Oklahoma. June 28, 1921.
Dissenting Opinion July 2, 1921. Re-hearing Denied Oct. 25, 1921.)

(Syllabus by the Court.)

1. Municipal corporations §8—Charter adopted under Constitution and statutes supersedes state laws conflicting on purely municipal matters.

The provisions of the charter of Oklahoma City adopted under the authority of section

3a, art. 18, of the Constitution, and section 539, Rev. Laws 1910, supersede all laws of this state in conflict with such charter provisions, in so far as such laws relate to purely municipal matters.

2. Municipal corporations §8—Charter must yield to conflicting laws of general concern.

Such charter provisions do not supersede the general laws of the state of general concern, in which the state has a sovereign interest, and where the provisions of said charter conflict with the general laws of the state of this character, such laws will prevail.

3. Municipal corporations §167—Where city charter creates office and defines duties, commissioner cannot transfer them, unless under special charter provision.

Where an office is created by a city charter and the duties thereof are defined by that instrument, it is not within the power of the commissioner to transfer such duties to another office, unless there is some specific provision in the charter authorizing such a transfer.

4. Constitutional law §13—Municipal corporations §8—Statutes §181(1)—Constructing city charter, lawmakers' intent must govern.

In the construction of Constitutions, statutes, and city charters, the intent of the lawmakers, when ascertained, must govern.

5. Statutes §194—Statute construed by rule of ejusdem generis.

General words in a statute must receive a general construction, unless there is something in it to restrain them, but in accordance with what is commonly known as the rule of ejusdem generis, where, in a statute, general words follow a designation of particular subjects or classes of persons, the meaning of the general words will ordinarily be presumed to be restricted by the particular designation, and to include only things or persons of the same kind, class, or nature as those specifically enumerated, unless there is a clear manifestation of a contrary purpose.

6. Statutes §209—Word or phrase used in different parts will be presumed used in the same sense, unless contrary is clear.

Where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout; and where its meaning in one instance is clear, this meaning will be attached to it elsewhere, unless it clearly appears from the whole statute that it was the intention of the Legislature to use it in a different sense.

7. Statutes §194—General words do not amplify preceding particular terms.

General words do not explain or amplify particular terms preceding them, but are themselves restricted and explained by the particular terms.

8. Statutes §181(2)—Ambiguity resolved to give statute most reasonable and just interpretation as the legislative intent.

If there is doubt or ambiguity in a statute, it is the duty of a court in interpreting the same to give it the most reasonable and

Just interpretation as the legislative intent, rather than an interpretation unreasonable, unjust, or one that will lead to an absurdity.

9. Municipal corporations \Leftrightarrow 168—Charter held not to authorize board of commissioners by four out of five vote to transfer powers belonging to mayor.

Section 11, art. 2, of the charter deals with the transfer of duties not elsewhere specifically named in the charter, and does not empower the board of commissioners by a vote of four out of five commissioners to transfer the powers specifically granted to the mayor by section 6, art. 2, of the charter of having charge of the department of public affairs, which includes the police department, city jail, etc., to some other department.

10. Injunction \Leftrightarrow 83—Municipal corporations \Leftrightarrow 168—Mayor may enjoin commissioners from exercising control of police department and city jail; transfer of mayor's authority by commissioners to other office or department is void.

The mayor of Oklahoma City, who is made the chief executive thereof, and whose duty it is by virtue of the charter and the statute of the state to see that all laws of the state and ordinances of the city are observed within the city limits, must necessarily possess control and supervision over the police department and city jail. *Held*, a motion adopted by four votes of the commissioners of said city, whereby they take from the mayor all control over the police department and city jail, and attempt to assign said duties to the control of some other office or department, is void, and *held*, further, injunction will lie on behalf of the mayor against the commissioners or commissioner from exercising control over the police department and city jail, by virtue of said void proceedings.

Kennamer and Miller, JJ., dissenting.

Appeal from District Court, Oklahoma County; Frank Mathews, Judge.

Petition by J. C. Walton, Mayor and Commissioner of Public Affairs of Oklahoma City, against Mike Donnelly, Commissioner of Finance and Accounting of Oklahoma City and others, to enjoin the defendants from interfering with the performance of plaintiff's duties. Demurrer to petition sustained, and case dismissed, and the plaintiff appeals. Reversed and remanded, with instructions to overrule demurrer and to take further proceedings not inconsistent with opinion.

Bayard T. Hainer and D. S. Levy, both of Oklahoma City, for plaintiff in error.

McAdams & Brady, Wright, Blinn & Gilmer, and Morgan & Deupree, all of Oklahoma City, for defendants in error.

Giddings & Giddings, of Oklahoma City, amicus curiae.

McNEILL, J. The question for determination in this case is whether the commissioners of Oklahoma City, by a motion receiving

the vote of four of the commissioners, can transfer the supervision and control of the police department and the city jail from the mayor. Oklahoma City has a commission form of government, and is operated under a charter framed and adopted as provided by section 8a, article 18, of the Constitution of the state. The charter provides for the election of five commissioners, who shall serve four years, and said charter assigns certain duties and departments to each commissioner. The instant case deals only with the duties of the mayor, who is commissioner of public affairs, and we will refer only to the sections of the charter applicable thereto.

Section 1, article 2, provides:

"The elective officers of this city shall be five commissioners, i. e., the mayor, who is commissioner of public affairs; the commissioner of public safety, commissioner of accounting and finance, the commissioner of public works, and the commissioner of public property," etc.

Section 4, article 2, provides as follows:

"The mayor, as such, shall be the chief executive officer of the city, and he shall see that the laws are enforced. In addition to other duties imposed upon him by the state and municipal laws, and the board of commissioners, he shall sign the commissions of all appointive officers," etc.

Section 6, article 2, provides as follows:

"*Commissioner of Public Affairs.*—The commissioner of public affairs shall be superintendent of and have charge of the department of public affairs, which shall include the police department, municipal counselor and assistant, municipal judge, city jail, and relation of the city to other municipalities."

The charter, under the Constitution and statutes of this state, becomes the organic law of the city, and in addition to creating the offices of the five commissioners, and assigning them their duties, gives to the Commissioners certain legislative powers.

On April 12, 1921, at a meeting of the commissioners, it was moved by one commissioner and seconded by another that the police department and city jail, which is under the supervision of the mayor, who, as we have seen, should have charge of the police department and city jail under the charter, be assigned and transferred to the commissioner of accounting and finance, who should thereafter supervise and have charge of the police department and city jail, and said transfer to take effect from date, four commissioners voting in the affirmative and the mayor voting in the negative. The petition in this case sets out all of the different provisions of the city charter, stated above, and alleges that immediately after the passage of the motion above, the commissioner of accounting and finance attempted to exercise supervision over the police department and

the city jail. It is contended the action of the commissioners in transferring the supervision and charge of the police department from the mayor is void and in violation of sections 4 and 6, article 2, of the city charter. The mayor by his petition asks to have the commissioner of finance and accounting enjoined from interfering with him in the performance of the duties assigned to him under the charter.

To the petition, the commissioner of accounting and finance filed a demurrer, which was sustained by the trial court. The mayor elected to stand upon the petition, and refused to plead further, and the court dismissed the case, and from said judgment an appeal has been prosecuted to this court.

The only question involved is the force and effect of the motion and its validity. Second, whether injunction is the proper remedy.

[1] It has been the uniform holding of this court that city charters become the organic law of the municipality, and supersede the laws of the state in conflict therewith in so far as they attempt to regulate purely municipal matters. See *Owen v. Tulsa*, 27 Okl. 264, 111 Pac. 320; *Lackey v. Grant*, 29 Okl. 255, 116 Pac. 913; *Mitchell v. Carter*, 31 Okl. 592, 122 Pac. 691; *Burns v. Linn*, 49 Okl. 526, 153 Pac. 826, Ann. Cas. 1918B, 139.

[2] The Constitution provides that the charter shall not be in conflict with the Constitution and statutes of the state, and it has been further held that such charter provision, where they conflict with the general laws of the state, in matters not purely municipal, must give way, and while they may run concurrently with the general laws of the state, they may not run counter thereto. *Burns v. Linn*, supra, Board of Education v. State ex rel. Best, 26 Okl. 366, 109 Pac. 563; *State v. Cummings*, 47 Okl. 44, 147 Pac. 161.

In the case of *Kempt v. City of Monett*, 95 Mo. App. 452, 69 S. W. 31, it was said:

"A charter is * * * the municipal organic law which no ordinance may override."

[3] The courts have uniformly held, where an office is created by the Constitution and the duties assigned to it, by the Constitution, the Legislature has no power to transfer those duties to some other office. The rule is stated as follows:

"Where an office is created by or imbedded in the Constitution and the duties thereof are defined by that instrument, or where the office antedated the Constitution, and its duties were enumerated by the statute at the time the Constitution was adopted, or where the office owes its origin to the common law, and had certain well-recognized duties attached thereto, or inherently connected therewith, or forming a substantial part thereof, it was not within the power of the Legislature to transfer such duties to an office of its own creation or to an officer selected and chosen in a manner differ-

ent from that by which the constitutional officer was named."

Trapp v. Cook Construction Co., 24 Okl. 854, 105 Pac. 687; *Insurance Co. of North America v. Welch*, 49 Okl. 620, 154 Pac. 48, Ann. Cas. 1918E, 471; *Love v. Boyle*, 180 Pac. 705. This being the settled law in this state, and the charter of the city being the organic law of the city, the commissioners would have no power or authority to transfer from an office created by the charter the duties defined by the charter, unless there is some specific provision in the charter that authorizes such a transfer.

It is, however, contended by the defendant that section 11, article 2, of the city charter authorizes such a proceeding. Said section is as follows:

"Board may assign Duties to Other Departments.—The board of commissioners shall have the power to assign duties not specifically named above to any department to which they may properly belong, and shall have power by a vote of four out of five commissioners to transfer duties from one commissioner and one department to another commissioner and another department."

[4] The question for consideration is, Did the framers of the charter in this sentence use the word "duties" in the latter part of the sentence to refer to the same "duties" referred to in the first part of the sentence, or did they use it in its broad and unlimited sense and refer to any and all duties? In the determination of this matter the court must be guided by the following proposition to wit:

"In the construction of Constitutions, statutes and city charters the intent of the lawmakers when ascertained must govern." *Hudson v. Hopkins*, 75 Okl. 290, 183 Pac. 505; *De Haasque v. A., T. & S. F.*, 178 Pac. 78, L. R. A. 1918F, 259.

[5] In an endeavor to ascertain the intent of the lawmakers, there are certain cardinal rules of construction to be used as an aid in guiding the court in arriving at the intention of the framers of the charter. One of these rules as announced in 25 R. O. L. p. 996, is as follows:

"General words in a statute must receive a general construction, unless there is something in it to restrain them, but in accordance with what is commonly known as the rule of ejusdem generis, where, in a statute, general words follow a designation of particular subjects or classes of persons, the meaning of the general words will ordinarily be presumed to be restricted by the particular designation, and to include only things or persons of the same kind, class, or nature as those specifically enumerated, unless there is a clear manifestation of a contrary purpose."

This court in applying the rule of ejusdem generis in the case of *Board of County Commissioners v. Grimes*, 75 Okl. 219, 182 Pac.

897, in the body of the opinion, stated as follows:

"General words do not explain or amplify particular terms preceding them, but are themselves restricted and explained by the particular terms.

The same rule was announced and applied in the case of *Wolf v. Blackwell Oil Co.*, 77 Okl. 82, 186 Pac. 484.

Let us apply this rule of construction to this section of the charter. The framers of the charter by the first part of this sentence or section used the term, "power to assign duties not specifically named above to any department to which they belonged," and in the latter part of the sentence used the term "power by a vote of four out of five commissioners to transfer duties from one commissioner and one department to another commissioner and another department." The only controversy is whether the word "duties" in the latter part of the sentence is restricted to the same duties referred to in the preceding part of the sentence, or whether it was used in the latter part of the sentence in a broader sense and referred to any and all duties. If we apply the rule that general words in the same section do not amplify particular terms preceding them, but are themselves restricted by the particular term, then the word "duties" used in the latter part of the sentence is restricted to the same duties referred to in the preceding part of the sentence, unless, as stated in *R. C. L.*, *supra*, there is a clear manifestation of a contrary purpose, and there is nothing in the section to indicate any contrary purpose, nor is there any other provision of the charter that would indicate a contrary purpose. The first part of the sentence refers to the duties the commissioners may assign, and the latter part provides how the commissioners, after once assigning certain duties, may thereafter transfer those same duties to another department.

[8] In this same connection the rule announced in 36 Cyc. 1132, is stated as follows:

"Where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout; and where its meaning in one instance is clear, this meaning will be attached to it elsewhere, unless it clearly appears from the whole statute that it was the intention of the Legislature to use it in a different sense."

In *R. C. L.* 25, p. 994, it is stated:

"Where a word susceptible of more than one meaning is repeated in the same act or section of an act (either meaning being in each case open to reasonable adoption), a presumption arises, more or less forcible according to the circumstances, that it is used throughout in the same sense."

In the case of *Rhodes v. Weldy*, 46 Ohio St. 234, 20 N. E. 461, 15 Am. St. Rep. 584, the court said:

"Where the meaning of a word or phrase in a statute is doubtful, but the meaning of the same word or phrase is clear where it is used elsewhere in the same act, or an act to which the provision containing the doubtful word or phrase has reference, the word or phrase in the obscure clause will be held to mean the same thing as in the instances where the meaning is clear."

By the application of the rules just stated, the same conclusion must be reached as when applying the rule of *ejusdem generis*.

[7, 8] There is another rule of construction that is used as a guide in construction of statutes:

"If there is a doubt or ambiguity in a statute, it is the duty of a court in interpreting the same to give to it the most reasonable and just interpretation as the legislative intent, rather than an interpretation unreasonable, unjust, or one that will lead to an absurdity." *Ledegar v. Bockoven*, 77 Okl. 58, 185 Pac. 1097.

If we consider this section of the statute as ambiguous and subject to two constructions, let us see the absurdity, if any, it would lead to if given the interpretation contended for by defendants. If the word "duties" as used in the last portion of the sentence refers to any and all duties and is not restricted in any manner, then the commissioners by the votes of four of them have power to transfer all the duties specifically assigned to one commissioner by the charter to some other commissioner, or distribute said duties among the other commissioners, and in this manner deprive one commissioner from having any duties whatever to perform, leaving him with an office and no duties to perform. Could it be said that such was the intention of the framers of the charter? By this same interpretation four commissioners could by their vote transfer all the duties of their offices to one commissioner, and place upon him and his department all the duties of the city government, and leave themselves free to draw their salaries without any duties whatever to perform. The suggestion of such a state of facts seems to us to lead to such an unreasonable construction that no argument is required to answer the same.

It is, however, contended that the rule announced in the case of *State ex rel. Owens v. Carter*, 186 Pac. 454, is applicable. We are unable to agree that this rule of law has any application to the facts in the case at bar. The charter creates the different offices and assigned certain duties thereto. If the charter contained a provision that said duties shall belong to such department, until otherwise provided by ordinance, or until changed by the commission, then said case might be authority, but no such provision is contained in the charter. The charter has various sections, assigning to each department certain duties. These are

particular enactments of the charter relating to certain duties of each department.

[9] Section 11 does not attempt to assign any duties to any particular department, but the section has for its purpose the vesting of certain power in the commissioners, to wit: First, power to assign any duties not specifically assigned by the charter: second, power to transfer the duties it has assigned to some other department. Even if we apply the rule, announced in the case of *Owens v. Carter*, supra, to wit:

"Where there is, in the same statute, a particular enactment and also a general one, which, in its most comprehensive sense, would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment."

The charter provisions assigning certain duties to each department are particular enactments, and deal only with certain duties. If we concede that the first part of the sentence in section 11 is a particular enactment vesting certain power to the commissioners in relation to duties not specifically assigned, and the latter part of the sentence is a general enactment granting powers to the Commissioner to transfer certain duties, and if we say the enactments are in conflict, we are in no better position, for the reason the particular enactment, by applying this rule, must stand and the general enactment does not apply. But the fallacy of this argument is the sections deal with different subjects—the one assigns certain duties to each department; the other section has for its purpose vesting of power in the commission to assign certain duties and in the same sentence power to transfer duties the commission has assigned.

It is contended, however, that the control of the police department is purely a municipal matter. While we do not think this question is material to a decision in this case, but this court has held the enforcement of the laws of the state are not purely local or municipal matters, but matters in which the state has an interest. As was said in the case of *State ex rel. Burns v. Linn*, 49 Okl. 526, 153 Pac. 826, Ann. Cas. 1918B, 139, as follows:

"The state may impose upon the local officers of the city of Tulsa specific duties in the matter of the enforcement of the laws of the state having force and effect within the city, and may provide penalties for failure to discharge such duties, and in respect to the duties so imposed the municipality and its officers are the agents of the state, and subject to its command and control at all times."

In the same opinion, the court stated as follows:

"The state has a sovereign interest in the enforcement of its general laws against the

traffic in intoxicating liquors, against gambling and prostitution, within the territorial limits of the city of Tulsa."

While the court in that case referred only to the laws against traffic in intoxicating liquor, gambling, and prostitution, as those were laws at issue in that case, but the state is just as much interested in the enforcement of all other state laws as those enumerated. The state is just as much interested in enforcement of laws against the crimes of murder, burglary, larceny, and various other crimes as it is in the enforcement of laws against prohibition, gambling, and prostitution. Not only is the mayor and police department amenable to the charter provisions, for failure to enforce violation of the laws, but they are also amenable to the state for failure to discharge their duties in the enforcement of state laws.

[10] Section 4 of article 2 of the charter provides that the mayor shall see that laws are enforced and places this duty upon him. Section 566, R. L. 1910, places the same duty upon the mayor. A very similar case arose in Missouri, to wit, *Francis v. Blair*, 1 S. W. 297 (89 Mo. 291). The court in the syllabus announced the law as follows:

"The mayor of a city, who is made chief executive officer thereof, and whose duty it is to see that all laws of the state and ordinances of the city are observed within the city limits, must necessarily possess control and supervision over the police and local constabulary.

"Under such circumstances, a resolution adopted by the board of police commissioners, whereby they take from the mayor all control over the police force, and assume that control themselves, will be absolutely void."

It is impossible by the aid of any of the rules of construction to give section 11, article 2, of the charter the construction placed upon it by defendant in error.

It is next suggested that injunction is not the proper remedy. While a court of equity will not aid by injunction one who is out of office to secure that office from one who is in the office actually performing its duties under some color of authority, but such is not the facts in the case at bar. The mayor is in office, and claims authority by virtue of the city charter to perform certain duties. No one is attempting to oust him from office. The commissioner of finance and accounting is in possession of his office, and contends, not that he is entitled to the office of mayor, but entitled to perform certain duties by reason of the motion passed by the city commissioners. This court had the identical question before it in the case of *Love v. Boyle*, supra, and, while the court did not state that injunction was the proper remedy, yet the court held the petition did not state a cause of action, and decided the case upon its merits. If injunction is not the proper remedy, then there is no remedy available. As

was said in the case of *Francis v. Blair* in the body of the opinion the court stated:

"It is contended that injunction will not lie in this case; the plaintiff having a remedy at law. What is that remedy? He cannot institute a quo warranto proceeding, because the right of defendants respectively to the office of police commissioner is not controverted. Quo warranto is resorted to for the purpose of testing the civil right by trying the title to an office or franchise and ousting the wrongful possessor. High, Extr. Leg. Rem. 603. He cannot have a writ of prohibition, because that is 'an extraordinary writ, issuing out of a court of superior jurisdiction, and directed to an inferior court, for the purpose of preventing the inferior tribunal from usurping a jurisdiction with which it is not legally vested.' * * *

"If injunction will not lie, the plaintiff has no remedy whatever. He has, neither as an individual nor an officer, sustained any injury not common to the entire community, nor any special damage for which he may sue and recover judgment. The result of the argument against the remedy sought by plaintiff would be, if sustained, to strip the mayor of the executive power conferred upon him by the law, and render him powerless to discharge the grave and responsible duties imposed upon him by the law of the land. If he has the right, the law will afford a remedy to enforce that right, and any remedy adequate to accomplish the end known to the law may be resorted to."

Cases although not identical but somewhat similar are the cases of *Brady v. Sweetland*, 13 Kan. 41; *Armijo v. Baca*, 3 N. M. (Gild.) 490, 6 Pac. 938; *Guillotte v. Poincy*, 41 La. Ann. 333, 6 South. 507, 5 L. R. A. 403; *Wheeler v. Board of Fire Commissioners*, 48 La. Ann. 73, 15 South. 179; *Goldman v. Gillespie*, 43 La. Ann. 83, 8 South. 880; *Ewing v. Thompson*, 43 Pa. 372; *Kerr v. Trego*, 47 Pa. 292, and *Ehlinger v. Rankin*, 9 Tex. Civ. App. 424, 29 S. W. 240.

We therefore conclude that the transferring of the duties from the mayor by motion upon vote of four commissioners was absolutely void, and without authority, and it was error for the trial court to sustain a demurrer to the petition.

For the reasons stated, the judgment of the trial court is reversed and remanded, with instructions to overrule the demurrer and to take such further proceedings not inconsistent with the views herein expressed.

HARRISON, C. J., and PITCHFORD, KANE, JOHNSON, ELTING, and NICHOLSON, JJ., concur.

KENNAMEY, J. I dissent from the interpretation of section 11, article 2, of the city charter of Oklahoma City, as sanctioned by majority of the judges of this court in the majority opinion, and on account of the interest manifested in the questions involved and the importance of the same to the public I have concluded to give the reasons for my dissent.

Under section 1, article 2, of the city charter of Oklahoma City, which was adopted and approved under the authority of section 3a, article 18, of the Constitution, Oklahoma City has a commission form of government, and the governmental powers of the city are vested in five elective officers, designated as city commissioners, being the mayor, commissioner of public affairs, commissioner of public safety, commissioner of finance and accounting, commissioner of public works, and the commissioner of public property. In sections 4, 6, 7, 8, 9, and 10 of article 2, certain duties are assigned to the respective commissioners, and, following the assignment of certain duties to the respective commissioners, section 11 of article 2 of said charter provides:

"Board may Assign Duties to Other Departments."—The board of commissioners shall have the power to assign duties not specifically named above to any department to which they may properly belong, and shall have power by a vote of four out of five commissioners to transfer duties from one commissioner and one department to another commissioner and another department."

I believe that the freeholders, who drafted section 11, article 2, of the charter, supra, in plain and unmistakable language said just what they intended to say and meant just what they said, and the majority opinion of the court has overlooked a sound and fundamental rule of construction of statutes and Constitutions, and that is, that words in a statute, or any kind of written instrument, should be construed according to their ordinary sense and the meaning commonly attributed to them, unless such construction will defeat the manifest intention of the Legislature or the parties to the contract. In 25 R. O. L. par. 234, p. 988, the rule will be found as follows:

"It is well settled that, in construing any statute, all the language shall be considered, and such interpretation placed upon any word or phrase appearing therein as was within the manifest intent of the body which enacted the law. The proper course in all cases is to adopt that sense of the words which best harmonizes with the context and promotes in the fullest manner the policy and objects of the Legislature, and the various rules and principles of interpretation hereinafter discussed are resorted to only as an aid to the courts in arriving at the true intent of the lawmaker. 'Every technical rule as to the construction or force of particular terms,' said Mr. Justice Story, 'must yield to the clear expression of the paramount will of the Legislature.' As a general rule, the words of a statute will be construed in their ordinary sense, and with the meaning commonly attributed to them, unless such construction will defeat the manifest intent of the Legislature, and express provision to this effect is found in the statutes of some states. This general rule of construction is applicable, not only to civil, but to penal, statutes.

This rule is uniformly supported by all of the text-writers and the appellate courts of every state in the Union and the Supreme Court of the United States. The citation to the decisions supporting this rule may be found in 25 R. C. L. pp. 988, 989.

It is true that this is not an invariable rule where giving to the words in a statute or constitution the construction of their ordinary sense would lead to conclusions which the Legislature did not contemplate, but in the case at bar it cannot be seriously contended that to give the word "duties" its ordinary meaning would lead to a conclusion which the drafters of the charter did not contemplate, but to give it the construction placed upon it that is adhered to by the court in its majority opinion leads to an absurdity and an injustice. If the contention of the plaintiff is correct under section 11, article 2, of the charter, three of the commissioners, being a majority, may create new duties and assign the same to any department that they deem proper, but if they decide to transfer these new duties which they have created and assigned, the vote of four commissioners of the five are required to make the transfer, or according to their contention it requires one more vote to transfer a duty they have created than it does to create the duty; such a conclusion is not in harmony with reason, and the fallacy of it is apparent on its face. The same three commissioners voting to create a new duty undoubtedly would have the power to destroy, assign, or transfer the same duty; the creator being vested with authority to deal with his creature.

Counsel for the plaintiff in this cause contended in the oral argument and in their brief filed herein that section 11, art. 2, supra, is one single sentence, and that the first portion of the sentence specifically provides for the assignment to the proper department of a certain class of duties, to wit, duties not specifically mentioned in the previous sections of the charter, and that the latter part of the sentence provides that the commissioners by a vote of four out of five are vested with authority to transfer duties from one commissioner and department to another commissioner and department, but that section 11, being one single sentence the duties referred to which the commissioners are authorized to transfer from one department to another department, has reference only to the duties referred to in the first part of the sentence. A casual reading of section 11, article 2, will show the error of this contention made by counsel for the plaintiff. Section 11, article 2, is not one single sentence, but is a compound sentence composed of two simple sentences, and I do not deem it necessary to cite any authority to the effect that section 11, article 2, is a compound sentence.

The first sentence of section 11, article 2, in plain language authorizes the board of

commissioners to assign duties not specifically mentioned above to any department to which they properly belong. This first simple sentence is plain, and there is no room for construction; it means just what it says—that duties not provided for in the charter may be assigned to the departments to which they belong. Then, the drafters of the charter realizing that in a growing and developing city conditions would probably change in some of the departments created, the duties of the various commissioners might become so burdensome that it would be a matter of physical impossibility for the commissioner of such department to properly and efficiently discharge all of the duties of his department, or that a commissioner might through incompetency, corruption, or a physical disability neglect the duties of his department and thereby retard the efficient administration of the governmental affairs of the city, then by the last sentence of section 11, article 2, in plain and unmistakable language, the drafters of the charter said—

"and should have power by a vote of four out of five commissioners to transfer duties from one commissioner and one department to another commissioner and another department."

This is the language of the supreme law of Oklahoma City; it is the voice of the people. The people, speaking through that provision of their supreme law, have said that four of their duly elected and qualified commissioners, exercising their best judgment and discretion in the honest and faithful administration of the governmental powers of Oklahoma City, are vested with power to transfer duties from one commissioner to another commissioner. They had a right to place that provision in their charter law. They did place it in their supreme law, and the wisdom of the people in adopting this provision, viewing the incompetency and inefficiency of many derelict municipal officers, cannot be doubted.

There is a rule of law which was announced by Mr. Chief Justice Marshall, the greatest American jurist that ever occupied a judicial position in this country, which is controlling in a proper determination of this cause, and which was not invoked in the opinion by the majority of this court. A statute which is not uncertain or ambiguous, but plain and clear in its terms, is not subject to construction. In the case of the *United States v. Wiltberger*, 5 Wheat. 95, 5 L. Ed. 42, Mr. Chief Justice Marshall, speaking for the Supreme Court of the United States, said:

"Where there is no ambiguity in the words, there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did

not suggest. To determine that a case is within the intention of a statute, its language must authorize us to say so."

The rule will be found in 25th R. C. L. par. 213, at p. 957:

"Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself."

The Supreme Court of the United States in the case of *Caminetti v. United States*, 242 U. S. 485, 37 Sup. Ct. 194, 61 L. Ed. at pp. 452, 453, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168, speaking through Mr. Justice Day, said:

"It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms. *Lake County v. Rollins*, 130 U. S. 662, 670, 671, 32 L. Ed. 1060, 1063, 1064, 9 Sup. Ct. Rep. 651; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 33, 39 L. Ed. 601, 610, 15 Sup. Ct. Rep. 508; *United States v. Lexington Mill & Elevator Co.*, 232 U. S. 399, 409, 58 L. Ed. 658, 661, L. R. A. 1915B, 774, 34 Sup. Ct. Rep. 337; *United States v. First Nat. Bank*, 234 U. S. 245, 258, 58 L. Ed. 1203, 1303, 34 Sup. Ct. Rep. 846.

"Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion. *Hamilton v. Rathbone*, 175 U. S. 414, 421, 44 L. Ed. 219, 222, 20 Sup. Ct. Rep. 155."

The people of Oklahoma City have provided in their charter that the duties imposed upon one department or one commissioner may be transferred from one commissioner to another commissioner or department, and the language is plain and simple, and under the rule of law that in such a situation there is no room for construction supported by the decisions of the appellate courts of every state in the Union and the decisions of the Supreme Court of the United States from the time Chief Justice Marshall adhered to the rule up until the present time, it is obvious that it is a dangerous precedent to depart from a rule so well established. The majority opinion of this court in the case at bar in holding that the word "duties" as found in the last sentence of section 11, article 2, of the city charter, has reference only to such duties as are referred to in the first sentence of said section, or duties not specifically provided for in the charter invokes the rule of *ejusdem generis*, and quotes for authority the rule as announced in 25 R. C. L. p. 996, to wit:

"General words in a statute must receive a general construction, unless there is something in it to restrain them, but in accordance with what is commonly known as the rule of *ejusdem*

generis, where, in a statute, general words follow a designation of particular subjects or classes of persons, the meaning of the general words will ordinarily be presumed to be restricted by the particular designation, and to include only things or persons of the same kind, class, or nature as those specifically enumerated, unless there is a clear manifestation of a contrary purpose."

But upon an examination of the rule as found in this authority it is apparent by reading the additional statement of the rule that the same does not support the contention of the plaintiff in this case, and it is also apparent that the effect of the rule is that, where a statute enumerates certain things that the statute is to operate upon, and then makes use of the phrases "other things," "others," or "any other," such phrases are commonly restricted to the class or kind of things previously described in the statute.

A continuation of this rule as found in 25 R. C. L., quoted in the majority opinion at page 997, which is as follows:

"A statute enumerating things inferior cannot, by general words, be construed so as to extend to and embrace those which are superior. In accordance with the rule of *ejusdem generis*, such terms as 'other,' 'other thing,' 'others,' or 'any other,' when preceded by a specific enumeration, are commonly given a restricted meaning, and limited to articles of the same nature as those previously described. Thus it has been held that the words 'other erection or inclosure,' employed in a statute defining burglary, must be interpreted as including only things of a similar nature to those already described by the specific words found in the statute. So it has been decided that replevin will not lie for crops severed by the person in possession of the land under claim of title, either at common law or under a statute enabling the owner of the land to maintain replevin for timber, lumber, coal or 'other property' severed therefrom. And in construing a statute which gives to 'every wife, child, parent, guardian, husband or other person' a right of action, for injury by reason of the intoxication of any person, against the seller of the liquors, since the persons enumerated are persons who stand to him in special relation, it is therefore to be assumed that 'any other person' who may sue must also stand to him in some special relation so as to be injured by his intoxication or by the sale, etc., to him."

It is obvious from the statement just quoted that the rule of *ejusdem generis* has no application to the case at bar, for nowhere in section 11, article 2, of the city charter is such a phrase as "others," "any other," "other," or "other things" used, and the cases of this court in *Board of County Commissioners v. Grimes*, 75 Okl. 219, 182 Pac. 897; *Wolf v. Blackwell Oil Co.*, 77 Okl. 82, 186 Pac. 484, do not sustain the contention of the plaintiff in this cause, for the reason that the language used in the statutes under construction were similar to the expressions

as found in the rule as announced in R. C. L., supra.

At page 908 of 25th R. C. L., the authority says:

"The rule ejusdem generis does not apply where the specific words signify subjects greatly different from one another. And where the particular words embrace all the persons or objects of the class mentioned, and thereby exhaust the class or genus, there can be nothing ejusdem generis left for the rule to operate on, and a meaning must be given to the general words different from that indicated by the specific words, or there can be ascribed to them no meaning at all."

In the first sentence of section 11, article 2, of the charter under consideration, complete provision was made for the assigning of duties not specifically named in the charter, and the board of commissioners were empowered in the first sentence of said section to dispose of such duties, and if the writers of the charter did not intend to empower the commissioners to transfer duties already provided for in the charter from one department unto another department, the second sentence found in section 11, article 2, has no meaning at all. The Supreme Court of the United States, in the case of *United States v. Simon J. Mescall*, 215 U. S. 31, 30 Sup. Ct. 20, 54 L. Ed. p. 79, speaking through Mr. Justice Brewer, said:

"Counsel for defendant invokes what is sometimes known as Lord Tenderden's rule, that, where particular words of description are followed by general terms, the latter will be regarded as referring to things of a like class with those particularly described—ejusdem generis. * * * But this is only a rule of construction to aid us in arriving at the real legislative intent. It is not a cast-iron rule, it does not override all other rules of construction, and it is never applied to defeat the real purpose of the statute, as that purpose may be gathered from the whole instrument. * * * Whilst it is aimed to preserve a meaning for the particular words, it is not intended to render meaningless the general words. Therefore, where the particular words exhaust the class, the general words must be construed as embracing something outside of that class. If the particular words exhaust the genus, there is nothing ejusdem generis left, and in such case we must give the general words a meaning outside of the class indicated by the particular words, or we must say that they are meaningless, and thereby sacrifice the general to preserve the particular words. In that case the rule would defeat its own purpose. See, also, *Gillock v. People*, 171 Ill. 307, 49 N. E. 712, and the cases cited in the opinion; *Winters v. Duluth*, 82 Minn. 127, 84 N. W. 788; *Matthews v. Kimball*, 70 Ark. 451, 462, 66 S. W. 651, 69 S. W. 547."

And this court, in the case of *Kansas City So. Ry. Co. v. Wallace et al.*, 38 Okl. 233, 132 Pac. 912, 46 L. B. A. (N. S.) 112, speaking through Mr. Justice Dunn, said:

"But in applying this principle of construction, and in determining what things are ejusdem generis, regard must be had to the general subject to which the act relates. Things which plainly belong to the same class when one subject is being considered might belong to an entirely different class when considered with reference to another subject. The rule would be absurd if under the head of 'other' nothing can be included in the construction of the act which is not exactly the same in every particular as the thing specified. * * * Moreover, it has been held upon sound reason that, when the particular word or words exhaust a whole genus, the general term will not be regarded as surplusage, but will be construed to refer to a larger class. This must be so if regard be had to the rule, which is more imperative than the rule ejusdem generis, that a statute is to be considered as a whole, so that, if possible, effect will be given to every part of it."

The courts have uniformly held that the rule ejusdem generis is by no means a rule of universal application, and the important use of the rule is to carry out and not defeat the legislative intention, and never applies when the specific words signify subjects greatly different from one another. *Jones v. State*, 104 Ark. 261, 149 S. W. 56, Ann. Cas. 1914C, p. 302 and note at page 305.

Applying this rule to the case at bar, the first sentence found in section 11, article 2 of the charter made provision for duties to be created by the commissioners, and, had it been the intent of the drafters of the charter to confine the transfer of duties, as prescribed in the second sentence of section 11, supra, to duties created by the commissioner, it would have been very easy to have qualified the word "duties" by the word "said" or "such," but, on the contrary, it is clear that it was the intention of the framers of the organic law of the city to vest the board of commissioners with discretionary power in meeting emergencies and changing conditions. It has been suggested that, if section 11, article 2, of the charter, is construed so as to permit the board of commissioners by a vote of four out of five to transfer duties from one department to another department, or from one commissioner to another commissioner, the board of commissioners may entirely take away the duties of a commissioner, and leave such commissioner with an office drawing a salary without any duties to perform. Courts will not indulge in the presumption that a majority of the board of commissioners will act corruptly and dishonestly in the discharge of their duties, or that they will abuse the power and discretion vested in them. All tribunals, boards, legislative bodies, and public officers of every description are vested more or less with discretionary powers, but the presumption is that this power will be exercised in the interest of the public.

This case is not before the court invoking

the equitable jurisdiction of the court to prevent some inferior tribunal from abusing its discretion. No doubt the petitioner could invoke the equitable jurisdiction of the court to prevent an inferior tribunal from doing him some great injury or wrong for which he is entitled to redress.

It has been suggested that the state has a sovereign interest in the police department of Oklahoma City. The state has a sovereign interest in every citizen in the state. The state has a sovereign interest in every school-teacher that teaches the youth of the state, but the state has no interest in what particular superintendent is selected to conduct the different schools of the state, and, while the state has an interest in the police department of the various cities of the state to the extent that police officers discharge their duties both to the state and city, the state has no interest whatever in what municipal officer controls the police department, or what particular officer controls the various city jails of the cities of the state. It is conceded that in purely municipal affairs the charter is the supreme law of the city, and must control. *Lackey et al. v. State ex rel. Grant*, 29 Okl. 255, 116 Pac. 913; *Mitchell v. Carter*, 81 Okl. 592, 122 Pac. 691; *Dunham, City Clerk, v. Ardery*, 43 Okl. 619, 143 Pac. 331, L. R. A. 1915B, 233, Ann. Cas. 1916A, 1148. Manifestly the distribution of the respective duties of purely municipal affairs is entirely a municipal affair, and the courts hold that the tenure of office and the method of removing and electing city officials are purely municipal affairs. *Conn. v. City Council of the City of Richmond*, 17 Cal. App. 705, 121 Pac. 714, 719; *Graham v. Roberts*, 200 Mass. 152, 85 N. E. 1009; *Hilzinger v. Gillman*, 56 Wash. 228, 105 Pac. 471, 21 Ann. Cas. 305. In this state the question that in purely municipal affairs in cities governed by a charter form of government the Legislature is without power to in any way interfere in governmental matters of purely municipal interest appears to have been settled. In the case of *Lackey et al. v. State*, supra, this court said, speaking through Mr. Justice Hayes:

"In that event, all that a city could do under the provisions of section 3a, supra, in the formation of a charter for its own government would be to adopt in *hac verba* the general statute. Such a result would render section 3a nugatory and the exercise of any power it is supposed to grant useless, and result in its effectual repeal by an act of the Legislature, without such power having been specifically granted to the Legislature. * * * To the extent that the charter form of government adopted by Oklahoma City provides that the powers granted to the corporation shall be administered by a board of commissioners elected from the city at large, it is in conflict with the statute; but whether the powers of such city are exercised by a mayor and a city council,

or by a board of commissioners, is purely a matter of municipal and local concern."

The Supreme Court of Michigan, in the case of *People ex rel. Le Roy v. Hurlbut et al.*, 24 Mich. 44, 9 Am. Rep. 103, speaking through Mr. Justice Cooley, said:

"The state may mold local institutions according to its views of policy or expediency; but local government is matter of absolute right, and the state cannot take it away. It would be the boldest mockery to speak of a city as possessing municipal liberty where the state not only shaped its government, but at discretion sent in its own agents to administer it, or to call that system one of constitutional freedom under which it should be equally admissible to allow the people full control in their local affairs, or no control at all."

Many cases have been cited to the effect where an office is created by a constitutional provision that the Legislature is without power to transfer the duties to some other officer. There is no reason to doubt the soundness of this rule, and the same has no application in the case at bar. It is admitted by the parties to this controversy that if the Constitution authorized the Legislature to transfer duties from one officer to another officer, then the act of the Legislature making a transfer of duties under constitutional authority would be valid.

The case of *Francis, Mayor of St. Louis, v. Blair et al.*, Police Commissioner, 89 Mo. 291, 1 S. W. 297, is relied upon as supporting the construction placed upon section 11, article 2, by the plaintiff in this action. In this case, the board of police commissioners appointed by the Governor of the state of Missouri, undertook by resolution to deprive the mayor of St. Louis, an elective municipal officer of said city, of the control of the police. The court held that, the duty of the mayor of St. Louis, being prescribed by an act of the Legislature of the state, the board of police commissioners appointed by the Governor of the state, were without authority to deprive the mayor of any of his duties, as they were prescribed by the Legislature of the state. The case is not in point in the case at bar. No one would contend that a board of aldermen in an incorporated town or city of Oklahoma, whose authority is defined by the general statutes of the state, and where the various officers of such city or town derive their authority only by virtue of the general laws of the state, would have authority to change the statutory duties of any city or municipal officer.

In the case at bar, upon a careful consideration of the issues involved and an examination of the authorities, I conclude that Oklahoma City adopted its charter under the authority of the Constitution, and under the Constitution the people of Oklahoma City

have the absolute right to local government, and that the matter as to who controls the police and city jail of Oklahoma City is purely a municipal matter, and that a court of equity is without jurisdiction to issue the extraordinary writ of injunction and interfere in a purely municipal governmental affair, where the action sought to be enjoined is clearly authorized under the plain provisions of the city charter; that section 11, article 2, of the charter was incorporated in the supreme law of the city in order to give a proper degree of elasticity to the charter, so that in times of emergency the public interest would not be allowed to suffer by reason of the inefficiency or dereliction of one commissioner. No doubt the drafters of the charter had in mind that four of the five commissioners could be depended upon to properly represent public opinion and act for the best interest of the city in case of emergency.

It was suggested in the oral argument of the cause that in the fall of 1918, during the epidemic of influenza, when the death rate was between 10 and 20 per day, and thousands were seriously ill, the commissioner in charge of the health department failed to discharge his duties satisfactorily to the public, and that the commissioners by a vote of four out of the five, the present plaintiff, then mayor, concurring in the vote, acting under the authority of section 11, article 2, transferred the duties of the commissioner of public health to another department. This only demonstrates the wisdom of the drafters of the charter in providing for an elastic form of government to meet the changing conditions. This shows conclusively that the only question involved in this cause is the intent to be derived from the section of the charter under consideration. I cannot believe that it was the intention of the framers of the charter to safeguard the transferring of incidental duties not provided for in the charter by so much caution as to require a vote of four out of five commissioners to transfer such incidental duties, but the logical and reasonable conclusion is that they intended to vest the commissioners with the power to meet emergencies.

It appears to the writer of this opinion, with great deference to majority opinion herein, that the construction that they have placed on the charter falls within the proverb of Judge Lamm, of Supreme Court of Missouri, when he said:

"Strained and unnatural statute construction smacks of wringing the words so hard the meaning extracted is bitter, even as the wringing of the nose brings blood."

I am authorized to state that Mr. Justice MILLER concurs in this opinion.

CARLILE et al. v. NATIONAL OIL & DEVELOPMENT CO. et al. (No. 10279.)

(Supreme Court of Oklahoma. May 13, 1921. Rehearing Denied Oct. 11, 1921. Motion for Leave to File Second Petition for Rehearing Denied Oct. 25, 1921.)

(Syllabus by the Court.)

1. Courts — "Jurisdiction" defined.

Jurisdiction is the authority to hear and determine, and in order that it may exist the following are essential: (1) A court created by law, organized and sitting; (2) authority given it by law to hear and determine causes of the kind in question; (3) power given it by law to render a judgment such as it assumes to render; (4) authority over the parties to the case if the judgment is to bind them personally as a judgment in personam (against the person), which is acquired over the plaintiff by his appearance and submission of the matter to the court, and is acquired over the defendant by his voluntary appearance, or by service of process on him; (5) authority over the thing adjudicated upon by its being located within the court's territory, and by actually seizing it if liable to be carried away; (6) authority to decide the question involved, which is acquired by the question being submitted to it by the parties for decision. *Roth v. Union Nat. Bank*, 58 Okl. 604, 160 Pac. 508; 10 Mod. Am. L. 501.

2. Appeal and error — §863—Guardian and ward — §118—Scope of review on appeal from sustaining of demurrer and motion for judgment on pleading stated; sale of minor ward's oil interest in land held void for failure to comply with court rule.

Where a suit is brought to cancel a contract, or what was called a stipulation, and to declare void an order of a county court confirmatory of such stipulation, and a demurrer is filed questioning the sufficiency of the petition filed therein, and a motion for judgment on the pleadings is also filed therein, and the trial court sustains the demurrer and motion for judgment on the pleadings, and exceptions are saved to the action of the trial court, and an appeal is brought to this court, the question therefore before the court is as to the sufficiency of the petition and pleadings.

In said suit the petition of the plaintiff below, besides attacking the judgment of the county court confirming the stipulation extending an oil lease upon the grounds of extrinsic fraud, alleged, in substance, in addition to the charge of fraud, that the proceeding in the county court was, in fact, a sale of a minor's oil interests under a pretense of being merely a modification of a prior and subsisting oil lease, and that the proceeding is void, because the court failed to comply with the procedure provided in rule No. 9, promulgated by the Supreme Court June 15, 1914 (171 Pac. viii), and fixing procedure to be followed in the sale of an oil and gas lease of a ward in the county courts. The petition alleged the execution of the stipulation by the guardian, and alleged the making of an order confirming the same by the county court, and attached

to the petition copies of the stipulation and of the order confirming the same, and made them a part of the petition. An examination of the copies of the stipulation and order confirming the same, attached to the petition, show, upon their face that they were not what they purport to be, a modification of the terms of a subsisting lease and such modifications to be executed within the term of a subsisting lease, but is in effect an extension of the term of the subsisting lease beyond the term thereof and as long as oil is produced thereafter in paying quantities, and the order confirming the stipulation upon its face, when considered in connection with the stipulation, shows a direction by the court to the guardian to enter into the stipulation with the lessee of the subsisting lease, at a consideration fixed in the order of the court directing the execution, or else, as provided in the stipulation presented to the court at the time the directing order was made; and that the stipulation and the order confirmatory of the same upon their face negative the conclusion that there could have been any competitive bidding, or that there was a compliance with rule No. 9 of the Supreme Court above referred to. *Held*, that the transaction constituted a sale of the minor's oil interests, and, the record showing, upon its face, a failure to comply with the procedure provided by rule No. 9 of the Supreme Court of this state, promulgated by the Supreme Court June 15, 1914, the same is void and of no effect, and that it was error for the trial court to sustain the demurrers and the motion for judgment on the pleadings.

3. Abatement and revival \S 41, 47—Action to cancel stipulation modifying lease does not abate on transfer of plaintiff's interests; may continue in plaintiff's name or transferee be substituted.

In an action to cancel an oil and gas stipulation or contract modifying and extending the terms of an oil lease, such action does not abate by the transfer of any interests of the plaintiff therein during the pendency of the suit, and, if the plaintiff has transferred his interests the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action.

4. Infants \S 57(1)—One attaining majority may ratify voidable but not void contracts.

Under the laws of this state, a minor, after he arrives at the age of 18 years, cannot give a delegation of power or appoint an agent, but any other contract a minor can make, after arriving at the age of 18, and such contract is not void, but merely voidable. And after he arrives at his majority he may disavow the contract within 1 year or he may ratify such voidable contract, but such contracts as are held absolutely void he cannot ratify, and this is upon the theory that such contracts are non-existing, since void, and there is nothing to be ratified.

On Rehearing.

5. Courts \S 85(1)—County courts may not dispense with Supreme Court rules or prescribe others in lieu thereof.

The rules of the Supreme Court relating to probate procedure promulgated June 15,

1914, by virtue of section 2, article 7, of the Constitution, and section 5347, Rev. Laws 1910, are binding upon the county courts of this state, and such courts and judges thereof are without power to dispense with the requirements of such rules, to vacate and set the same aside, or to prescribe other rules in lieu thereof or in conflict therewith.

6. Courts \S 85(1)—Rules made pursuant to statutory authority have force and effect of law, and bind litigants, counsel, and courts.

The rules of court made pursuant to statutory authority of an appellate court to govern the procedure in inferior courts have the force and effect of law, and are binding upon litigants and upon counsel, and upon the court and its officers.

7. Courts \S 85(3)—In construing court rule as to whether amendatory or directory, the same rules are applicable as to Constitutions and statutes.

In determining whether rule 9 of this court, made pursuant to constitutional and statutory authority, was intended to be mandatory or directory, we must apply the same rules of construction that are applicable to construction of Constitutions and statutes.

8. Statutes \S 184—Should receive rational construction in accordance with intended purpose.

A statute should receive a rational, sensible interpretation, one which tends to avoid or remove the mischief at which it was leveled, and to accomplish the object sought by the legislative body which enacted it, rather than one which promotes or permits the evil and avoids the accomplishment of the purpose of the enactment.

9. Infants \S 39—Approving oil and gas lease on minor's land, unless sold in open court to highest bidder, is for minor's protection.

Rule 9, promulgated by this court by virtue of constitutional and statutory authority, requiring that no oil and gas lease upon the lands of a minor should be approved unless sold in open court to the highest and best bidder, as provided in said rule, was promulgated for the minor's protection, pursuant to a general principle of public policy for the protection of minors.

10. Infants \S 39—Sale of oil and gas lease on minor's land, not in compliance with court rule, is void.

A sale of an oil and gas lease upon the lands of a minor through the probate court, which is not in substantial compliance with rule 9 of this court, is void.

Appeal from District Court, Washington County; R. B. Boone, Judge.

Suit by Levi Carlile and another against the National Oil & Development Company and the Prairie Oil & Gas Company, in which the court rendered judgment for defendants on the pleadings and dismissed the petition as to the National Oil & Development Company, and each of the plaintiffs appeal. Re-

versed and remanded for proceedings consistent with opinion.

George T. Brown, of Tulsa, B. B. Blakey, of Oklahoma City, J. H. Maxey, of Tulsa, and Hubert Ambrister, of Oklahoma City, for appellants.

J. T. Shipman, of Bartlesville, and Burford, Miley, Hoffman & Burford, of Oklahoma City, for defendants in error.

Geo. S. Ramsey, of Muskogee, Edgar A. De Meules, of Tulsa, and Malcolm E. Rosser and Villard Martin, both of Muskogee, James B. Diggs, of Tulsa, Edw. H. Chandler, Summers Hardy, and Wm. O. Beall, all of Tulsa, amici curiæ.

ELTING, J. This action was begun by Levi Carlile and B. E. Capps, plaintiffs in error herein and plaintiffs below, against the National Oil & Development Company and the Prairie Oil & Gas Company, defendants in error herein and defendants below, by filing a petition in the district court in Washington county, state of Oklahoma, the 31st day of January, 1918. Levi Carlile alleged in his petition that he brought the suit in his own behalf, as his interest in the petition appears, and also prosecuted it in his name for the use and benefit and on behalf of his coplaintiff, the said B. E. Capps, as the interest of the said Capps in and to the subject-matter appears in said petition. Levi Carlile is alleged, in the petition, to be a citizen by blood of the Cherokee Tribe of Indians, and duly enrolled as a citizen of one-sixteenth blood, and that he reached his majority on the 14th day of September, A. D. 1917; that the land in controversy and involved in the oil lease is his distributive share of the lands of the Cherokee Tribe of Indians, and is described as the north half of the northeast quarter, section 14, township 27 north, range 13 east, and for which he received a patent; that the said Levi Carlile after he became of age, and on, to wit, October 10, 1917, for a good and valuable consideration, made an oil and gas lease, covering the lands, to the other plaintiff, B. E. Capps, and that he granted to the said Capps seven-eighths of all oil rights and mineral rights thereon from and since the 13th day of September, 1917, and that since the execution of said lease, the said Capps was seized and possessed of the exclusive rights to enter upon, operate, drill, and develop the same for petroleum and gas; and that one-eighth of said oil interest was reserved to the said Levi Carlile.

The plaintiffs asked to have the defendants enjoined from continuing to operate and extract oil and gas from the said lands, and convert the same to their own use, to the great, irreparable, and continuing damage to the plaintiffs, and that they had no adequate remedy at law, and hence ask for injunction.

As a second cause of action, the plaintiffs allege: That on the 7th day of October, 1905, Thomas J. Carlile, the duly appointed, qualified, and acting guardian for the plaintiff Levi Carlile, entered into an oil and gas lease with the defendant the National Oil & Development Company, and that the said lease was for a term of years beginning October 7, 1907, and ending September 13, 1917, and during the minority of the said Levi Carlile, for the purposes of developing and extracting oil from said lands. That under said lease the said defendant drilled 32 oil wells, from which it did, during the term of its lease aforesaid, produce and market great quantities of petroleum and natural gas. That on or about the 21st day of February, A. D. 1917, the defendant the National Oil & Development Company, through its agent, one Humphrey, procured from Thomas J. Carlile a purported stipulation, modifying the terms of the former lease so that it would continue for a term of years during the minority of the said plaintiff Levi Carlile, and to September 13, 1917, and as long thereafter as oil or gas was produced from said land in paying quantities by the lessee, its successors, or assigns. That on the same day or day following the one on which the stipulation was procured J. D. Cox, county judge of Cherokee county, Okl., made a confirmatory order, confirming and approving said stipulation. That said stipulation was in words and figures as follows:

"Whereas, Thomas H. Carlile, of Tahlequah, Okl., as guardian for Levi Carlile, a minor, and the National Oil & Development Company, of Bartlesville, Okl., as lessee, entered into an oil and gas mining lease dated October 7, 1905, covering the following described tract of land situated in Washington county, Okl., to wit: The N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of Sec. 14, Twp. 27 N., R. 13 E. containing 80 acres, more or less; and whereas, the present owner of said lease and the owner of the said described land desire to amend, change and modify certain terms of said contract: Now, therefore, in consideration of one hundred dollars, the receipt whereof is hereby acknowledged by the lessee hereinafter contained, said lease is hereby modified in the following particulars, to wit:

"1. The term of said lease is extended to September 13, 1917, and as long thereafter as oil or gas is produced therefrom in paying quantities by the lessee, its successors or assigns.

"(2) The royalty on oil produced from said land to be paid to the lessor is hereby increased from one-tenth to one-eighth.

"(3) The lessee agrees that within thirty days from the execution hereof it will install a vacuum pump for the purpose of putting a vacuum on said lease, and will connect the wells located on said land above described to said vacuum pump, and will thereafter operate said wells under a vacuum.

"In witness whereof, the parties hereto have hereunto affixed their signatures this 20th day of February, 1917. [Signed] Thos. H. Carlile, as Guardian of Levi Carlile, a minor. Nation-

al Oil & Development Co., by G. J. Humphreys, Agent."

"Acknowledged, February 20, 1917, by Thomas H. Carlile, as guardian of Levi Carlile, a minor, before J. W. De Moss, a notary public, Cherokee county, Oklahoma."

That the confirmatory order was in words and figures as follows:

"Abstract of Court Order.

"On this 21st day of February, 1917, the guardian herein presents for confirmation and approval the stipulation modifying the terms of the oil and gas mining lease heretofore entered into on the 7th day of October, 1906, by Thomas H. Carlile, as guardian of said Levi Carlile, with the National Oil & Development Company, said stipulation having been executed by said guardian on the 20th day of February, 1917, and said stipulations providing for the modifying of the terms of said oil and gas mining lease so that the term of said lease is extended until the 18th day of September, 1917, and as long thereafter as oil or gas is produced on said land in paying quantities by said lessee, its successors and assigns, and providing for the increase of the royalty on oil produced, payable to the lessor from one-tenth to one-eighth, and further providing that within 30 days from the execution thereof said lessee company connect the wells on said land with a vacuum pump, and said stipulations having been executed in pursuance of the order made and entered herein on the 20th day of February, 1917; and, the court having examined said stipulation, and heard evidence on the same, and it appearing that the same is in proper form, that a valuable and fair consideration has been paid the lessor therefor, and that the order and direction of this court has been fully complied with, the court being well and sufficiently advised in the premises, it is ordered and adjudged by the court that said stipulation be, and the same hereby is, in all things hereby ratified, approved, and confirmed.

"Done at Tahlequah, Okl., within the county of Cherokee, state of Oklahoma, this 21st day of February, 1917.

"[Signed] J. D. Cox, County Judge
of Cherokee County."

That copies of the said stipulation and confirmatory order were attached to and made a part of the petition.

The plaintiffs further alleged that the stipulation and confirmatory order are null and void by reason of the false and fraudulent representation made by the representative of the lessee, the National Oil & Development Company, to the guardian of the plaintiff, Levi Carlile, whereby he was induced to execute such stipulation, and which representations were as follows:

"That said agent of said defendant did then and there represent and state to said guardian that the lease of said defendant would shortly expire, and that upon the expiration thereof, unless said defendant procured a new lease, or an extension of the old lease, it would dismantle said lease and all the equipment thereon, pull all of the casings from said oil wells, and thus destroy the same; and that in

the meantime the vacuum pumps were to be placed on the oil wells on the adjoining property to said lands, and that the defendant would not put vacuum pumps on the wells operated by it on the lands of said Levi Carlile unless it procured an extension of said lease, and that by reason whereof the adjoining leasehold operators would thus drain the oil from under the lands of the plaintiff Levi Carlile, so that within 30 days his lease would become unproductive and dry."

They alleged, further, that said representations were false and untrue, and the agent knew them to be untrue. They alleged, further, that said leasehold interest was reasonably worth the sum of \$15,000, and that by reason of the said false representations the guardian was induced to grant said lease for the sum of \$100, and an increase of royalties from one-tenth to one-eighth and, said consideration being so grossly inadequate as to shock the conscience, that the lease is also void for that reason. They alleged, further, that the same representations were made to the county judge as were made to the guardian, whereby he was induced to make the confirmatory order.

It was further alleged and contended that the order of the court, confirming said extension, was void, in that there was a failure to comply with rule No. 9 of the rules of procedure in probate matters adopted by the Supreme Court of Oklahoma (171 Pac. viii) and in such cases made and provided, and effective July 15, 1914; That said rule No. 9, reads as follows:

"9. No oil and gas, or other mineral lease, covering lands belonging to minors or incompetents will be approved except after sale in open court to the highest and best responsible bidder. All petitions for the approval of oil and gas leases shall be filed at least five (5) days before same are to be sold as provided herein, and notice of such sale must be given by posting and by publication where publication is practicable and shall be on ——— of each ———."

The petition then alleges facts showing the production of oil by the company, prayed for an accounting for the oil and gas removed from the lands, asking that the title of the plaintiffs in and to said lands and leasehold interest be quieted in the plaintiffs, and that the defendant be enjoined from entering into and upon said lands, and that a receiver be appointed to take charge of said lands and the oil and mining rights pertaining to the same, and for all proper and just relief.

To the said petition the Prairie Oil & Gas Company filed a demurrer. The National Oil & Development Company filed a separate answer, containing a general denial of everything except what was specifically admitted, and setting up their compliance with the provisions of the stipulation, and that they installed the vacuum pumps called for therein,

and were operating the same. The answer further alleged that the plaintiff herein had ratified said extension stipulation by accepting the royalties provided for herein, and other benefits thereunder, after becoming of age.

To the separate answer, the plaintiff below, Levi Carlile, filed a reply, denying the acceptance of any royalties thereunder, or the benefits of said contract, and hence has not ratified the same. Levi Carlile alleged further in his reply that he had before receiving any royalties under said stipulation, disavowed said contract, and had filed suit in the county court of Cherokee county, Okl., and followed it up by filing the present suit.

On May 10, 1918, the National Oil & Development Company filed a supplemental answer, in which they alleged that on March 5, 1918, Levi Carlile executed to John H. Kane, of Bartlesville, Okl., a general warranty deed, conveying to him the lands covered by the lease in controversy in this case, for and in the consideration of the sum of \$9,000. That said deed was duly recorded. They alleged, further: That the said Levi Carlile executed and delivered to the said John H. Kane a transfer order, transferring to the said John H. Kane all of the one-eighth royalties on oil produced on said premises by the defendant operating under and by virtue of the said lease and the stipulation mentioned in the plaintiffs' petition, extending said lease for so long as oil or gas is produced upon the premises in paying quantities, and that Levi Carlile, up to that time, to wit, March 5, 1918, did receive and accept and has received and accepted all of the royalties of one-eighth of the oil produced by the defendant company on said premises by its oil lease and extension. That hence the said Levi Carlile has no further interest in said suit by reason of said sale, and by reason of his acceptance and transfer of said royalties he has ratified and affirmed the contract and stipulation so made and entered into by the said guardian and approved by the court. To this supplemental answer, the plaintiffs filed no reply. That on the 23d day of May, 1918, the attorneys for the Prairie Oil & Gas Company, presented their demurrer to the petition, same was argued, and the court sustained the same, to which ruling the plaintiffs excepted and refused to amend said petition, and elected to stand thereon as against the defendant the Prairie Oil & Gas Company. Thereupon the counsel for the plaintiffs and for the defendant the National Oil & Development Company made their statement to the court of the issues involved in the case. Whereupon the attorney for the defendant the National Oil & Development Company moved the court for judgment on the pleadings as against Levi Carlile, and moved for judgment on the pleadings as against B. E. Capps, and after

argument the court sustained the motion as to both plaintiffs, and dismissed the petition as to the National Oil & Development Company, to which ruling of the court the plaintiffs, and each of them, excepted and elected to stand upon their pleadings and declined to plead further as against the defendant the National Oil & Development Company. The plaintiffs prayed an appeal to the Supreme Court, and notice of appeal was accepted. Transcript of appeal filed in this court October 8, 1918. Hence the appeal is now before this court upon the question of the sufficiency of the plaintiffs' petition and the sufficiency of the pleadings as raised by the demurrer, and the motion for judgment on the pleadings, both sustained by the trial court.

The plaintiffs in error in this case contend in their brief that the fraud they allege is fraud extrinsic the record, and hence if the fraud is sufficient it is such fraud as can be alleged and proved in a collateral attack for the purpose of having the judgment of the probate court decreed void. They contend, furthermore, that the allegation as to the gross inadequacy of consideration is also permissible in a collateral attack upon the judgment, in the instant case, and for the purpose of showing the same to be void.

The defendants in error contend in their brief that the allegations set forth in the plaintiffs' brief are not representations of present or past facts, but are in the nature of expressions of opinion and of matters that are to be done in the future. The defendants in error further contend that, even if the allegations of fraud be held to be sufficient representations constituting fraud, they are not extrinsic fraud, and cannot be proved aliunde the record, and are such representations as induced the action of the guardian and the action of the court, and such facts as the court is presumed to have considered in arriving at his judgment, and hence the question of fraud is concluded by the judgment, and it is not such fraud as can affect the judgment collaterally.

The holding of this court is such, however, that it is not necessary for it to determine the distinctions thus raised by the briefs of the plaintiffs in error and defendants in error. The only question to be determined is the sufficiency of the petition and the pleadings.

[1] Three essentials are required to give legality to a judgment. They are: First, jurisdiction of the parties; second, jurisdiction of the subject-matter, and third, the power of the court to enter the kind of judgment entered.

The county court that made the orders and judgment involved in the instant case seems to have had jurisdiction of the parties consisting of one of the defendants in error, by their representative, and the guardian of

one of the plaintiffs in error, Levi Carlile, and the law gave the county court general jurisdiction over the estate of the minor and the power to make orders pertaining to such estate in the way and manner regulated by law; but our holding is that the county court of Cherokee county did not have the power to make the kind of a decree that was made in the instant case.

[2] A brief analysis of what is called the confirmatory order shows that the county court of Cherokee county did the following: It either directed by its order the guardian to enter into a contract or a stipulation with the representative of the National Oil & Development Company for a price already fixed and determined, covering the interests of this minor in the oil and gas upon the lands of the minor, and then after the contract or stipulation was executed as directed the court confirmed the same, or else the guardian first entered into the contract or stipulation with the representative of the National Oil & Development Company, and after the same was executed brought it to the court for confirmation, and the same was confirmed.

As to which method was pursued herein it is difficult to determine from the record. But whether the court did first issue an order directing the contract to be made with the National Oil & Development Company upon terms already determined before confirming the same, or whether the guardian acted upon his own initiative, makes no difference, for the holding of this court is such that in either event the judgment is void on its face, since the order itself does not purport that it is a sale, but a modification of the terms of the old lease, and a term extending beyond the minority of the ward, and constitute a legal fraud against the minor. No guardian, and no court, as we view the law, has the authority, either acting separately or conjointly with the guardian, to enter into a private deal, the very nature of which and the manner of its handling is such as to prevent any competitive sale of the property of the minor, whether the same be personal property, chattels real, or real property. It must be borne in mind that the transfer or sale of the interests of a minor in any of his property can only be done as the law directs. The nature of this transaction is plainly shown and disclosed upon the face of this judgment and the accompanying stipulation. No extrinsic truths are required to show the nature of the proceeding. The recitals in the judgment and the accompanying stipulation show just what was done; and just what was done had the inevitable effect of preventing a free, fair, public and competitive transfer of the rights of this minor in his property. This court knows of no law that sanctions such a proceeding.

It may be contended that this deal was fair to the minor; that it was to his best interests that such a deal be made. But courts are supposed to stand guard over the rights of minors, and their duty it is to see that the safeguards of the law that have for their purpose the protection of minors in their property rights are not impaired, and the courts cannot in any particular case sanction any relaxation of the rules that are intended to protect those who labor under disabilities and are held not capable to contract for themselves. All who deal with the property of minors must take notice that they can only deal with them safely as the sanctions of the law permit.

It may be further argued that the National Oil & Development Company had equitable rights in and to the oil they had developed under their lease, and that the original lease was taken under certain misconceptions of the law, at the time the lease was taken, in that a lease could not be taken to extend beyond the time of the minority of the minor, and that under the customs and usages prevailing in the oil country certain equities had arisen in their favor, and that the rigid rules of the law should be mitigated in their favor. If that were true and their contentions were sufficient to relieve them against the terms of their contract, why are they not found in a court of equity asking relief, instead of in a court that is bound by the rules of law, and can only act legally and as those rules direct?

The facts in the instant case disclosed by the pleadings of the plaintiff in error show that a lease was made with the guardian of this minor in the year 1905, and that the lessee went upon said lands under said lease, and developed 32 producing wells; that the lease ended, by its own terms, September 13, 1917, one day before the minor reached his majority. On the date fixed for the ending of the terms of this lease the rights of the lessee in and to the oil from said lands would have ended, unless the effect of the stipulation and order confirming the same has the legal effect of extending them. The situation that confronted the lessees on the day that this purported stipulation and confirmation were made and before they were made, was such that on the day following the 13th day of September, 1917, the minor would own eight-eighths of the oil, but immediately after this transaction and the deal in the county court of Cherokee county had been put through, and if that transaction is held to be legal and binding upon the minor, then the lessees would own seven-eighths as long as oil was produced in paying quantities, and the minor would only own one-eighth, which seven-eighths, it is alleged, had the present value of \$15,000. The consideration paid was \$100, and an increase of royalty from one-tenth to one-eighth, and other un-

certain and undetermined considerations, which might or might not have been ample and sufficient to sustain the transaction in event it is held otherwise legal.

It seems to be admitted that if this transaction had been the disposition of an original oil and gas lease, and not what the defendants in error called a modification of an old lease, that it would have been necessary to have complied with rule No. 9 of the Supreme Court, which provides that no oil or gas or other mineral lease covering lands belonging to minors or incompetents shall be allowed, except when sold at a sale in open court to the highest and best responsible bidder, and that all petitions for the approval (sale) of oil and gas leases shall be filed five days before the same are sold, as provided herein, and notice of such sale must be given by posting, and by publication where publication is practical. We cannot understand why more rigid rules would be applied, and are held to be necessary for a legal sale of a minor's oil interests before development of oil, than would be required for the disposition of a minor's interests after oil is developed. The statement of such a contention is its own answer, and the absurdity of it is manifest.

The courts do hold that a lessor capable of contracting for himself, and capable of making waivers and of being estopped, can, during the lifetime of a lease, make extension of the same; but when it comes to dealing with minors and those under disability, the minor can only be bound by the proper orders of the court having jurisdiction of his estate. No one else, and through no other medium can he be legally dealt with, and even the courts that have jurisdiction to alienate and transfer the rights of its minor wards are controlled by certain fixed and essential rules, and a failure to comply with them vitiates and destroys the force of its actions, and one of those essential and fundamental rules is that no court has the power to authorize or confirm a transaction that has for it a purpose the disposition and sale of the property rights of its ward, when that transaction is handled in such a way that the prevention of free, fair, open, and public sale, or the competitive bidding, is inevitably prevented.

The law pertaining to the sale of oil and gas leases, in force and effect in the state of Oklahoma, has been interpreted in the cases of *Duff v. Keaton*, 33 Okl. 92, 124 Pac. 291, 42 L. R. A. (N. S.) 472, and *Cabin Valley Mining Co. v. Hall*, 53 Okl. 760, 155 Pac. 570, L. R. A. 1916D, 1016; and, interpreting section 6569, R. L. 1910, the first cited case upheld the sale of oil leases of minors where the application was filed on a certain day and order made finding the making of a lease advisable and directing sale, the sale consummated and confirmed, all done on the same day; but an investigation of that case shows

that the application set forth asks for an order directing the guardian to make a contract, not to any particular person, and the order directing the sale did not direct the sale to be made to any particular person for a certain determined price. But what have we in the instant case?

If an application was made at all to the county court of Cherokee county, it was an application to dispose of this leasehold interest to the National Oil & Development Company, and that for a certain fixed consideration. And if an order was made at all, directing the said sale, it provided and directed the guardian to dispose of said leasehold interests to the National Oil & Development Company, and that at a certain fixed and directed consideration. And then the confirmation confirmed the sale to the National Oil & Development Company, at the fixed consideration. That this was done is shown on the face of the stipulation and the order confirming same, and they should be considered together. This we will show later.

The case of *Cabin Valley Mining Co. v. Hall*, heretofore cited, was a case like the instant case, where a lease had been taken for a certain time and expired the day before the majority of the ward, and the lessee and the guardian agreed to an extension or modification of the lease and made 4 years before its expiration, for and in the consideration of \$400 and an increase in royalties. It was agreed that the lease be extended beyond its term for a period thereafter as long as oil and gas was produced in paying quantities. The transaction complained of took place in 1908. The guardian applied to the county court for authority to execute form K. Form K was a form for the extension of leases provided and approved by the Interior Department. The extension made in this case seems to have been with the approval of the Interior Department. The main controversy in the case seemed to revolve around the proposition as to the power to make a lease on a minor's land, the term of which would extend beyond the minority of the minor, and being involved in the transaction in the cited case because the extension provided to extend the lease to a time covered by the minority of the minor and as long thereafter as oil or gas was produced in paying quantities. The syllabus in the case does not cover any other proposition of law. The procedure pursued by the court in making this extension was only incidentally considered and indifferently discussed by the lawyers in their brief and by the court in its opinion. The court in the cited case, after laying down the proposition that county courts in this state were courts that procured their power solely from the Constitution and statutes of the state, and then after citing a few of those statutes, and a few provisions of the Constitution applicable to coun-

ty courts, then took up a discussion of the powers of equity courts in handling the estates of minors and others under disability, seemingly with a view of arriving by analogous reasoning to the conclusion that the statutes and Constitution of our state gave the same powers to our county courts. The record in the Cabin Valley Mining Co. Case was filed and the appeal perfected on March 14, 1913, opinion rendered February 15, 1916, rehearing denied June 6, 1916. At the time the cited case was tried in the court below rule No. 9 had not yet been promulgated by the Supreme Court. The probabilities are that the rule was promulgated by this court and embodied in the probate procedure as an outgrowth of the discussions in the Supreme Court of the Cabin Valley Mining Company Case.

The attorneys for the defendant in error cite section 6569 of R. L. 1910, and state that it had the effect of making it discretionary with the county court whether a lease be let at public bidding or private negotiation. An investigation of that section shows that it pertains to the investment of proceeds of the sale of property of the ward after sales had been made, and pertains to the management and handling of the money and proceeds of the sale and their disposition.

The law in force and effect in this state pertaining to the powers of county courts over minors at the time the opinion was rendered in the Cabin Valley Mining Co. v. Hall where the same laws that were in force and effect at the time Justice Williams rendered the opinion in the case of Duff v. Keaton, heretofore cited, and, regarding the condition those laws were in at the time of the rendering of the opinion in Duff v. Keaton, Justice Williams made the following to say:

"The statutes of this state are entirely lacking as to any specific provision for the procedure to be followed by the guardian in leasing the lands of his ward for agricultural or grazing or commercial purposes or for exploring for oil or gas."

On page 28 of the defendants in error's brief, and in discussing whether the record in this case showed that a petition was first filed in the county court asking for authority to enter into the stipulation, they refer to Exhibit A, attached to plaintiff in error's reply in the court below. The exhibit referred to is a copy of the petition filed by Levi Carlile after he became of age, in the county court of Cherokee county, to set aside the order confirming the stipulation for the extension of the lease. We quote the following from said exhibit, beginning on page 49 of case-made:

"The plaintiff further says that by reason of said false and fraudulent representations made by the said Humphreys, and believing them to be true, the said Thomas H. Carlile signed a petition, praying the court to make

an order authorizing the execution of said stipulation, and presented the same to the county court of Cherokee county, and plaintiff says that upon the hearing of said petition the same false and fraudulent representations were made to the county court of Cherokee county, Okla., as had been made to the guardian aforesaid, to seek the execution of said stipulation above mentioned by the said Humphreys, he acting in the capacity aforesaid, for the defendant National Oil & Development Company, and, knowing at the time that the said representations were false and fraudulent, the plaintiff says that the county court relied upon said false and fraudulent representations, and, believing them to be true, made and entered the orders marked Plaintiff's Exhibit B and C, authorizing the said Thomas H. Carlile, guardian, to execute the stipulation hereto attached, as Plaintiff's Exhibit B and the order approving and confirming the execution of said stipulation hereto attached as Plaintiff's Exhibit C."

Exhibit B referred to does not seem to be attached to the petition filed in the county court, and Exhibit B seems to be the order of the court, directing the guardian to execute the stipulation. Exhibit C appears to be the order of the county court approving the stipulation as executed, and it is attached. The order confirming the contract of extension refers to the previous order twice in the following language:

"The said stipulations having been executed in pursuance of the order made and entered herein on the 20th day of September, 1917, and the court having examined said stipulation and heard the evidence on the same, and it appearing that the same is in proper form, and that a valuable and fair consideration has been paid the lessor therefor, and that the order and direction of this court has been fully complied with, the court well and sufficiently advised in the premises. It is ordered and adjudged by the court that said stipulations be, and the same is in all things hereby, ratified, approved, and confirmed."

Upon the proposition as to what is shown upon the face of the stipulation and the order confirming the same when considered together, pertaining to the nature of the transaction and the relations of the court thereto, we will make the following comment: In the first place, the order refers to the stipulation, not as a lease, but calls it a stipulation modifying the terms of the oil and gas mining lease, heretofore entered into on the 7th day of October, 1906, by Thomas H. Carlile, as guardian of Levi Carlile, with the National Oil & Development Company, and that said stipulations were executed on the 20th day of February, 1917. The date of the confirmatory order is the 21st day of February, 1917. The court then, further down in its order, says:

"Said stipulations having been executed in pursuance of the order made and entered herein on the 20th day of February, 1917."

The inevitable conclusion being that if the stipulations were executed in pursuance of the order directing the execution of the stipulations, then whatever the stipulations provide for the court must have directed to have been done by its order on the 20th day of February; and if the provisions of the stipulations are such that they exclude the idea that any one had the power to carry them out but the old lessee, then the effect of the order directing and the stipulation itself was such as to restrict the contracting party to the old lessee under the old lease, the National Oil & Development Company. The language of the stipulation and the terms of the same, and set out in the order confirming the same, provide that the lessor is to receive one-eighth instead of one-tenth royalty as formally provided. It provides for the payment of \$100. It provides for the installation of vacuum pumps within 30 days from the date of stipulation, which was within the term, and no one could carry out said condition except the National Oil & Development Company. Further down in the order, after saying that he had examined the stipulation, the order states as follows:

"That the order and direction of this court has been fully complied with."

If it has been fully complied with, the court must have directed that the stipulation be executed in the manner that it was executed; and hence, upon the face of the record, the possibility for competitive bidding and of any one else procuring any interests in and to said oil rights belonging to said minor than the said National Oil & Development Company was absolutely foreclosed by the order of the court directing the execution of the stipulation. While the court declares it a modification in his order, and the defendants in error in their pleadings and brief declare the stipulation to be a modification, done within the term of the lease, which is true (done on February 21, 1917, the old lease ending by its terms, the 13th of September, 1917), yet the idea that it was merely a modification, such modification to be carried out during the life of the old lease, is destroyed by the provision of the stipulation that reads as follows:

"The term of said lease is extended to September 13, 1917, and as long thereafter as oil and gas is produced therefrom in paying quantities, by the lessee, its successors, or assigns."

This provision destroys and makes the naming of the stipulation a modification not only a misnomer but also a delusion. If the stipulation and order, to repeat, are permitted to stand as of legal force and effect, the inevitable consequence is to transfer seven-eighths of this minor's interest in said oil to the National Oil & Development Company, and that it, in effect, was such a transaction

as is shown upon the face of this record, and it was in no sense a compliance with rule No. 9 of the probate procedure, laid down by this court and made effective June 15, 1914.

The defendants in error contend in their brief that the presumption is that all things necessary to give the court jurisdiction in granting the confirmatory order were done. It is our contention that the order and the stipulation, which are a part of the court record, taken together, negative the idea that there was any attempt to comply with rule No. 9. The defendants in error do not contend that it was intended to be a sale in their brief, or in the allegations of their pleadings.

The following is the sixth paragraph of the separate answer of one of the defendants in error, the National Oil & Development Company:

"Defendant further denies that the order of the county court confirming said stipulation above set forth was or is void, or that the court was without jurisdiction, or that said stipulation extending said lease is null or void or of no effect; or that it is in truth or in effect or constitutes the making of a lease on plaintiff's land within the rules of the court, but avers that said stipulation was and is in truth and in effect what it purports to be, and nothing more, namely, a stipulation modifying certain terms of an oil and gas mining lease already made and entered into, and then already in force and effect."

The trouble with their conclusion is that they did not stop at the modification of the old lease, but extended the term of the old lease which had the same effect as the sale of a new lease, to begin and be in effect at the end of the term of the old lease. If the modifications and changes had been limited to the terms of the old lease, there might be something in the argument of the defendants in error, but it is not such, and does not purport to be.

If the order of the county court is upheld, the effect would be to take the interests of the minor and transfer the title to the defendants in error to the same extent as the execution of another lease. In effect it would be doing indirectly just what the defendants in error admitted could not be done directly. They admitted that execution of a lease to begin at the ending of the term of the old lease would require a compliance with rule No. 9, and all the formality of a sale of an original oil lease. But, to repeat, the effect is the same upon the interests of the minor, as far as the conveyance of his interests are concerned, whether conveyed under a new lease or whether held to be conveyed under such a transaction as took place in the instant case. The transaction in the instant case is in effect a sale of the minor's oil interests in the land under the disguise of an

extension of a lease, and it is unreasonable to contend that it is anything else.

The defendant in error suggests, in their brief, that it would be a vain and useless thing for the court to put up at public auction, during the term of a lease, the question of the extension and modification of the old lease, for the reason that no one would bid on such an interest but the old lessee, due to the interests of the old lessee still subsisting. The trouble with such a contention is that it involves a suggestion of a reason why a court, in the exercise of his discretion, and with due regard to the interests of the ward, should not make an order allowing a sale or an extension under such conditions, but if, in any case, the county court, in his discretion, concluded it was for the best interests of the minor that it be done, there is no reason why there could not be at least a reasonable compliance with the procedure laid down in rule No. 9. It might result in a vain thing, and result in the same thing as has resulted in the instant case. But it would result in a sale, judicial in its nature, and the rights of the minor would at least be protected by an opportunity for open and public bidding, and the purposes of the law satisfied. We quote the following from page 24 of the defendant in error's brief:

"In a great many instances where such leases have been extended, no doubt the transaction is entirely free from the charge even of the slightest taint of fraud, and have in every sense been to the advantage of the minor. The rule here sought to be invoked would strike down every such contract extending a lease, it matters not how honestly and fairly made, how beneficial to the minor's estate, or how much investment has been honestly made under it."

Our reply to this statement is that the purported extension of this lease was made a long time subsequent to the promulgation of rule No. 9 by the Supreme Court. The rules of the Supreme Court have the same force and effect, as has been held by this court, as does a statute. We are unable to discover where any constitutional or statutory provision in force before said rule was promulgated are contravened or set at naught by this rule. As stated by Justice Williams in the quotation from his opinion in *Duff v. Keaton*, there does not appear to have been any definite or specific rules of procedure in this state, and hence there is nothing to be contravened. About the only rules controlling the oil procedure seems to be several general and indefinite statutory provisions from which the Supreme Court of this state has sought to evolve a rule. About the most definite thing that has yet been provided for is rule No. 9 of the Supreme Court, and even that has been accused of being indefinite, and we think, as do the attorneys for the defendants in error in this case, that the word "approval," used in said rule,

should be changed to "sale," and that that is its inevitable meaning, and has been so interpreted in actual practice. We hold it to be no infringement of the rule to have approval follow the sale immediately; and in actual practice the custom is to have the approval of the sale follow immediately after the sale. No petition for the approval being required, and petition for sale being a reasonable requirement, the requirement to have the petition of approval on file five days must inevitably mean the "petition for the sale," instead of the "petition for approval."

All persons are presumed to take notice of the promulgation of rules of the Supreme Court. Whether rule 9 be held to be merely a rule of procedure or a substantive regulation, it is a provision which is required to be pursued at the beginning of every sale of an oil and gas interest belonging to a minor. The whole import and purpose of it was to give an opportunity for competitive bidding for a minor's oil interests, and no technical refinement can read any other purpose into it. These rules are not promulgated to be flouted and disregarded and their terms evaded. It is therefore the holding of this court that the stipulation, and the order confirmatory thereof, entered into and confirmed on the 20th and 21st days of February, 1917, between one of the defendants in error, the National Oil & Development Company, and Thomas H. Carlile, guardian of Levi Carlile, one of the plaintiffs in error herein, is void and of no effect, and conveyed no interests of said minor.

[3, 4] There are two other propositions raised by the defendants in error, yet to be disposed of, and that is the question raised by the answer and the supplemental answer, whereby it is alleged: First, that the plaintiff in error Levi Carlile, after he became of age and having the power to contract, ratified the extension of said lease by accepting the royalties and doing others acts confirmatory of said extension.

In the case of *Capps v. Hensley*, 23 Okl. 311, 100 Pac. 515, in an opinion by Dunn, Justice, this court, after holding that a lease of agricultural lands made by a natural guardian without the sanction of a court or an order to lease was void as to the infant at his or the option of those who legally represented him, held that after becoming of age the minor could adopt or affirm the transaction of his father. But in that decision it was not necessary for the court to have so held, since the minor had died, and, the father being the sole heir, it was held that the father had adopted and affirmed the lease and acted in such a way that he was bound by the same, and in the reasoning of the case they seem to hold that the minor could have adopted or affirmed but not ratified, the case showing the distinction between ratification and affirmation or adoption.

Chief Justice Williams, in the case of *International Land Co. v. Marshall*, 22 Okl. 693, 98 Pac. 951, 19 L. R. A. (N. S.) 1056, held that, after a minor has arrived at the age of 21 years he could not sustain a suit to set aside a deed absolutely void, where such a minor had fraudulently misrepresented his age at the time of the transaction, until such minor had first tendered back the consideration received. Levi Carlile tendered the consideration back that the guardian received. Section 5035, Snyder's Compiled Laws of Oklahoma 1909, reads as follows:

"A minor cannot give delegation of power, nor under the age of 18, make a contract relating to real property, or any interest therein, or relating to any personal property not in his immediate possession or control."

Section 883, vol. 1, R. L. 1910, is the same, with the following added:

"Except as otherwise specially provided."

It appears from the above provision that a minor cannot grant a delegation of power even before or after he is 18 years of age. We do not think that a minor can ratify a void act. He might, by a new contract after becoming of age, adopt or affirm, as is expressed in the case of *Capps v. Hensley*, heretofore cited. The following is from 22 Oyc. 514:

"An infant cannot legally appoint an agent, or give a power, warrant, or letter of attorney. It has been frequently asserted that such acts on the part of an infant, as well as the acts of the person attempting to be appointed agent or attorney, are absolutely void; nevertheless there is also very respectable authority for the view that such acts are voidable only and not void."

In the case of *Trueblood v. Trueblood*, 8 Ind. 195, 65 Am. Dec. 756, we find the following:

"Infant's appointment of agent is act absolutely void; and the act of a person assuming to be agent of an infant cannot be ratified by the latter after attaining majority. * * *

"In the first volume of *American Leading Cases* (3d Ed.) 248 et seq., the doctrine is laid down, as the result of the American cases on the subject, that the only act an infant is incapable of performing as to contracts is the appointment of an agent or attorney. Whether the doctrine is founded in solid reason, they admit, may be doubted, but assert that there is no doubt but that it is law. See the cases there collected."

"The law seems to be held the same in England. In *Doe v. Roberts*, 16 Mee. & W., 778, a case slightly like the present in some respects, the attorney in argument said: 'Here a tenancy has been created, either by the children or by Hugh Thomas, acting as their agent.' Parke, B., replied: 'That is the fallacy of your argument. An agreement by an agent cannot bind an infant. If an infant appoints a person to make a lease, it does not bind the infant, neither does his ratification bind him. There is

no doubt about the law; the lease of an infant, to be good, must be his own personal act.' So here, had the bond been the personal act of the infant, he could have ratified it. It would have been simply voidable. But the bond of his agent, or one having assumed to act as such, is void, and not capable of being ratified. See *Hiestand v. Kuns*, 8 Blackf. 345."

Since we have held that this stipulation, and the order confirming the same, is void and of no effect, then it constitutes an unauthorized act of the guardian with no sanction of law or the court with the effect of legalizing it; neither is it the act of the minor after reaching the age of 18. The minor is therefore incapable of legalizing the same after reaching age. He might adopt or affirm by way of a new contract or what would amount to a new contract, as suggested in *Capps v. Hensley*, heretofore cited.

The statute heretofore quoted absolutely forbids a minor, at any time during his minority, giving a delegation of power. In other words, appointing an agent. And any such appointment is absolutely void, and any one who assumes to act for him, the act done is absolutely void, and the minor cannot ratify such act after his majority.

The question as to whether he can adopt or affirm by a new contract is a question we are not herein determining. And what acts would constitute such an adoption or affirmation we are not undertaking herein to define.

In the case of *Capps v. Hensley*, heretofore cited, the following quotation is given from Wald's *Pollock on Contracts* (3d Ed.) pp. 620, 621:

"A party to an apparent agreement which is void by reason of fundamental error has more than one course open to him. * * * He is entitled to treat the supposed agreement as void, and is not, as a rule, prejudiced by anything he may have done in ignorance of the true state of the facts, yet, after that state of facts has come to his knowledge, he may nevertheless elect to treat the agreement as subsisting, or, as it would be more correct to say, he may carry his execution by the light of correct knowledge, the former intention which was frustrated by want of the elements necessary to the formation of any valid agreement. It is not that he confirms the original transaction, for there is nothing to confirm, but he enters into a new one."

After a minor has become 18 years of age, and under the laws of this state as they seem now to exist, he can enter into a contract personally as to any matter except the giving of a delegation of authority or the appointment of an agent, and the transaction, so entered into by the minor, is not void, but merely voidable and he can ratify it after he becomes of age. But a transaction involving the property of a minor that is absolutely void he cannot ratify upon the theory that the contract is nonexistent and there is nothing to ratify, but the authorities seem

to hold that after the full knowledge of the transaction is brought home to the minor, after he becomes of age, he may adopt or affirm it as his own contract, in other words, make a new contract, and such will bind him.

It appears from an examination of the pleadings in this case that the defendants below, defendants in error herein, set up the grounds of ratification of this contract by the plaintiff in error Levi Carlile, and he specifically denied the ratification of the contract, further stated in the reply that before he had received any of the moneys from the defendants in error pertaining to the royalties he had filed a petition, in the county court of Cherokee county, disavowing the contract and stipulation relied upon by the defendants in error, on the grounds that the same was void, and that said petition was not dismissed, until a day or two before the filing of the petition in the district court in the instant case; that he had hence disavowed the contract within the year after becoming of age.

The second question raised is one as to the abatement of suit. It also appears from the pleadings that on the 10th day of October, 1917, Levi Carlile executed to B. E. Capps an oil and gas lease on the premises in controversy herein, conveying a seven-eighths interest and reserving a one-eighth interest, and that he sues in this case, as far as his own interest appears, for himself and for the use and benefit and in behalf of B. E. Capps, the other plaintiff in error.

In the supplemental answer, filed by defendants in error, they have set up the fact that on the 5th day of March, 1918, Levi Carlile, one of the plaintiffs in error herein, by a warranty deed conveyed his interest in and to said land, and transferred his interest in the royalties coming therefrom, for and in the consideration of \$9,000, to John H. Kane. To this supplemental answer, there is no reply. The conveyance to John H. Kane was made after the institution of the present suit, and on, to wit, March 5, 1918, while the instant suit was filed January 31, 1918. The defendants in error contend that since Levi Carlile has conveyed his interests in the subject-matter of this suit and is not the real party in interest, the suit for that reason abated. We do not think the suit is abated in this case. In the case of *Cushing v. Newbern et al.*, 75 Okl. 258, 183 Pac. 409, and wherein the interests of the plaintiff were conveyed, as in the present suit, this court, through McNeill, Justice, stated as follows:

"As to the intervener, Lucy Harjo, the plaintiff argues that by reason of her having disposed of her interest prior to the termination of the suit she could no longer maintain her action to quiet title. Section 4695 of the Statute (R. L. 1910) provides as follows: '* * * In case of any other transfer of interest, the action may be continued in the name of the original party, or the court may

allow the person to whom the transfer is made to be substituted in the action.' It appears that this statute is controlling in the case at bar, and the plaintiff presented no authority or reason why this statute should not govern. We therefore hold that in the case at bar the statute will govern and it was not error to permit Lucy Harjo to continue to prosecute the case in her name. We hold this case to be controlling in the instant suit."

We therefore hold that the trial court committed error in sustaining the demurrer to the petition and in sustaining the motion for judgment on the pleadings and the judgment of the trial court is reversed, and the cause remanded for such other and further proceedings as are not inconsistent with the holding herein.

HARRISON, C. J., and JOHNSON, McNEILL, and NICHOLSON, JJ., concur.

On Rehearing.

McNEILL, J. The defendants in error have filed a very extensive brief in support of their petition for rehearing, and in addition thereto numerous attorneys have filed amicus curiae briefs. The trial court sustained a demurrer to the petition as to one defendant, and sustained a motion for judgment on the pleadings as to the other defendant. The petition asked for cancellation of the oil and gas lease upon several grounds, to wit: First, that it was obtained by fraud; and second, that the procedure adopted in procuring said lease was in direct violation of rule 9 of this court.

It was alleged the lease at the time was of the reasonable value of \$15,000, and the same was obtained for the sum of \$100. If we accept the allegations of the petition as true, it is very apparent a great injustice has been perpetrated upon the minor, and a valuable oil and gas lease obtained upon his property through a pretended court proceeding at such a grossly inadequate consideration that it should at least appeal to the conscience of a court of equity. While those filing amicus curiae briefs are interested in this court rendering the proper decision and the properly protecting the rights of both parties to the litigation and correctly announcing the law, but in no instance have they under the facts as stated suggested that the minor was entitled to any relief. A great portion of the briefs for rehearing suggests the proposition that rule 9 of this court is simply a rule of procedure and a failure to comply with said rule, when acquiring an oil and gas lease, upon the lands of a minor, where the lease has been confirmed by the court, will not render, the lease void. In dealing with this question it is necessary to first consider the power and authority of this court to prescribe rules relating to probate procedure in the county court, where not pre-

(201 P.)

scribed by statute, and not in conflict with the Constitution nor statutes of this state.

[5] The power and authority of this court to prescribe such rules and the force and effect of such rules when promulgated was decided by this court in the case of *State ex rel. Freeling v. Kight*, 49 Okl. 202, 152 Pac. 362, where the court stated:

"By section 2, art. 7, of the Constitution, * * * the Supreme Court is given jurisdiction to exercise a general superintending control over all inferior courts and all commissions and boards created by law, and this jurisdiction is a separate and distinct grant from its appellate jurisdiction."

In the first syllabus the court stated:

"By virtue of section 5347, Rev. Laws 1910, the Justices of the Supreme Court are given authority to prescribe such rules regulating procedure in probate matters as are necessary to carry the provisions of the Code into effect, and to prescribe such further rules * * * as they therewith may deem proper."

[6] The second syllabus is as follows:

"Such rules when so prescribed apply to and are binding upon the county courts of this state, and such courts and the judges thereof are without power to dispense with the requirements of such rules, or to vacate or set the same aside, or to prescribe other rules in lieu thereof or in conflict therewith."

In the body of the opinion, the court quoted with approval from 6 Stand. Ency. 63, as follows:

"Rules have the force and effect of law, and are binding upon litigants, and upon counsel, upon the court and its officers. A rule made pursuant to statutory authority by an appellate court to govern the procedure in inferior courts is binding upon the latter, and rules adopted by a board or convention of judges are binding upon the individual judges."

In the body of the opinion the court quoted with approval from 18 Ency. P. & P. 1271, as follows:

"Although courts may sometimes dispense with the requirements of their own rules, it is uniformly held that they have no such power in regard to rules prescribed for them by a higher court."

The opinion in the above case was cited, approved, and followed by this court in the case of *Haddock v. Johnson*, 80 Okl. 250, 194 Pac. 1077.

[7] Let us now consider the contention of the defendant in error on rehearing in view of the decision of this court in the case of *State ex rel. Freeling v. Kight*, supra, where the court stated:

"Rules have the force and effect of law, and are binding upon litigants and upon counsel, upon the court and its officers."

The defendants in error do not complain of the statement of law as announced above,

but state that a rule of procedure cannot deprive the court of jurisdiction. If rule 9 has the same force and effect as an enactment of the Legislature, then let us treat it as if it was one of the sections of our statute relating to the sale of an oil and gas lease upon the lands of the minor. The first portion of the rule provides:

"No oil or gas lease or other mineral lease covering lands belonging to minors or incompetents will be approved except after a sale in open court to the highest and best responsible bidder."

Let us compare this with section 6384, R. L. 1910:

"No sale of real estate at private sale shall be confirmed by the court unless the sum offered is at least ninety per cent. of the appraised value thereof, nor unless such real estate has been appraised within one year of the time of said sale."

These sections, one dealing with the confirmation of sale of an oil and gas lease, the other with the confirmation of the sale of the land of minors contain very similar language, and the language in one is as mandatory or prohibitive as the language in the other. This court had section 6384 under consideration in the case of *Winters v. Oklahoma Portland Cement Co.*, 164 Pac. 965, the court in the fifth syllabus announced the following rule:

"The provision of the statutes [Rev. Laws 1910, § 6384] which provides that no sale of lands of minors at private guardianship sale shall be confirmed where the bid is not 90 per cent. of the appraised value, or where there has been no appraisal of such lands within a year prior to the sale, is mandatory, and goes to the jurisdiction of the court to make the order of confirmation. Where an order of confirmation of such a sale is made in violation of such provision, the order of confirmation is void for want of jurisdiction."

In that case it was urged that the failure to appraise the lands or a sale for less than 90 per cent. of the appraised value was a mere irregularity, and was cured by the order of confirmation of the sale, and in support of that contention the parties relied on the case of *Eaves v. Mullen*, 25 Okl. 679, 107 Pac. 433; *Sockey v. Winstock*, 43 Okl. 758, 144 Pac. 372, and the same cases that are relied upon in this case.

In the above case, this court in commenting upon the case of *Eaves v. Mullen*, supra, used this language:

"The rule announced in *Eaves v. Mullen*, supra, as to the effect of irregularities and defects after the acquirement of jurisdiction and antecedent to the order of confirmation was based upon decisions from the Supreme Court of the United States and the appellate courts of California, South Dakota, and Arkansas. We do not find where the three first named courts have passed upon the question as to whether a vio-

lation of the appraisement by the order of confirmation, in a private guardianship sale, is a mere irregularity or is a jurisdictional departure, but the Supreme Court of Arkansas, in the case of *Mobbs v. Millard et al.*, 106 Ark. 563, 153 S. W. 821, rendered after the decisions in the Arkansas cases cited in *Eaves v. Mullen*, held that such a violation was not an irregularity, but a jurisdictional departure, rendering the order of confirmation absolutely void. In *Mobbs v. Millard et al.*, supra, the Arkansas court said:

"Under the law a minor cannot act for himself, and his guardian is his statutory agent. The requirement that no real estate of any minor shall be sold for less than three-fourths of its appraised value was passed for his protection pursuant to a general principle of public policy. Appraisement means valuation. Thus it will be seen the Legislature provided a means for fixing in advance the lowest valuation at which a minor's land can be sold. In the instant case it is conceded that the land was sold for less than three-fourths of its appraised value. * * * We hold that the sale was not in substantial compliance with the statute, and is invalid. * * * We do not wish to be understood as holding that errors and irregularities in making the appraisements or in otherwise complying with the provisions of the statute in regard to the sale would not be a substantial compliance with the provisions thereof. * * * But we do hold that an essential requirement of the statute in regard to the sale of a minor's land cannot be entirely omitted and wholly disregarded."

The learned commissioner in the opinion used the following language:

"We must hold that the provision that no private guardian's sale shall be confirmed by the court unless the sum offered is at least 90 per cent. of the appraisement, nor unless the real estate sold has been appraised within one year from the time of such sale, is mandatory, and that an order of confirmation and guardian's deed violating this provision are absolutely void. We should not be understood as holding, however, that mere irregularities in the appraisement proceedings would have such effect, if such irregularity was not such as to deprive the appraisement of substance."

The case of *Winters v. Oklahoma Portland Cement Co.* was before this court a second time, and entitled *Oklahoma Portland Cement Co. v. Winters*, 77 Okl. 36, 186 Pac. 468, as the second syllabus in the case quoted the fifth syllabus in the former case, and in the body of the opinion the court, speaking through Justice Kane, stated as follows:

"Moreover, we have examined the opinion of Commissioner Johnson again, as we did when we approved it on former appeal, and believe that the ruling on the question now under consideration is correct. The authorities cited by the learned commissioner are in point, and support his ruling on this question, and the conclusion reached is not, as contended contrary to the decisions of this court in *Hathaway v. Hoffman*, 53 Okl. 72, 153 Pac. 184, *Baker v. Cureton*, 49 Okl. 15, 150 Pac. 1090, *Welch v. Focht*, 67 Okl. 85, 171 Pac. 730, *L. R. A.*

1918D, 1163, or any other case of this class. In our judgment this case, as held by the learned commissioner, is governed by the authorities cited by him in support of his opinion, and particularly by such cases as *Roth v. Union National Bank*, 58 Okl. 604, 160 Pac. 505, and *Mobbs v. Millard*, 106 Ark. 563, 153 S. W. 821. We think the case of *Roth v. Union National Bank*, supra, is precisely in point in principle. As the opinion prepared by the learned commissioner carefully and satisfactorily distinguishes *Hathaway v. Hoffman*, *Baker v. Cureton*, and other cases of this class relied upon by counsel for defendant from the case at bar and the other cases by which it is ruled, no further discussion of these cases is necessary."

This court in a later opinion in the case of *Glory v. Bagby*, 79 Okl. 155, 188 Pac. 881, followed the rule announced in the case of *Winters v. Oklahoma Portland Cement*, supra.

It would be inconsistent to hold that the sale of the lands of the minor sold at private sale for less than 90 per cent. of the appraised value, or where sold without appraisement in violation of section 6384, R. L. 1910, was a jurisdictional departure, and rendered the proceedings void, and to hold that the Constitution and statute of this state empowered this court to prescribe rules for county courts in probate procedure, and that the rules so prescribed have the same binding force and effect as a statute, and then to hold that a total failure to comply with rule 9, which contains just as strong and mandatory language as section 6384, would not be a jurisdictional departure and render the proceeding void.

It is contended that no rule of procedure or no statute relating to procedure can deprive a court of jurisdiction. This is perhaps a correct statement of the law, but a rule of procedure or the statute relating to procedure simply prescribes how and when a court may exercise the jurisdiction conferred upon it. The county court has jurisdiction over the estates of minors, but the different section of the statute relating to procedure prescribed when and how the court must exercise that jurisdiction. This court is committed to the rule, if the statute relating to procedure is mandatory, the court must substantially comply with the provisions thereof. As to whether the statute is mandatory or directory must be determined from the reading of the statutes themselves and the intent of the framers when ascertained must control.

[8] Bearing in mind that section 2, article 7, of the Constitution, and section 5347, R. L. 1910, conferred upon the justices of the Supreme Court power and authority to promulgate rules regulating procedure in probate matters, and that this court has held that such rules when promulgated had the force and effect of statutes and was binding upon the inferior courts, in determining whether the rules were intended by the court to be mandatory or directory we must be governed by the same rules of construction that is ap-

applicable in construing statutes, and the intention of the parties when ascertained must control. There is another rule applicable, and that is announced in the case of *Harper v. Victor*, 212 Fed. 903, 129 C. O. A. 423, where the court stated as follows:

"A statute should receive a rational sensible interpretation, one which tends to avoid or remove the mischief at which it was leveled and to accomplish the object sought by the legislative body which enacted it, rather than one which promotes or permits the evil and avoids the accomplishment of the purpose of the enactment."

[9, 10] With this principle in mind, let us consider the reason, or apparent reason, if any, for adopting rule 9. In the year 1914, when rule 9 was adopted, this court consisted of practically the same members as when the opinion in the case of *Duff v. Keaton*, 33 Okl. 92, 124 Pac. 291, 42 L. R. A. (N. S.) 472, was adopted, and the court upheld a sale of oil and gas mining lease in the absence of fraud, where a petition was filed for the sale of an oil and gas lease and on the same day, and the court made an order authorizing the guardian to sell an oil and gas lease to the highest and best bidder, and on the same day the guardian reported that he had sold a lease upon the land, and on the same day the court approved the sale. It is very apparent the court did not consider this procedure a sufficient protection for the minor, as the proceedings might all be consummated within an hour's time, and no one except the party interested would have knowledge that valuable oil rights of the minor was being offered for sale. Prospective purchasers would have no opportunity to bid, and in this manner the rights of the minor would not be protected, and his property would be disposed of at a very inadequate consideration. To avoid this vice, and to avoid the evil effects of such proceedings, the court adopted the rules. Why did the court deem it necessary that it be sold to the highest and best bidder? In order that the minor's rights might be protected, and he would receive a just compensation for his property. The rules were no doubt promulgated to prevent just what occurred in the case at bar, to wit, the alleged sale of a valuable lease worth \$15,000 for the sum of \$100. The requirements that the petition be on file a certain length of time, and that the sale be in open court, with an opportunity for every one to bid, was promulgated by the court for the protection of the minor.

As was said in the case of *Mobbs v. Millard*, 106 Ark. 563, 153 S. W. 821:

"The requirement that no real estate of any minor shall be sold for less than three-fourths of its appraised value was passed for his protection pursuant to a general principle of public policy [for the protection of the minor]."

It is, however, contended that this decision overrules the case of *Eaves v. Mullen*. This same contention was urged in the case of *Winters v. Oklahoma Portland Cement Company*, but this court held otherwise. The decisions of the Supreme Court of Arkansas, cited to support the case of *Eaves v. Mullen*, followed the former decisions of that court, and the court in its opinion stated the law as announced had become a rule of property in that state. The law announced by the majority of the court was severely criticized in a dissenting opinion in the case of *Apel v. Kelsey*, 52 Ark. 341, 12 S. W. 703, 20 Am. St. Rep. 183, and suggested that if it had become a rule of property it was the duty of the Legislature to change the same by a legislative enactment.

The Legislature made a minor change in the law, and the court refused to follow its former decisions, and announced the rule in the case of *Mobb v. Millard*, supra, which was cited with approval, and followed in the case of *Winters v. Portland Cement Co.*, which was adopted November 28, 1916, and a rehearing denied May 15, 1917, so at the time of acquiring the lease in this case, it was the recognized law of this state that the rule of this court in relating to probate procedure in obtaining oil and gas leases were binding upon the lower court, and had the same force and effect as a statute.

It was likewise the recognized law of this state that the order of confirmation of a sale of the minor's property, in violation of section 6384 of the statute, was void, for want of jurisdiction, so there can be no rule of property upon which the plaintiff in error can rely. It is suggested in some of the briefs that this was not really a sale of the minor's property. This contention we think is well answered in the original opinion. If it is not a sale, it is simply a subterfuge by acquiring a minor's property by a procedure of "stipulation" and "modification."

The National Oil Company had an oil and gas lease upon this minor's property, and in a few months he would become of age, and its lease would terminate. The day he would become of age, he would have a right to the land and all of the oil. The county court would no longer have jurisdiction over his estate. He would have a right to make the kind and character of lease he desired, or he would have the right to produce the oil himself, as the wells had been already drilled. To deprive him of that right a procedure termed "stipulation" and "modification" was invoked, and the same confirmed by the county court, thereby attempting to deprive him of a valuable lease upon his property for an inadequate consideration. There was no substantial compliance with the rules of this court, and the county court was without jurisdiction to adopt a procedure in direct violation of the rules of this court.

For the reasons stated, the petition for rehearing is denied, and the former opinion adhered to.

HARRISON, C. J., and JOHNSON, KENNEMAR, ELTING, and NICHOLSON, JJ., concur.

Ex parte PHILLIPS et al.
(Nos. 4084, 4085.)

(Criminal Court of Appeals of Oklahoma.
Oct. 29, 1921.)

(Syllabus by Editorial Staff.)

Habeas corpus \S 85(1)—Proof and presumption held to warrant bail.

Where a charge of murder was predicated upon a charge of conspiracy, evidence in habeas corpus proceedings held such that the proof could not be held evident or the presumption great, so that bail should be granted.

J. W. Phillips and Alexander Watson were charged with murder and held without bail by order of the examining magistrate, and, bail being refused them by the district court, they bring habeas corpus. Writ denied as to J. W. Phillips, and allowed as to Alexander Watson.

Cornellus Hardy, of Tishomingo, H. H. Brown, of Ardmore, and P. B. H. Shearer, of Tishomingo, for petitioners.

E. L. Fulton, Asst. Atty. Gen., and W. D. French, Co. Atty., and J. S. Ratliff, both of Tishomingo, for respondents.

PER CURIAM. The petitioners in this case were separately charged with the murder of J. M. (Marion) Williams at Tishomingo, Johnston county, on August 3, 1921, and are being held without bail, pursuant to an order made by the examining magistrate after a joint preliminary hearing. Both petitioners were denied bail by the district court of Johnston county. The applications here are Nos. 4084 and 4085, and by agreement of parties were by this court heard and considered together.

The record before us consists of the testimony taken before the examining magistrate against both petitioners at their joint preliminary; affidavits in support of and in resistance of petitioners' applications here; and the oral testimony of both petitioners offered before this court.

From a careful consideration of all these it is the opinion of the court that, according to the showing thus far made, the proof is evident and the presumption great that J. W. Phillips is or may be guilty as charged and is not entitled to bail, and his application for bail is therefore denied.

As to the application of Alexander Watson, the charge of murder against him is predicated upon a charge of conspiracy, and, so far as is shown here, this theory of the case for the most part must stand or fall upon the testimony of two illiterate witnesses, who at different times, under pressure and upon the receipt of money without consideration made statements exonerating the petitioner Alexander Watson; later, under influence and pressure and upon the receipt of money without consideration, these two witnesses repudiated and still repudiate their statements first made, which later statements tend to implicate this petitioner as a conspirator with the other petitioner, J. W. Phillips.

Under this state of facts we cannot say that the proof as to Alexander Watson is evident or the presumption great that he is guilty of the crime of murder as charged. It is therefore ordered that the petitioner Alexander Watson be admitted to bail in due form of law in the sum of \$25,000 upon the making of a good and sufficient bond to be approved by the court clerk of Johnston county, Okl.; and the respondent, the sheriff of Bryan county, upon proof of the execution and approval of such bond, is ordered to release the petitioner Alexander Watson.

BLUNT v. STATE. (No. A-3583.)

(Criminal Court of Appeals of Oklahoma.
Oct. 31, 1921.)

(Syllabus by Editorial Staff.)

Criminal law \S 1079, 1081—Appeal will be dismissed for want of service of notice or summons in error.

Oral notices of appeal in a criminal case are insufficient, since Laws 1917, c. 219, relates solely to civil cases, and has no application to criminal appeals, and the appeal will be dismissed where notices were not served on the county attorney or county clerk, and no summons in error was issued, or served on the Attorney General; such not being waived.

Appeal from District Court, Oklahoma County; Frank Mathews, Special Judge.

Ed Blunt was convicted of manslaughter in the first degree, and he appeals. Appeal dismissed.

Prulett, Sniggs, Patterson & Morris, of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., and E. L. Fulton, Asst. Atty. Gen., for the State.

PER CURIAM. This is an attempted appeal from a judgment of conviction rendered in the district court of Oklahoma county

against the defendant, Ed Blunt, for the crime of manslaughter in the first degree; the punishment assessed at imprisonment in the state penitentiary for a term of 10 years.

The Attorney General has filed a motion to dismiss the appeal on the ground that no notices of appeal were served on the county attorney or court clerk, and no summons in error was issued and served upon Attorney General, or the same waived. Responding to said motion, counsel for defendant rely solely upon notice given in open court, as provided in chapter 219, Session Laws 1917, as sufficient to give this court jurisdiction of the appeal.

In the case of *Burgess v. State*, 17 Okl. Cr. —, 197 Pac. 173, this court held:

"Chapter 219, Sess. Laws 1917, did not repeal sections 5989, 5992, and 5997, Rev. Laws 1910, relating to the manner and methods of taking an appeal in criminal causes and giving notice thereof. Said chapter 219 relates solely to the giving of notice of appeal in civil causes, and has no application to criminal appeals.

"Where appellant, within the time allowed for taking an appeal, served no notice of appeal upon the clerk of the court or county attorney, as provided by Rev. Laws 1910, § 5992, and no summons in error was issued and served upon the Attorney General, nor any waiver of the issuance and service ever made by him, within section 5997, or any general appearance entered by him, the Criminal Court of Appeals has no jurisdiction to entertain the appeal on its merits, and will dismiss it."

The sufficiency of an oral notice to confer jurisdiction of an appeal in a criminal cause was directly passed upon in the *Burgess Case*, and decided adversely to contentions of defendant's counsel in this case. We see no reason at this time to depart from the holding in the *Burgess Case*. The same is adhered to, and for reasons stated in that opinion this appeal is dismissed.

Ex parte CHAMBERS. (No. A-4098.)

(Criminal Court of Appeals of Oklahoma.
Oct. 29, 1921.)

(Syllabus by Editorial Staff.)

Habeas corpus §85(1)—Evidence indicating manslaughter held to warrant bail.

In a habeas corpus proceeding to secure bail for defendant charged with murder, evidence of altercation between plaintiff and deceased showing that deceased became unconscious after the assault had ended voluntarily, and subsequently died held to indicate probability of manslaughter and to warrant bail.

Jerome Chambers was charged with murder and committed without bail by the ex-

amining magistrate, and the district judge denied his application for bail, and he seeks bail by habeas corpus. Prisoner admitted to bail.

Pryor & Stokes and Joel E. Hall, all of Wewoka, for petitioner.

Lewey O. Gilstrap and Crump & Carver, all of Wewoka, for respondent.

PER CURIAM. The petitioner, Jerome Chambers, was charged with the murder of A. J. Horton in Seminole county on the 15th day of September, 1921, and was committed without bail to answer this charge by the examining magistrate. Later the petitioner made application to the district judge of Seminole county to be admitted to bail, and the district judge, upon hearing, denied the application.

The testimony before us seems to disclose that the petitioner, in the heat of passion, assaulted the deceased by striking him on the head with a pistol, with an intent to severely punish the person assaulted, but without an intent to kill; that the assault ended voluntarily, and both the defendant and the deceased left the scene of the altercation; that the deceased some hours later became unconscious, and died on the following day from the effects of the blow.

In our view of the evidence before us there was probably no premeditated design evinced by the petitioner to effect the death of the person assaulted, nor does it seem probable, that the assault was perpetrated in a manner showing a depraved mind, regardless of human life and imminently dangerous to others. Unless other testimony is later adduced, showing a different state of facts, the accused is probably guilty of manslaughter, and not of murder.

The petitioner will therefore be admitted to bail in the sum of \$15,000 by making a good and sufficient bond in that sum within 15 days from this date, to be approved by the court clerk of Seminole county.

WILSON v. STATE. (No. A-3708.)

(Criminal Court of Appeals of Oklahoma.
Oct. 31, 1921.)

(Syllabus by the Court.)

1. Criminal law §1159(2)—Where there is apparently credible evidence to sustain judgment, it will not be reversed for insufficiency of evidence.

Where there is evidence, apparently credible, in the record, which, if believed, is sufficient to sustain the judgment, this court will not reverse the case on the sole ground of the insufficiency of the evidence.

(Additional Syllabus by Editorial Staff.)

2. Rape \Rightarrow 51 (4).—Prosecutrix's testimony held sufficient to sustain conviction.

Testimony of prosecutrix held sufficient to support a conviction for rape by force and violence, where prosecutrix resists, as defined in Rev. Laws 1910, § 2414, subd. 4.

Appeal from District Court, Blaine County, Thos. A. Edwards, Judge.

Charles A. Wilson was convicted of rape in the first degree, and he appeals. Affirmed.

I. H. Lookabaugh, of Watonga, for plaintiff in error.

S. P. Freeling, Atty. Gen., and E. L. Fulton, Asst. Atty. Gen., for the State.

MATSON, J. This is an appeal from a judgment of conviction for rape in the first degree, rendered against the defendant in the district court of Blaine county, on the 10th day of September, 1919, with punishment assessed at imprisonment in the state penitentiary for a period of 15 years, the minimum punishment for said offense. But one question is presented for review, viz. the insufficiency of the evidence to sustain the conviction.

The prosecutrix testified that on the night of the first Monday in June, 1918, the defendant escorted her home by automobile from a circus or tent show in the town of Okeene, a distance of several miles, and that on the way home the defendant forcibly pulled her from the car, threw her upon the ground, and ravished her against her will and by means of force and violence; that the prosecutrix resisted by fighting, striking, kicking, and scratching the defendant, but that the defendant overcame her resistance and accomplished the act of sexual intercourse. The defendant denied having any sexual intercourse with the prosecutrix, but admitted that on one occasion he did take her in an automobile to her home from the town of Okeene, and admits that he pulled or jerked her out of the car; but in explanation of his conduct the defendant contends that the car had stopped at the top of a steep grade and defendant, seeing that the car would likely roll back down the grade and onto a dangerous bridge, asked the prosecutrix to jump out of the car, and upon her refusal to do so defendant pulled her out of the car, in order to protect her from the danger of car's likely skid down the hill.

The evidence of the prosecutrix is corroborated by that of her mother, to the effect that on the next morning the prosecutrix was

very sore, to such an extent that she was unable to get out of bed; that her clothing was torn in several places, and that about four blood spots the size of a quarter were discovered on her underclothing and the skirt of her dress, and that the prosecutrix at that time told her (the mother) that the defendant had ravished her the night before. The prosecutrix is also corroborated in her statement that the defendant took her to the tent show in Okeene that night, and then home in her car, by the testimony of one Irene Gray, a girl about her age, who lived on a farm owned by the defendant about 6 miles from Okeene. The Gray girl testified that she was with the defendant and the prosecutrix, Mary Beckloff, at the show that night, and rode with them as far as the defendant's farm, where she left them. The defendant denied this; at least, he said he did not remember it. Defendant, while denying the commission of the crime, admitted that he might have suggested to the prosecutrix that they have sexual intercourse; but he says he had no intention of having sexual intercourse with her. The testimony of the defendant is evasive, and at times contradictory, and we believe, on the whole, apparently incredible.

[2] The defendant was a man of mature years, with children near the age of the prosecutrix; the prosecutrix being a little over 17 years of age at the time of the commission of this offense. The testimony of the prosecutrix is sufficient to support a conviction of rape, as defined in the fourth subdivision of section 2414, Rev. Laws 1910. The act occurred in a secluded place on a public highway, near the hour of midnight; the nearest house, according to the testimony of the prosecutrix, being about a half mile distant. The prosecutrix resisted with all the force at her command at the time, and this resistance was overcome by the superior strength of the defendant. The clothing of the prosecutrix was badly torn, and there were blood spots upon her undergarments and also upon the skirt of her dress.

[1] This evidence was sufficient to support the conviction if believed by the jury, and it was the exclusive province of the jury to determine and decide the weight of the evidence and the credibility of the witnesses. Where there is evidence, apparently credible, in the record, which, if believed, is sufficient to sustain the judgment, this court will not reverse the case on the sole ground of the insufficiency of the evidence.

For reasons stated, the judgment is affirmed.

DOYLE, P. J., and BESSEY, J., concur.

SPESS v. STATE. (No. A-3617.)

(Criminal Court of Appeals of Oklahoma. Oct. 31, 1921.)

*(Syllabus by the Court.)*1. Homicide \S 250—Evidence held to sustain conviction.

For evidence examined and held sufficient to sustain a conviction for murder, see body of opinion.

2. Criminal law \S 825(3)—Instruction on alibi inartificially drawn not reversible error, where no request for more definite instruction.

An instruction on the defense of alibi, not fundamentally erroneous, will not be held to be reversible error because inartificially drawn.

Appeal from District Court, Pawnee County; Owen Owen, Judge.

James Spess was convicted of murder, and appeals. Affirmed.

Thompson & Smith, of Sapulpa, for plaintiff in error.

S. P. Freeling, Atty. Gen., and E. L. Fulton, Asst. Atty. Gen., for the State.

MATSON, J. James Spess was charged by information and convicted of the crime of murder in the district court of Pawnee county, and sentenced to life imprisonment.

The evidence on behalf of the state is to the effect that on the afternoon of the 12th day of January, 1921, three men held up and robbed the bank in the town of Tarlton. They came into town on horseback, and left their horses about a quarter of a mile from the bank in a creek bottom. Two of the men went into the bank, and the third was stationed at a point near the Frisco railroad tracks between the bank and the place where the horses were left. One of the two that went into the bank was armed with a pistol, the other with a rifle.

Several persons were in the bank at the time, some officers and employees of the bank, others, customers. The robbers at the point of their weapons compelled these parties to face the wall with their hands raised above their heads and also compelled the bankers to open the cash drawer and safe. After taking several hundred dollars of the bank's money (mostly in silver) and loading it into a sack, the bankers and others there were compelled to carry the sack to the place where the horses had been left. In the meantime one person, who was in a separate room of the bank, realizing what was taking place, escaped unnoticed through a rear door and organized a posse of citizens to apprehend the robbers, if possible. While the robbers and those who had been compelled to accompany them were at the horses, this

posse appeared, but the robbers had protected themselves by using the others as a line between them and the crowd that followed.

While the robbers were fixing the money on the horses, S. R. Moore, a deputy sheriff, stepped out into an open place in a field about 125 yards away and was shot and killed by a shot fired from a rifle in the hands of Spess.

[1] None of the robbers were masked. The entire transaction covered a considerable space of time—approximately 30 minutes—and during that time the parties who were compelled to accompany the robbers had opportunity to and did observe them closely. These parties unanimously identify Spess as one of the men who entered the bank and the one who fired the shot that killed Moore.

In addition there is also the testimony of an alleged accomplice, Imhofe. This witness detailed the plan of the robbery, and testified Spess was one of the perpetrators thereof, and it is unnecessary to enlarge upon his testimony, except to state that it is corroborated by other circumstances and facts other than the evidence of the witnesses who positively identified Spess.

The defense interposed was an alibi, and numerous witnesses were introduced in behalf of defendant in an attempt to convince the jury that the defendant Spess was not and could not have been at the scene of the crime at the time of its commission.

The record is very voluminous, containing about 700 pages of typewritten matter and it would consume too much space to give a synopsis of each witness' testimony. The evidence is in direct conflict upon the question of the identity of the defendant and his presence at the commission of the robbery and murder of Moore.

The contention is advanced that this evidence is insufficient to support a conviction; that the great weight of the evidence, the most credible evidence supports the truthfulness of the alibi. All these witnesses were before the jury and the trial court. The jury after due consideration and deliberation decided this issue of fact adversely to the defendant. The trial court having seen these witnesses, noted their demeanor, etc., was in a much better position to judge of the correctness of the jury's decision than is this court.

While the evidence is conflicting and apparently irreconcilable, it was the exclusive province of the jury to determine whom of the witnesses to believe and whom to disbelieve or whose testimony to disregard.

The verdict was evidently not the result of passion or prejudice, as this trial took place over four years after the commission of the crime; neither do we think the verdict unfounded in fact—this being the second conviction and appeal by this defend-

ant to this court—the first trial resulting in a conviction of murder with life imprisonment. See *Spess v. State*, 13 Okl. Cr. 277, 164 Pac. 131. The evidence of the state is amply sufficient to support the conviction.

[2] It is also urged that the trial court committed reversible error in giving the following instruction on the defense of alibi:

"You are instructed that the defendant has interposed in this case as one of his defenses what is known in law as an alibi, that is, that the defendant was at another and different place at the time of the commission of the crime alleged and charged in the information herein. The law is that such a defense is proper and legitimate, and the jury should consider all of the evidence bearing upon this point, whether introduced by the state or the defendant, and if after a careful consideration of all the evidence, you are convinced beyond a reasonable doubt that the defendant was not at another and different place at the time of the commission of the crime charged in the information, then the defense known in law as an alibi has failed, and you should then consider the case the same as if the defendant had never interposed this defense; but, if you entertain a reasonable doubt, after a careful consideration of all the evidence in the case, as to whether the defendant was in such other and different place at the time the crime was committed, then and in that event you should resolve that doubt in favor of the defendant, and should acquit him."

Counsel for defendant has filed a lengthy brief, citing numerous authorities which are contended as being in point that the foregoing instruction is prejudicial, in that it places too great a burden on defendant to establish the defense of alibi, and that the instruction is evasive and confusive. No authority is cited containing a criticism of an instruction on alibi couched in the language employed by the trial court in the instant case.

In the case of *Thompson v. State*, 6 Okl. Cr. 50, 117 Pac. 216, this court, at page 66 of the official report (117 Pac. 223) set out a form of approved instruction on the defense of alibi. Here the trial court followed the form of instruction approved in the *Thompson Case* with certain additional matter which in our opinion does not in any particular require the defendant to establish his alibi beyond a reasonable doubt or even by a preponderance of the evidence. The instruction given, when considered as a whole, requires the jury to acquit if a reasonable doubt is entertained that defendant was in another and different place at the time the crime was committed. The instruction given is not fundamentally erroneous, and in the absence of a request for a more definite instruction on the subject we think it was sufficient.

The defense of alibi is not an involved one. The adult with ordinary intelligence and limited experience is fully able to under-

stand and comprehend that if a person (whose presence at the scene of the crime is relied upon for conviction) was at another different and distant place at that time, it was a physical, as well as legal, impossibility for such person to have committed the offense. Alibi is not an extrinsic defense. It amounts to nothing more than a mere traverse of the material averments of the information or indictment. It is introduced for the purpose of creating a reasonable doubt of guilt, and we think its nature is fairly understood by the average juror. Apparently it has been more of a nightmare to the courts than to the juries. As this defense involves a clear-cut issue of fact, practical men (such as compose a trial jury) can more readily comprehend and truthfully decide the issue than can the courts, trained in technicalities, establish uniform principles of law applicable to such defense in every jurisdiction. It may be seriously doubted if any instruction on alibi should be given beyond the general instructions "that the defendant is presumed to be innocent," and "that the burden rests upon the state to prove his guilt beyond a reasonable doubt." The views herein expressed result from a consideration of the numerous and conflicting decisions construing instructions on alibi and the varied reasons given for such holdings.

In some jurisdictions the burden is upon the defendant to establish this defense "to the satisfaction of the jury," in others "by a preponderance of the evidence," in others "by evidence tending to raise a reasonable doubt of guilt." Why these various holdings? Certainly such confusion could never have arisen had no specific instruction on alibi been given. In all these jurisdictions the state is required to establish guilt "beyond a reasonable doubt"; if the burden never shifts to the defendant to establish his innocence, then it is apparent that any evidence (be it that of alibi or weakness of the state's case) which creates a reasonable doubt is sufficient to authorize an acquittal.

The general instruction on "reasonable doubt" ought to be sufficient to cover a simple issue of fact such as an alibi, any other instruction on the subject if correctly stated in this jurisdiction, would be nothing more in its final analysis than stating the same burden in different language.

While we cannot give our unqualified approval to the form in which the foregoing instruction was given, it cannot be said that the instruction as a whole was prejudicial, or that it shifted the burden from the state to establish guilt "beyond a reasonable doubt."

The judgment of the trial court is affirmed.

DOYLE, P. J., and BESSEY, J., concur.

Ex parte BAKER. (No. A-4080.)

(Criminal Court of Appeals of Oklahoma.
Oct. 29, 1921.)*(Syllabus by Editorial Staff.)***Habeas corpus** §85(1)—Bail not allowed where proof of the killing is evident and presumption great.

Where the proof in habeas corpus proceedings seems evident, and the presumption great, that defendant killed a man as charged, while intoxicated, he will not be admitted to bail.

Charlie Baker was charged with murder, and his application to the district court for bail was denied, and he seeks bail by proceeding in habeas corpus. Bail denied.

Anglin & Stevenson, of Holdenville, for petitioner.

Geo. C. Crump and Hugh A. White, both of Holdenville, for the State.

PER CURIAM. Charlie Baker, the petitioner, was on the 29th day of July, 1921, arrested, charged with the murder of Thurman Hines. Later an information was filed in the district court of Hughes county charging the petitioner with murder, and he has since been held in the county jail without bail. On August 29, 1921, application was made to the district judge of Hughes county to admit petitioner to bail, and upon hearing the district judge denied the application. On September 16, 1921, application for bail was filed in this court.

The testimony before us indicates that at the time of and before the homicide petitioner was city marshal of the town of Gerty, in Hughes county, that there was a public dance in a hall over a drug store on the night of the homicide, and that the petitioner on that day and night had been drinking heavily of several kinds of intoxicating liquor, and at the time of the homicide was in a state of voluntary intoxication; and that he and several companions, probably also under the influence of liquor, went to this dance, where the killing occurred at about 10:30 on the night of July 28, 1921.

The testimony indicates that the petitioner was not so drunk as to be unable to deliberate. To us the proof seems evident and the presumption great that, although there may have been no intention on the part of the petitioner to take the life of Thurman Hines, or possibly of any one else, yet he did kill Thurman Hines in a manner imminently dangerous to others and evidencing a depraved mind, without regard for human life.

The application for bail is therefore denied

COOK v. STATE. (No. 512.)

(Supreme Court of Arizona. Oct. 29, 1921.)

Forgery §34(3)—Check of individual admitted in evidence held materially different from the check of same person as superintendent, described in the information.

In a prosecution for forgery, the check offered in evidence, purporting to be by one as superintendent, differed materially from the copy set out in the information, purporting to be by the same person as an individual, and the variance was fatal.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

A. C. Cook was convicted of forgery, and he appeals. Reversed, and new trial granted.

Thomas J. Croaff, of Phoenix, for appellant.

W. J. Galbraith, Atty. Gen., and R. E. L. Shepherd, Co. Atty., of Phoenix, for the State.

FLANIGAN, J. The appellant was convicted of the crime of forgery, under an information which charged the uttering, passing, and publication of a certain forged bank check of the following tenor:

"Florence, Arizona, April 30, 1920. No. 508.

"Pinal Bank and Trust Company 91-80

"Pay to the order of A. C. Cook \$50.00.

* * * Only Fifty * * * Dollars.

"[Signed] C. G. Powell."

Upon the trial there was offered in evidence by the state, in support of the charge, an instrument in form as follows:

"Arizona State Prison, C. G. Powell, Supt.

"Florence, Arizona, April 30, 1920. No. 508.

"Pinal Bank and Trust Company 91-80

"Pay to the order of A. C. Cook \$50.00.

* * * Only Fifty * * * Dollars.

"C. G. Powell, Superintendent,

"By — Secretary."

Defendant duly objected to the reception of such instrument in evidence, upon the ground of variance between it and the check described in the information. This objection was overruled, and the instrument admitted. Upon the conclusion of the testimony for the state, the defendant moved for a directed verdict, "for a fatal variance between the allegations in the information and the instrument which was introduced in evidence." This motion was denied. Appellant offered no evidence. A verdict of guilty was returned, judgment rendered thereon, and defendant was sentenced to be imprisoned under the judgment. Defendant moved for a new trial, which was denied.

Upon this appeal, error is assigned to the rulings of the court: (1) Admitting in evidence the check referred to; (2) refusing to

direct a verdict of not guilty at the conclusion of the state's case; (3) denying defendant's motion for a new trial—all based upon the ground that there was a fatal variance between the instrument set out in the information and the instrument put in evidence. We shall consider these assignments in the order they are made.

A defendant in any proceeding, criminal or civil, is entitled to know the exact nature of the charge made against him, that he may make defense thereto, and that there shall be preserved an unerring record of the matter adjudicated, lest he be twice vexed for the same cause. And so far as the specific criminal charge made in this case is concerned, the following quotation from the opinion in *People v. Crane*, 4 Cal. App. 144, 87 Pac. 240, well and fairly states the law:

"The rule which in early days prevailed in prosecutions for forgery, that the instrument set forth in the indictment must be an exact copy of that offered in support of the charge, has been in modern days relaxed to the extent that, unless the variance is such that the defendant may have been prejudiced in making his defense, or exposed to the danger of being again put in jeopardy for the same offense, it will be held to be immaterial. See *People v. Phillips*, 70 Cal. 61, 11 Pac. 493. The requirement that the instrument offered in evidence must conform to that laid in the indictment has reference to its identity and the manner in which it is described. If its identity is so apparent that a conviction or acquittal of the defendant would be a bar to any further prosecution for the same offense, the variance will be insufficient to justify its exclusion. The presence or absence of unimportant words which do not affect the sense of the instrument, or change its identity in any material respect, will not constitute a material variance."

Applying these principles, we have no hesitancy in holding the ruling complained of to be erroneous. It being incumbent upon the state to substantiate the charge made, it could in no event prevail without, at the least, proving that the instrument described in the information and that offered in evidence were in fact identical. To make that proof in this case certainly called for some explanation of why instruments patently different were to be taken, nevertheless, as one and the same. Although no such explanation was made or offered, the check was admitted unconditionally as being the instrument described in the information. We hold this was error.

Nor was this error cured by the evidence subsequently admitted. On the contrary, such evidence strongly tended to show that the passage and utterance of the check admitted was a separate and distinct forgery committed by the defendant. The cashier of the Pinal Bank & Trust Company, testifying for the state, said that this check, if good, would have been recognized as a draft upon the

"state prison fund," and not upon the personal account of Mr. Powell with the bank; that the secretary of the prison, Mr. Spillman, usually made deposits to the credit of the "state prison fund"; that Mr. Powell's personal checks were signed "C. G. Powell," and checks upon the prison might be signed by the superintendent C. G. Powell, or by the secretary, Mr. Spillman. The check received had therefore a different legal effect from the one charged, being drawn upon another fund and by the drawer in an official capacity; in short, upon this record no conclusion can be drawn, other than, if the defendant is guilty at all, he is guilty of a crime not charged in the information.

We hold, therefore, that motion for a directed verdict of acquittal should have been granted, and that defendant was entitled to a new trial. These conclusions render it unnecessary to consider the error assigned to the sentence imposed.

The defendant having moved for a new trial, our order must be that the judgment is reversed, with instructions to the court below to grant defendant a new trial, and to take such other proceedings as may not be inconsistent herewith.

ROSS, C. J., and McALISTER, J., concur.

WALKER v. STATE. (No. 511.)

(Supreme Court of Arizona. Oct. 29, 1921.)

1. Rape \S 51(1)—Evidence that prosecuting witness was not wife of accused need not be direct, but circumstances held sufficient.

Evidence that the prosecuting witness was not the wife of the accused need not be direct, and circumstantial evidence held sufficient.

2. Criminal law \S 369(8)—Evidence of similar offenses not admissible in prosecution for rape.

In a prosecution for forcible rape, evidence of other similar crimes against other persons than prosecutrix is inadmissible.

3. Criminal law \S 1171(1)—Misconduct of counsel for the state in trial for rape held prejudicial.

Misconduct of the state's attorney in a prosecution for rape, in repeatedly propounding improper and incompetent questions to accused and two other witnesses, the purpose in asking the questions being to get before the jury statements in the guise of questions, though objections to evidence were sustained, held prejudicial.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Lewis Walker was convicted of rape, and he appeals. Reversed and remanded.

Howard C. Speakman and Arthur L. Goodman, both of Phoenix, and Dougherty & Dougherty, of Mesa, for appellant.

W. J. Galbraith, Atty. Gen., and George R. Hill, Asst. Atty. Gen., for the State.

McALISTER, J. The appellant herein, Lewis Walker, was convicted of the crime of rape, and given an indeterminate sentence of not less than 25 nor more than 30 years in the state prison. He appeals from this judgment and the order denying him a new trial.

[1] There are three assignments of error. The first is the denial of appellant's motion for a new trial, based upon the ground that the state failed to prove that at the time of the alleged rape on October 26, 1920, the prosecuting witness was not the wife of the defendant. It is true that there is no direct evidence in the record on this material allegation; that is, no one testified in answer to a question or otherwise that the prosecuting witness and defendant were not then husband and wife. It appears very clearly, however, from the evidence that the defendant and the prosecuting witness, Ruthie May Brakebill, first met about 5 o'clock on the afternoon of October 26, 1920, in the Arizona Café at Mesa, Ariz., where the defendant had gone for his dinner, and that she was introduced to him as Ruthie May Brakebill, and according to her own statement her name so remained until November, the 18th, following, when she married one J. W. Fletcher. She testified that previous to her marriage, which was to Fletcher, her name was Brakebill, which shows conclusively that she could not have been the wife of defendant on October 26th.

This fact is also disclosed from an examination of the entire record. The prosecuting witness arrived in Mesa, a stranger, from her home in Blackwater, Pinal county, Ariz., only the day before she first saw the defendant. Her plan was to do housework, but, upon learning after reaching the town that the gentleman whose employ she intended to enter was a widower, declined that position, and secured one as a waitress in the Arizona Café, her service beginning the day following her arrival in Mesa. She and the defendant, who went to the restaurant about 5 p. m. on the first day of her work for his dinner, were introduced by Ruby Davis, another waitress in the same café, and while he was having his meal, which she had served, they engaged in conversation. The defendant left after finishing his dinner, but returned to the restaurant that evening about 9, when he and the prosecuting witness again conversed for a short while. It was suggested by him at their first meeting, and agreed on either then or at the second, that they go for a ride that evening after the prosecuting witness finished her day's work at 11 p. m., and pursuant to this agreement the de-

fendant appeared at the restaurant a few minutes before that time, the two leaving together immediately after 11, and going over to an automobile standing near the Salt River Valley Bank, where Ruby Davis and Roy Horton were waiting. These four entered the car, which was a taxi driven by a colored man by the name of John Chavie, and went by way of Tempe to what is known as the Hole-in-the-Rock, where it is alleged the criminal act was committed, returning to Mesa about 1 or 2 a. m., October 27th, only eight or nine hours having elapsed since the parties first met.

These were the only three occasions on which the prosecuting witness and the defendant were together. What they said and did at each meeting was testified to by several witnesses, and to no one of them was any reference made to their being married, and such an occurrence, especially on an acquaintance so brief, would undoubtedly have been mentioned in the testimony. The circumstances of each meeting were such as to negative it, for the first and second time they were together was at the restaurant while the prosecuting witness was on duty, and the third was at the same place just before 11 p. m. under the same conditions, though they left there just afterwards, going directly to the automobile, which they entered, and then to the Hole-in-the-Rock, from which they returned in two or three hours, making an effort all the while to avoid being recognized by any one. These facts conclusively show that the prosecuting witness was not the wife of the defendant at the time of the alleged offense; in fact, the case was tried by both parties upon this theory. It is not necessary that such allegation be established by direct evidence; it is sufficient if the facts and circumstances are such that no other conclusion can be drawn. As said by the Supreme Court of Washington in *State v. May*, 59 Wash. 414, 109 Pac. 1026, Ann. Cas. 1912B, 113:

"The principal contention of the appellant is that the evidence is insufficient, because there is no proof in the record that the child was not the wife of one Gust Arndt, who actually committed the crime. It is true there is no direct and positive evidence that the child was not married to Arndt. It was apparently assumed by counsel throughout the trial of the case that the marriage relation did not exist, and no direct testimony was offered upon that question. But it was shown that the child was under the age of 14 years, and that she was living at home with her father and mother, and bearing her maiden name. In fact, she was a mere schoolgirl, and there is nothing in the record to indicate that she was married. All the circumstances indicate beyond question that she was unmarried, and certainly was not the wife of Arndt. While it is the rule that want of the marriage relation is an essential ingredient of the crime, and must be alleged and proved, still it is not absolutely necessary to prove that fact by direct and positive testi-

mony; but, like any other fact, it may be proved by facts and circumstances from which the conclusion may be drawn."

See, also, *State v. Reed*, 153 Mo. 451, 55 S. W. 74; *Lewis v. People*, 37 Mich. 518; *Brenton v. Territory*, 15 Okl. 6, 78 Pac. 83, 6 Ann. Cas. 769; *Munger v. State*, 57 Tex. Cr. R. 384, 122 S. W. 874; 22 R. O. L. 1221, par. 55.

[2, 3] The second assignment is the denial of appellant's motion for a new trial, based upon the misconduct of counsel for the state, the assistant county attorney, in propounding to the appellant and two of his witnesses on cross-examination certain questions which, it is urged, were entirely improper and incompetent, but asked solely for the purpose of prejudicing the jury against appellant. Mrs. Walker, mother of the defendant, was questioned as follows:

"Q. Mrs. Walker, I will ask you whether the defendant, your son in this case, was ever in any trouble similar to this.

"Mr. Speakman: Wait just a minute. I object to this, if your honor please.

"The Court: Sustain the objection.

"Mr. Noble: I will ask you, Mrs. Walker, whether or not a lady by the name of Mrs. Morgan and her daughter, from Prescott, Ariz., did not visit you here and tell you that Lewis was the father of an unborn baby."

The appellant himself was asked the following questions:

"Q. You have been arrested in Mesa for bootlegging—

"Mr. Speakman: Wait just a minute. We object to any further questioning on the reputation, as to general reputation or as to specific acts.

"Mr. Noble: I was not asking him about specific acts which would not be admissible, your honor.

"The Court: I will sustain the objection, Mr. Noble, as to the misdemeanor referred to.

"Mr. Noble: Have you ever been told by the town marshal in Mesa to leave town?"

Mrs. Ruby O'Neil, formerly Ruby Davis, a witness in behalf of appellant, was interrogated as follows:

"Q. Have you ever been convicted over here by city police?

"Mr. Speakman: Now, if your honor please, we object to that.

"The Court: The objection is sustained.

"Mr. Noble: Or by the Mesa police?

"The Court: The objection is sustained.

"Mr. Noble: Have the Mesa police ever warned you to get out of town?

"Mr. Speakman: I object to that.

"The Witness: Have not; have not.

"The Court: Those questions are improper, Mr. Noble; they are not allowed.

"Mr. Noble: I know it; but I want to ask them, your honor; I have a purpose."

An objection to each of these questions was interposed and sustained, but appellant urges that merely to ask questions so palpably improper and incompetent is so highly

prejudicial that it constitutes reversible error, and with this contention the respondent, the state, by its brief filed in the cause, does not take issue, at least in so far as it refers to the question propounded to Mrs. Walker regarding Mrs. Morgan and her daughter from Prescott. The appellant was being prosecuted for the crime of rape committed against the person of Ruthie May Brakebill, and the perpetration of other crimes of a similar nature against other persons than she was wholly beside the issue, the crime charged—forcible rape—not being one in which the similar offense rule obtains. There could have been, therefore, no purpose in asking these questions other than to get before the jury certain statements in the guise of questions, that would be highly prejudicial to the appellant but which the assistant county attorney must have known were inadmissible for any purpose, even though he may have been convinced they were true.

The prosecuting attorney represents the people, is a quasi judicial officer, and consequently looked upon as fair and impartial, and when questions like these are propounded by him, jurors are likely to think that the statements made therein are true, or they would have gone unasked. Such a method is violative of the fundamental rights of the appellant, for every person charged with crime is entitled under the Constitution and laws of this state to a fair and impartial jury trial, "conducted according to the established principles of law, not the least important of which is that the verdict shall be found only upon relevant and competent facts produced before the jury under the rules prescribed for the admission of evidence." *People v. Ah Len*, 92 Cal. 282, 28 Pac. 286, 27 Am. St. Rep. 103. In a case in Nebraska defendant was being prosecuted for forcible rape, and the state's attorney asked him on cross-examination if he did not on the day following the alleged offense go to the home of Miss B., and, finding her alone, attempt to kiss her and drag her to a lounge, and stated before the jury that he would follow this up and prove it. The Supreme Court of that state in *Leahy v. State*, 31 Neb. 566, 48 N. W. 390, in disposing of an assignment of error based on the action of the county attorney in this respect, used the following language:

"It is the duty of an officer prosecuting to conduct the trial of a criminal case according to established rules. He acts in a semijudicial capacity and is supposed to act alone from principle and without bias or prejudice. The state has guaranteed to every one a fair trial, and such trial cannot be had if the prosecution can resort to tricks to secure a conviction. If such practice was sanctioned it would result in many cases in the conviction of innocent persons. The plaintiff in error was on trial for the crime charged in the information. So far as appears he had not been charged with any

other offense, and certainly was not on trial for the second. The statements of the attorney were improper and in the highest degree prejudicial, and for those causes the judgment is reversed and the cause remanded for a new trial."

In this case, however, the prosecution seems to have proceeded upon the theory that questions as well as answers furnished information for the guidance of the jury in determining the guilt or innocence of the accused. In reply to the court's remark that certain questions propounded by him to one of appellant's witnesses were improper, the state's attorney admitted that he knew it, but said that he had a purpose in asking them. What could this have been except to influence the jury against appellant by discrediting in a highly improper manner one of his witnesses and her testimony? For all information brought before a jury is supposed to be for the purpose of aiding the cause of the side which introduces it. The statement, therefore, that he knew it was improper was an admission that an attempt to convict the accused on facts which could not properly have been admitted was being made.

"This was an entirely unfair way to try the case; and the mischief was not averted because the court properly sustained the objection—though we think it should have warned counsel against the course which he was taking—and instructed the jury specially on the subject. The wrong and harm was in the asking of the question. Of course, in trials of criminal cases questions as to the admissibility of evidence will frequently arise about which lawyers and judges may fairly differ in opinion; and in such cases defendants must be satisfied when courts sustain their objections. But where the prosecuting attorney asks a defendant questions which he knows, and every judge and lawyer knows, to be wholly inadmissible and wrong, and where the questions are asked without the expectation of answers, and where the clear purpose is to prejudice the jury against the defendant in a vital matter by the mere asking of the questions, then a judgment against the defendant will be reversed, although objections to the questions were sustained, unless it appears that the questions could not have influenced the verdict." *People v. Wells*, 100 Cal. 459, 34 Pac. 1078.

See, also, 16 C. J. 892, note; *People v. Grider*, 13 Cal. App. 703, 110 Pac. 586; *State v. Gleim*, 17 Mont. 17, 41 Pac. 998, 31 L. R. A. 294, 52 Am. St. Rep. 655; *People v. Un Dong*, 106 Cal. 83, 39 Pac. 12; *People v. Mullings*, 83 Cal. 138, 23 Pac. 229, 17 Am. St. Rep. 223; *Gale v. People*, 26 Mich. 159; *State v. Irwin*, 9 Idaho, 35, 71 Pac. 608, 60 L. R. A. 716; *State v. Fournier*, 108 Minn. 402, 122 N. W. 329; *State v. Rose*, 178 Mo. 25, 76 S. W. 1003.

It cannot be fairly deduced, however, from the entire record that the prejudicial conduct of counsel for the state did not aid in

bringing about the conviction. Hence the judgment is reversed, and the case remanded for a new trial.

ROSS, C. J., and FLANIGAN, J., concur.

BYRAM v. PAYNE, Agent. (No. 3627.)

(Supreme Court of Utah. Aug. 30, 1921.)

1. Carriers \S 228(5)—Evidence held to support shipper's allegation that sheep died from alkaline water furnished by carrier.

In an action for death of part of a shipment of sheep evidence that the sheep were allowed by the carrier to drink alkaline water, that such water often kills sheep, and that they died from drinking it, held to constitute prima facie proof of the complaint, as against motion for nonsuit.

2. Carriers \S 211—Carrier furnishing unwholesome water to sheep carried liable.

Where the carrier undertakes to rest and water sheep carried under an interstate shipment, as required by the federal law, it must furnish wholesome water, and if it does not, and the sheep die from drinking unwholesome water, the carrier is liable.

3. Carriers \S 211—Want of knowledge no defense for furnishing unwholesome water to sheep carried.

Where sheep carried in an interstate shipment died from drinking alkaline water furnished by the carrier, it was no defense, in an action against the carrier, that it had no knowledge that the water was unwholesome; it being the carrier's duty, under federal law, to furnish wholesome water.

4. Carriers \S 230(1)—Value of sheep dying en route sufficiently shown as against motion for nonsuit.

In a shipper's action for damages for sheep killed during transportation by drinking poisonous water, the value of the sheep held sufficiently proven, as against motion for a nonsuit, although testimony of value at an intermediate point merely and not at destination, was given (citing *Dee v. San Pedro*, L. A. & S. L. R. Co., 50 Utah, 167, 167 Pac. 246).

5. Carriers \S 229(2)—Measure of damages for sheep dying during shipment is market value at destination.

Where part of a shipment of sheep died from drinking poisonous water furnished by the carrier en route, the measure of damages was the market value at destination.

6. Appeal and error \S 1003—Appellate court will not weigh evidence.

The weight of testimony, including that of expert witnesses, is wholly a subject for the jury's determination, and it is not within the province of an appellate court to pass on the evidence and say that the opinion of the jury was wrong.

7. Carriers ⇐228(1)—Burden on shipper to prove carrier's negligence.

In a shipper's action for the death of sheep from drinking poisonous water furnished by the carrier, the burden was on plaintiff to show defendant's negligence.

8. Carriers ⇐228(5)—Evidence held to show carrier had constructive notice that water furnished sheep was unwholesome.

In a shipper's action for the loss of sheep through drinking alkaline water furnished by the carrier, evidence held to show that the condition of the water had existed so long that notice of its unwholesomeness was imputed to the carrier.

9. Carriers ⇐227(3)—Shipping contract inadmissible under pleadings to show shipper's contributory negligence.

In a shipper's action for the loss of sheep through drinking unwholesome water in a yard furnished by defendant, it was not error to exclude the shipping contract to show that the shipper himself undertook to unload the sheep and that he was guilty of contributory negligence; no such defense nor any special contract having been pleaded.

10. Appeal and error ⇐260(2)—Ruling excluding evidence not excepted to not reversible error.

A ruling excluding evidence is not reversible error where no exception was taken thereto.

Appeal from District Court, Weber County; A. W. Agee, Judge.

Action by Robert Byram against John Barton Payne, as Agent, under the federal Transportation Act of 1920 (41 Stat. 456), of the Union Pacific Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Geo. H. Smith, Jno. V. Lyle, and C. B. Diehl, all of Salt Lake City, and Charles R. Hollingsworth, of Ogden, for appellant.

John G. Willis, of Ogden, for respondent.

WEBER, J. Defendant, the Director General of Railroads, appeals from a judgment in favor of plaintiff on two causes of action.

At Huntsville, Utah, on September 6, 1919, plaintiff delivered to defendant, for transportation to Omaha, Neb., seven carloads of sheep, and Fred J. Cobabe delivered three carloads of sheep for the same purpose. The ten cars were shipped together. Two hundred and thirty of plaintiff's sheep and 135 of Cobabe's died at North Platte, Neb. Cobabe's claim was assigned to plaintiff before this action was brought.

In the first cause of action the allegations of negligence are that plaintiff's sheep were negligently unloaded by defendant from the cars upon which they were being transported into the yards at the station at North Platte, Neb., which yards contained water

unwholesome and poisonous and dangerous to the life of sheep if partaken of by them, and of which said water the defendant negligently permitted said sheep to drink, from the effects of which they died; and at the time the sheep were placed in the yards by defendant he knew, or by the exercise of ordinary care might have known, that the yards contained large quantities of said water and that the sheep were likely to drink of the same and be thereby poisoned. The same allegations of negligence were contained in the second count of the complaint.

The answer denied these allegations of negligence and averred a separate and distinct affirmative defense to each cause of action, to the effect that whatever, if any, damage was done to the shipment of sheep was caused not by any negligent act of commission or omission on the part of defendant, but by the inherent nature and disposition of said sheep themselves, or by sickness, or disease, or condition existing in said sheep, over which sickness, disease, and condition defendant had no control and of which he had no knowledge.

When plaintiff had completed the presentation of testimony, defendant moved for a nonsuit upon the grounds that there was no evidence that the sheep died from drinking poisonous or unwholesome water; that there was a complete absence of testimony to show that the defendant knew at the time the water to be poisonous, or any testimony to show that by the exercise of ordinary care the defendant might have known that the water was poisonous or unwholesome; and that there was no evidence of the market value of the sheep at Omaha, the destination of the shipment. The motion for nonsuit was denied, and the ruling is assigned as error.

The substance of plaintiff's testimony was that the sheep had been driven from their mountain range, about 35 miles from Huntsville, Utah, eating grass and drinking pure mountain water on the way; that the shipment of sheep arrived at North Platte at 1:35 p. m., September 9, 1919, and was unloaded between 5 and 6 o'clock of that day; and that the sheep were then driven into a pasture containing a slough of stagnant water which was testified to as being alkaline. The plaintiff and his assignor were experienced sheep men. They had frequently observed sheep die from drinking alkaline water. They testified that the water which the sheep drank was alkaline and that its drainage was from alkaline land. They further testified that sheep, after being "alkalied," stand and tremble; that some die right away, while others live for a few hours or a day or two afterwards; that the actions, conduct, and appearance of the sheep at North Platte, on the morning after they

(201 P.)

arrived there, were similar to the conduct and appearance of sheep which the witnesses had seen die from alkaline water on other occasions. Except two of the sheep that were apparently trampled to death, none of them died before reaching North Platte, and none of them died after leaving that station.

Plaintiff and Mr. Cobabe, plaintiff's assignor, accompanied the sheep. Not having been notified that the sheep would be unloaded at North Platte, they remained on the train and were carried a mile or so beyond North Platte when the train was stopped, and they walked back to the stockyards. Upon their arrival at the stockyards, the sheep were being unloaded and 300 or 400 of them were drinking the water in the pasture into which they were being driven. The pasture was described by plaintiff as "a kind of salt grass and alkali field," and was one of the feeding places provided there and covered about 80 acres. The shipment of sheep consisted of lambs, yearlings, two-year olds, and some ewes probably six years old.

After qualifying as a witness as to the market value of the sheep, the plaintiff testified that the 235 head of his sheep which died at North Platte were worth \$7.40 per head "right here in Morgan." Plaintiff's assignor, who was also a qualified witness on the subject, testified that he estimated the Byram sheep at \$7.40 per head. He himself lost 135 sheep which he said were worth \$5.90 per head, the difference in value being because the Byram sheep were in better condition than those owned by the witness.

[1] The defendant claims that the testimony was insufficient to constitute prima facie proof of the averments of plaintiff's complaint. True, plaintiff's evidence is not strong. However, some substantial evidence was produced showing that the water was alkaline, that such water injures and often kills sheep, and that the sheep, which were presumably in good condition and apparently free from disease when delivered to the defendant, died from the effects of drinking water furnished by defendant.

[2] This was an interstate shipment. The federal law provides that when animals are unloaded they "shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad * * * company." Comp. St. § 8652. It is the duty of the carrier to provide reasonable facilities for feeding, watering, and resting stock during transit, and "where the carrier undertakes to feed and water stock, notwithstanding a contract imposing this duty on the shipper, it is bound to exercise due care to see that the stock are given suitable food and water." 10 C. J. p. 26, § 108. It being the carrier's duty to furnish water, it must furnish wholesome, not poisonous, water. And if it furnishes water that is

unwholesome, and sheep drink of it and die from the effects of drinking such water, the carrier is liable. Thus it has been held that—

"If the carrier permits salt water to stand in pens accessible to lambs offered for shipment, it is guilty of negligence and liable for loss occasioned thereby." 10 C. J. p. 80, § 82, citing cases.

[3] It is argued that before defendant could be held liable proof of notice to him or knowledge by him of the condition of the water must be adduced. The fact that a slough existed in the pasture in which there was stagnant water, the color and appearance thereof, together with the alkaline character of the surrounding land, constituted some notice to defendant of the unwholesome condition of the water if notice was necessary to make defendant liable. However, it was defendant's duty to furnish suitable food and wholesome water. If a common carrier furnishes unwholesome and poisonous water to stock that is being transported by it, it is no defense to say that he did not know the water was unwholesome or poisonous. It is the carrier's duty to know, and if poisonous food or water is furnished the carrier furnishes it at his peril.

[4, 5] The evidence of value of the sheep was definite and exact—\$7.40 per head for some of the sheep and \$5.90 per head for others. Byram testified that his sheep were worth \$7.40 per head "right here in Morgan," a station on the Union Pacific railroad a few miles east of Ogden; the latter being the nearest railroad station to Huntsville, the initial point of shipment. Plaintiff was entitled to recover the market value of the sheep at Omaha, Neb., the point of destination. Presumably the market value was higher at Omaha than at Huntsville, Ogden, or Morgan, Utah, or North Platte, Neb. The value at Huntsville, plus the freight which had been paid, would ordinarily be the market value at Omaha. The market fluctuations might make a decided difference one way or the other. The witnesses were shown to be competent. They had sold their sheep on the Omaha market. They were in the sheep business, and were fully qualified to testify as to the market value in Utah and as to the market value in Omaha. On cross-examination no questions were asked of the witnesses regarding the subject of value. Both parties seemed to be satisfied with the proof.

In *Dee v. San Pedro, L. A. & S. L. R. R. Co.*, 50 Utah, 167, 167 Pac. 246, one of the questions involved was as to the value of horses at Salt Lake City. There was no direct proof at all of the value in Salt Lake City, the place where the value of the horses ought to have been shown. It was shown, however, that the horses were purchased at

Pocatello for \$125 each, then shipped via Salt Lake City to Los Angeles, the higher market. They were rebilled at Salt Lake City. Referring to the question of value in the Dee Case, at page 179 of the Utah report (167 Pac. 250), Mr. Justice Thurman announces the rule which is applicable here as being:

"The presumption is almost conclusive that the horses were worth more in Salt Lake City than in Pocatello, because they were nearer the better market."

Plaintiff established the value of the sheep at Morgan, east of Ogden. Presumably the sheep would have been worth more at North Platte, and still more at Omaha. The defendant therefore could not have been prejudiced by proof of value at Huntsville, Ogden, or Morgan, at least in the absence of any evidence rebutting the presumption they were worth more at Omaha.

Considering all of the testimony produced by plaintiff in the light most favorable to him, it was sufficient to justify the court in denying the motion for nonsuit.

After both parties had rested, the defendant moved for a directed verdict in his favor. The denial of this motion by the court is assigned as error.

[8] On the part of the defendant evidence contradicting that of plaintiff was introduced. The plaintiff was corroborated by the testimony of one of the defendant's witnesses as to the claim of the alkaline nature of the land about North Platte. Evidence was adduced tending to establish the affirmative defense that the sheep died from disease. A veterinarian of North Platte who examined the sheep testified that in his opinion they died from hemorrhagic septicæmia. Ears were cut from some of the sheep that died and sent to a prominent veterinarian at Kansas City, who made a microscopical examination of blood from each ear sent him. Other tests were made by this veterinarian, and from all of them he concluded that the sheep had died from hemorrhagic septicæmia. He said that he found "the presence of a gram of negative bipolar non-motile hemorrhagic septicæmia which fulfills the characteristics of the hemorrhagic septicæmia bacterium." How many of the sheep survived is a mystery that "passeth all understanding." From the verdict it is apparent that to the jury this exposé was confusing rather than informative, obfuscating rather than illuminating. Counsel, however, contend that the expert testimony should have been accepted by the jury as conclusive. Possibly the jury failed to give to the testimony of these expert witnesses the weight to which it was entitled, but the weight of testimony, including that of expert witnesses, is wholly a subject for the jury's determination. Doubtless the defendant presented a strong defense, but it is evi-

dent from their verdict that the jurors believed the sheep men and farmers and doubted or rejected the testimony of the veterinarians and biologists. It is not within the province of an appellate court to pass upon the evidence and say that the opinion of the jury was wrong.

[7, 8] Counsel for defendant say that—

"Under the facts and the law of this case the burden was upon the plaintiff to prove the carrier's negligence, that is, that the sheep drank poisonous and unwholesome water in the stockyards at North Platte, and that such condition of the water was known to the defendant and was the cause of the death of the sheep."

The jury were properly instructed that the burden of proof was upon the plaintiff, and while the plaintiff's testimony does not seem especially convincing, there was some substantial testimony from which it could logically be inferred and concluded, not only that the water was unwholesome or poisonous, but that drinking of it killed the sheep. So far as notice of the condition of the water to defendant is concerned, the evidence adduced by plaintiff in rebuttal, to which no objection was made, was sufficient to prove notice to defendant that sheep drinking from this water frequently died. Mr. Marriott, a witness for plaintiff, testified that prior to 1919 he had watered sheep in the pasture connected with the North Platte stockyards and had sheep die from drinking the water. When in 1919 he selected a pasture south of the stockyards in which there was no stagnant water his sheep "did fine." So that, if notice of the condition of the water was necessary to make defendant liable, testimony was produced by plaintiff tending to show that the condition of the water had existed for such length of time that notice of its unwholesome and poisonous character was imputed to defendant.

The request for a directed verdict was therefore properly denied.

When testifying on cross-examination, the plaintiff stated that he had read the contract under which the sheep were transported. Thereupon the defendant offered the shipping contract in evidence for the purpose of showing that the plaintiff himself understood and contracted to unload the sheep. It was claimed that the contract was material because the witness said in direct examination that the carrier drove the sheep into the pasture. In the language of defendant's counsel:

"We want to show that if these sheep were permitted to rush to that water and it was going to be detrimental to them, I don't care whether it was fresh or poisonous, then plaintiff himself was to blame."

An objection to the introduction of the contract was sustained by the court. This ruling is assigned as error.

(201 P.)

[9, 10] Contributory negligence is not pleaded by the defendant. Nor is any contract imposing special conditions pleaded in the answer. No claim is made in defendant's answer that plaintiff failed to perform any duty that devolved upon him. The objection to the introduction of the contract was therefore properly sustained, for the reason that the proposed proof would have been proper only for the purpose of establishing contributory negligence on the part of plaintiff and that he did not care for the sheep as he should have done. Another reason why the ruling would not be reversible error is that no exception was taken to the court's ruling.

An examination of the court's instructions, to which many exceptions were taken by defendant, discloses no material or prejudicial error. Numerous requests to instruct were made by defendant. Those that were correct and that were applicable to the facts were given in substance.

There being no reversible error in the record, the judgment is affirmed.

CORFMAN, C. J., and GIDEON, THURMAN, and FRICK, JJ., concur.

PERRIN v. UNION PAC. R. CO.
(No. 3480.)

(Supreme Court of Utah. Oct. 18, 1921.)

1. Appeal and error \S 870(6)—Record of first trial at end of which court granted a new trial, preserved in bill of exceptions, is reviewable on appeal.

Where there were two trials and at the end of the first the court granted a new trial and the record of the first trial is preserved in the bill of exceptions the ruling if assigned as error may be reviewed on appeal from the final judgment.¹

2. Master and servant \S 291(12)—Instruction on presumption against contributory negligence of deceased employé held correct.

In action for causing the death of a brakeman, instruction that in the absence of evidence there is a presumption that the deceased used due care about the work when he was killed, and that he did all that was reasonably required of him for his protection, was correct, where there was no evidence to show just how the accident happened.

3. New trial \S 72—New trial may be granted if trial court determines jury did not give due weight to uncontradicted testimony.

In action for death of a brakeman, where the engineer testified that the train had stopped when the brakeman's light disappeared on account of going between the cars, and his testimony was uncontradicted, it was the duty

of trial court on motion for new trial to determine whether the jury had given due weight to this testimony, and if in its judgment the jury had failed to give it proper weight, it was no abuse of discretion to grant a new trial.

4. Appeal and error \S 1015(3)—Question of weight of evidence on motion for new trial is for the trial court.

Consideration of the weight of evidence on motions for new trial is peculiarly within the province of the trial courts.

5. Appeal and error \S 977(3)—Order granting new trial not set aside on appeal unless there is an abuse of discretion.

Appellate courts will not set aside an order granting a new trial unless there is an apparent abuse of discretion.²

6. Master and servant \S 265(14)—Presumption deceased brakeman exercised ordinary care in going between cars.

In action against a railroad company for the death of a brakeman, where there was no direct evidence as to how the accident happened, held that there was a presumption that deceased exercised ordinary care in going between cars to connect an air hose.³

7. Master and servant \S 289(2)—Contributory negligence of deceased brakeman question for jury.

In action against a railroad company for death of a brakeman, a presumption of the exercise of ordinary care by the deceased, which arose in the absence of direct evidence thereon, is sufficient to take the case to the jury where there is evidence of defendant's negligence.

8. Negligence \S 134(10)—Evidence of responsibility for injury insufficient.

If the probabilities are equally balanced that an accident was produced by a cause for which defendant was responsible, or one for which he is not, the plaintiff must fail.⁴

9. Evidence \S 588—Physical facts may be relied on to show negligence.

In action for negligently causing the death of a brakeman, plaintiff may rely on physical facts to show that train moved while deceased was between cars, though conductor testified negatively that he did not observe it move.

10. Master and servant \S 278(18)—Evidence held to show negligent movement of train while deceased brakeman was between cars.

In action against a railroad company for negligently causing the death of a brakeman, evidence held sufficient to prove that train moved after deceased went between cars to couple an air hose, and that his dangerous

¹ Vallotis v. Utah-Apex M. Co., 55 Utah, 151, 184 Pac. 802; Hirabelli v. Daniels, 44 Utah, 83, 138 Pac. 1172; Van Dyke v. Ogden Sav. Bank, 48 Utah, 606, 161 Pac. 50; Salt Lake Inv. Co. v. Stoutt, 54 Utah, 100, 180 Pac. 182.

² Lewis v. Rio Grande Western Ry. Co., 40 Utah, 483, 123 Pac. 97.

³ Tremelling v. South. Pac. Co., 170 Pac. 83.

⁴ Hirabelli v. Daniels, 44 Utah, 83, 138 Pac. 1172.

position was known to the engineer and conductor.

11. Negligence \S 134(2)—Circumstantial evidence sufficient.

While it was incumbent upon plaintiff to prove negligence, positive or direct proof is not required, but it may be inferred from the circumstances.⁵

12. Appeal and error \S 719(1)—Assignment of errors necessary.

The Supreme Court is not authorized, either by statute or rules of court, to review any ruling of the district court, unless error is assigned designating or specifying the alleged error.⁶

13. Appeal and error \S 207, 237(1)—Without request to withdraw improper remarks of counsel or to instruct the jury to disregard them, the error is not reviewable.

Where the trial court was not requested to withdraw remarks of counsel alleged to be improper, or to instruct the jury to disregard that part of the argument, the error is not reviewable.⁷

14. Negligence \S 101—Contributory negligence mitigates damages under federal act.

Under the Federal Employers' Liability Act, \S 3 (U. S. Comp. St. \S 8659), the fact that deceased may have been guilty of contributory negligence would not bar recovery, but could be considered by the jury in mitigation of damages.

15. Master and servant \S 226(1)—Risk of employer's negligence not assumed.

Where brakeman was injured through the negligence of his employer, the injury did not result from any usual and ordinary danger incident to his employment and the risk of injury was not assumed.

Frick, J., and Corfman, C. J., dissenting.

Appeal from District Court, Weber County; A. W. Agee, Judge.

Action by Elizabeth Mabel Perrin, administratrix of the estate of Arthur O. Perrin, deceased, against the Union Pacific Railroad Company. From judgment for plaintiff, defendant appeals. Affirmed.

Geo. H. Smith, John V. Lyle, and R. B. Porter, all of Salt Lake City, and C. R. Hollingsworth, of Ogden, for appellant.

John G. Willis and Howell & Wright, all of Ogden, for respondent.

GIDEON, J. The respondent, as administratrix of the estate of Arthur O. Perrin, deceased, brought this action to recover

damages for his death. The damages are sought for the benefit of herself as the widow, and one minor child, Florence W. Perrin.

[1] At the time of the accident, appellant was engaged in interstate commerce, and deceased was in its employ as a rear brakeman. Recovery is therefore sought under the federal Employers' Liability Act (35 U. S. St. L. 65, c. 149; U. S. Comp. St. \S 8657-8665). Two trials were had. The first resulted in a verdict in favor of appellant. Thereafter the district court granted a new trial. That ruling is assigned as error on this appeal. The record of the first trial is preserved in the bill of exceptions, and is therefore before this court for review. *Hirabelli v. Daniels*, 44 Utah, 88, 138 Pac. 1172. The complaint charged negligence on the part of the appellant: (1) That appellant, in violation of its duty, negligently and carelessly backed its train and the cars between which the deceased had gone for the purpose of connecting the air hose, a duty imposed upon him by his employment, without giving timely or any warning of its intention to move the train; (2) that appellant, in violation of its duty, negligently and carelessly failed to keep the appliances of the cars, particularly the handhold of the angle cock of the air hose of the car where the deceased was working, in a state of repair, and permitted the same to become defective and insufficient. The answer denied negligence. As an affirmative defense defendant pleaded contributory negligence and assumption of risk.

The court, in its instructions upon the first trial, limited the consideration of the jury to one ground of negligence, namely, Did appellant after deceased went between the cars, move the train without giving the deceased notice of its intention to do so, and, if so, did the same constitute negligence upon which respondent could recover? Two of the grounds claimed for a new trial were: (a) Errors in law occurring at the trial; (b) insufficiency of the evidence to justify the verdict. The district court, as indicated by an entry in the record, was of the opinion that it had erred in not submitting to the jury both grounds of negligence alleged in the complaint and in limiting the consideration of the jury to one ground only.

Appellant contends that at the first trial no error was committed that justified the granting of a new trial. It is argued that the mere fact that the court may have committed errors of law, or that the verdict was not, in the judgment of the court, what it should have been under the evidence, does not authorize granting a new trial; that there was testimony in the record from which the jury could reasonably conclude that the respondent had failed to establish her right to recover, and it was therefore error on the part of the district court to grant a new trial.

⁵ *Dearden v. Railroad*, 33 Utah, 147, 93 Pac. 271; *Johnson v. Silver King Con. M. Co.*, 54 Utah, 34, 179 Pac. 61.

⁶ *Teakle v. Railroad*, 32 Utah, 284, 90 Pac. 405, 10 L. R. A. (N. S.) 486; *Andrews v. Free*, 45 Utah, 508, 146 Pac. 556; *Vancott v. Wall*, 53 Utah, 282, 178 Pac. 42; *Sargent v. Union Fuel Co.*, 37 Utah, 392, 108 Pac. 928; *Smith v. Nelson*, 23 Utah, 512, 65 Pac. 485.

⁷ *Andrews v. Free*, 45 Utah, 508, 146 Pac. 556.

Reliance is had upon the opinion of this court in *Hirabell v. Daniels*, supra, to support appellant's contention. In the *Hirabell* Case the district court granted a new trial for the reason that the jury had, in the judgment of the court, determined the damages in an amount less than the court thought the evidence warranted, and this court held that an abuse of discretion. Mr. Justice Straup, speaking for the court, said:

"We are indeed slow to interfere with a ruling granting or refusing a new trial on questions relating to damages, but a court on the measure of general damages cannot tie a jury to only pain suffered, and when they follow and obey that instruction, then set the verdict aside, not for a misdirection, but on the ground that they disregarded or misconceived the instructions and rendered a verdict which the court thinks does not adequately compensate the plaintiff for his general damages."

In the present case the district court granted a new trial for the reason that it had limited the consideration of the jury to one ground of negligence. The complaint charged two acts of negligence, and there was testimony, in the judgment of the court, tending to establish both. The new trial was granted, not because the jury had disregarded or misconceived the instructions and rendered a verdict which the court did not think adequately compensated respondent, but rather for a "misdirection," or a failure to instruct upon an issue presented by the pleadings. The court was of the opinion that such issue had some support in the testimony. However, as this court is of the opinion that there was no testimony at either trial tending to prove that the condition of the angle rock was the cause of or contributed to the injury, no opinion is expressed as to whether granting a new trial would have been an abuse of discretion if there had been no other grounds authorizing or justifying such action. There are other reasons which, in our judgment, warranted the court in granting the motion.

[2] At the first trial the plaintiff requested the following instruction:

"You are instructed that in the absence of evidence there is a presumption that the deceased, Arthur C. Perrin, used due care in and about the work that he was engaged in when he was killed; and that he did all that was reasonably required of him for his protection while so engaged."

It is contended that the foregoing request is not a correct statement of law, and the refusal to give an erroneous instruction is never ground for granting a new trial, although the litigant may have been entitled to an instruction relating to the subject of the request. It is argued that the last clause of the above instruction does not state the law, and it would have been error to give the instruction as requested. Just in what way the

instruction is erroneous is not very clearly stated in counsel's brief. The instruction is applicable only in the absence of evidence as to just how the accident happened. There was no eyewitness. It is only in such cases that litigants are entitled to this or a like instruction. There seems to be no difference between the general instruction that the deceased "used due care in and about the work he was engaged in when he was killed," and the additional clause, "and that he did all that was reasonably required of him for his protection while so engaged." The exercise of due care necessarily implies the doing of what is reasonably required. That clause, at most, is but a reiteration of the first part of the instruction. The court refused to give the instruction. We are of the opinion the plaintiff was entitled to this or some similar instruction. The rule of law stated is not found in any other instruction given.

[3, 4] Moreover, at the first trial the engineer testified as follows:

"Q. Now, at the time the train stopped, the light at the rear end of the train was still visible, as I understood you a little while ago? A. Yes, sir.

"Q. The lantern light, did you afterwards see it disappear? A. Yes, sir.

"Q. And when, with reference to the time you stopped the train? A. Why, the train was stopped when it disappeared.

"Q. The train was stopped when it disappeared? A. Yes, sir.

"Q. And when, with reference to that stoppage, did it disappear? A. Well, I don't know. I didn't pay any attention. It disappeared right away.

"Q. Now, when you say the train was stopped do you mean the entire train was stopped, or that the engine was stopped and the car next to you? A. As far as I know, the whole train was stopped."

That testimony was nowhere contradicted. After the train became stationary it could only move by some act of the engineer, either some movement of the engine or by releasing the air on the brakes, thereby permitting the slack of the cars to run out. In either event the defendant could be charged with negligence by reason of the fact that the engineer knew the deceased had gone between the cars. It was the duty and privilege of the district court, in considering the motion for a new trial, to determine whether the jury had given due weight to this uncontradicted testimony. If in the court's judgment the jury had failed to give such weight to the testimony as it was entitled to receive, it was no abuse of discretion to grant a new trial. *Rison v. Harris*, 50 Okl. 764, 151 Pac. 584. Our statute relating to new trials is taken from the California Code. Consideration of the weight of evidence on motions for new trial is peculiarly within the province of the trial courts, as has frequently been held by the Supreme Court of that state. *Sherman v. Mitchell*, 48 Cal. 577;

Bjorman v. Ft. Bragg Redwood Co., 92 Cal. 500, 28 Pac. 591; *Garton v. Stern*, 121 Cal. 347, 53 Pac. 904; *In re Martin*, 113 Cal. 479, 45 Pac. 813; *Holtum v. Germania Life Ins. Co.*, 139 Cal. 645, 73 Pac. 591. To the same effect is the great weight of authority. 29 Cyc. 1011, note.

[8] Appellate courts will not set aside an order granting a new trial unless there is an apparent abuse of discretion. *Vallotis v. Utah-Apex M. Co.*, 55 Utah, 151, 184 Pac. 802; *Hirabelli v. Daniels*, supra; *Van Dyke v. Ogden Sav. Bank*, 48 Utah, 606, 181 Pac. 50; *Salt Lake Inv. Co. v. Stoutt*, 54 Utah, 100, 180 Pac. 182; *Fitger v. Guthrie & Co.*, 89 Minn. 330, 94 N. W. 888; 20 R. C. L. 227. There was no abuse of discretion in granting a new trial. Therefore this assignment of error cannot prevail.

Respondent was permitted to file an amended complaint. It is alleged that appellant is engaged in interstate commerce as a common carrier by railroad between Ogden, Utah, and Omaha, Neb.; that the deceased was at the time of the accident, to wit, on September 22, 1916, employed by appellant in such commerce as brakeman upon one of its trains; that at said time the appellant was transporting over its road, at or near a station known as Red Desert, in the state of Wyoming, a certain car equipped with power train brakes, which, together with other cars likewise so equipped, made up a train of railway cars at that time operated by appellant in said commerce; that the appellant negligently, and contrary to the acts of Congress, permitted the said power train brakes upon said car to become defective and inoperative, and that the same were not maintained in accordance with the provisions of said acts; that at the time of the accident, in the discharge of his duty as brakeman, the deceased went between the said defectively maintained car and the caboose of the train for the purpose of connecting up the air hose of said car with the air hose of the caboose on said train, and that, while the deceased was so engaged, the appellant so negligently and carelessly maintained and operated its train that, as a result thereof, the said deceased was seriously injured and died from the effect of such injury.

The answer to the amended complaint denied the acts of negligence. The appellant further alleged that the deceased assumed the risks and dangers of the employment and that the injury was caused through his own negligence.

There is little, if any, dispute as to the facts. The accident happened at or about the hour of 9:30 p. m. The deceased was employed as a rear brakeman on a freight train traveling east on the line of appellant's railway in the state of Wyoming. The train arrived at Red Desert station about the hour indicated. The train was composed largely of coal cars. At a station west of Red Des-

ert four or five additional cars, known as outfit cars, were placed in the train immediately ahead of the caboose. These cars were to be left at Red Desert. For that purpose a stop was made and the caboose disconnected from the train. The caboose was left standing on the main track. The outfit cars were placed on a siding. The remaining cars were pulled onto the main line and the engineer proceeded to back the train to couple onto the caboose. The deceased took his station at the east or front end of the caboose. The conductor, one Mr. Marti, was some 9 or 10 car lengths further east. The train was backing slowly toward the caboose, and when within about 20 or 30 feet of same the deceased, as part of his duty, gave a "slow down" or "stop" signal, indicating to the engineer that the rear of the train was approaching the caboose. Accordingly, the engineer applied the air brakes, gradually slacking the speed, and slowly pushed the cars back until the rear car came in contact with the caboose. The application of the air upon the brakes is controlled by the engineer operating a lever, and in that way the amount of force is controlled. A separate or independent set of brakes controls the engine, in no way connected with the air on the brakes upon the cars. The engineer testified that when the train came to a stop he immediately released the brakes on the cars and set the brakes on the engine. At the time of, or shortly after, giving the stop signal, and about the time the train became stationary, the light by which the deceased gave the signal to the engineer disappeared, apparently going between the cars. The conductor saw the light disappear. Both the engineer and conductor kept watching for a "proceed" signal. It was the duty of the deceased to give this signal as soon as he had connected the air hose of the caboose with the car immediately ahead and opened the angle cock. After a reasonable time, two or three minutes, and no one appearing, and no signal being given, the conductor walked to the rear of the train to ascertain the cause of the delay. Upon arrival there he found the deceased lying across the south or right rail of the track with the east or front wheel of the rear truck of the coal car, immediately ahead of the caboose, upon his body. The deceased was unable to speak and died a few minutes later. The conductor immediately gave the engineer a "back up" signal so as to remove the wheels of the truck from the body of the deceased. Upon the train moving, the conductor opened the angle cock between the caboose and the car ahead. The effect of opening the angle cock was to apply the air on the brakes, and that in turn stopped the train instantly. The conductor found the air hose between the caboose and the car ahead connected but the angle cock was not open. The lantern which

the deceased had at the time he gave the signal to slow down was found standing upright near the center of the track, still burning, some three or four feet east of the body of deceased. The distance from the rear of the car to the front wheel of the rear truck is 12 or 15 feet.

There is much testimony as to what effect releasing the brakes would have upon letting out what is designated the "slack" of the train. On each drawbar connecting the couplings with the body of the car is a spring which compresses and recoils, controlled by the movement of the train. In backing the train, where the engine pushes against the cars, this "slack" is taken in, or the cars become bunched, and remain that way while the train is moving backwards, or while stationary if the brakes are set. The testimony is that there could be as much as 6 inches slack in each car. There were approximately 33 cars in this train, making it possible for the train to move 15 feet in letting out the slack. Necessarily, that would be controlled by the extent the cars had become bunched in the backward movement.

After the accident the train was moved forward and set out on a side track where it remained until some time after midnight. A special crew came from Rawlins, Wyo. and the train was taken to that place, arriving there about 7 o'clock on the following morning. At that time it became the duty of the brakeman who accompanied the train from Red Desert to disconnect the caboose from the car immediately ahead. He testified that he found the angle cock of the air hose difficult to operate, to such an extent that it was necessary in cutting off the air to strike the handle which controlled the valve with a hammer or brake rod.

At the close of the testimony appellant moved for a directed verdict upon the following grounds: (a) That there was no proof of any act of negligence alleged in the complaint, or otherwise; (b) assuming the angle cock was out of repair, it was not shown that said defect was the proximate cause of the injury; (c) whatever condition existed which caused the injury was a condition known to the deceased, the dangers of which he assumed; (d) assuming that the defective condition of the angle cock was the proximate cause of the death, there is no proof that appellant knew, or, by the exercise of ordinary care could have known, of such condition. The court denied the motion. The refusal of the court to grant the motion, and its refusal to give a peremptory instruction to find a verdict for defendant, constitute the principal errors relied on for a reversal.

[8, 7] There was no direct evidence as to just how the accident happened. It was the duty of the deceased to go between the cars, after coupling was made and the train became stationary, to connect the air hose and

open the angle cock between the train and the caboose. Under the facts disclosed by this record, the respondent was entitled to the presumption that the deceased was, at the time of the accident, in the exercise of ordinary care. *Lewis v. Rio Grande Western Ry. Co.*, 40 Utah, 483, 123 Pac. 97. That presumption alone would entitle the respondent to have the question of contributory negligence submitted to the jury if there is evidence in the record tending to prove negligence on the part of the appellant.

The testimony, considered in connection with the physical conditions found at the place at the time of the injury, establishes conclusively that the accident resulted from one of four conditions or state of facts: (1) Either the deceased went between the cars while the train was still in motion, connected the air hose while the train was still moving, set the lantern down in an upright position, and was then knocked over or tripped and fell while the train was still moving; or (2) the deceased went between the cars while the train was still moving, made the connection of the air hose, was either knocked over or tripped, and in falling the lantern was in some way knocked from his grasp and fell to the ground in an upright position near the center of the track; or (3) deceased went between the cars while the train was still in motion, succeeded in making the coupling of the air hose, set the lantern down at the time the train became stationary, and left it in an upright position for the purpose of opening the angle cock, and the train afterwards moved and deceased was knocked under the wheels, resulting in death; or (4) the deceased went between the cars after the train became stationary, placed his lantern on the ground either before or after making the coupling of the air hose, and the train then moved and the injury resulted. If either the third or fourth state of facts existed, then negligence is shown on the part of defendant. If the first or second state of facts is as reasonable or probable under all the circumstances and conditions surrounding the accident, then it is the duty of the court to hold that there is an absence of proof of negligence in the record, or any fact upon which negligence can be inferred.

[8] This court, in harmony with the weight of authority, is committed to the rule that—

"If the probabilities are equally balanced that the accident was produced by a cause for which the defendant is responsible or by one for which he is not, the plaintiff must fail." *Tremelling v. Sou. Pac. Co.*, 170 Pac. 83.

To hold that the first or second state of facts is as reasonable or probable, under the conditions and circumstances disclosed by the record, as the third or fourth, is to run counter to the physical facts described by the witnesses, and in addition to that it ignores the presumption, to which the respondent is enti-

tied, that the deceased was in the exercise of ordinary care in the performance of his duty at the time of the accident. The location of the lantern, the fact that the lantern was standing upright and was still burning, the position of the body, if not conclusive proof, is, at least, strongly suggestive and argumentative that the probabilities are that deceased went between the cars after the train became stationary. The same state of facts, in our judgment, meet the argument of appellant that there is nothing in the record to show that the train moved after it became stationary, and subsequent to coming in contact with and being coupled to the caboose. It is true the conductor testified he did not observe any movement of the train. That testimony was at most but negative. Had it been positive, the jury might have disregarded it, especially if found to be contrary to what the physical facts tended to prove.

[9] The respondent relied upon, and had a right to rely upon, the physical facts to show that the appellant was negligent as charged in the complaint. In *Dodge v. Toth*, 95 Conn. 75, 110 Atl. 454, the Connecticut Supreme Court of Errors, in discussing the evidence in a damage case, says:

"This witness, named Barber, was one of the occupants of the automobile. His testimony was interpreted by the court, and perhaps correctly, as showing that Dodge was walking on his left-hand side of the road. With this interpretation in mind, the court said that the plaintiff offered no evidence in support of her allegation that the deceased was walking on his right-hand side of the highway, and, furthermore, that if the jury disbelieved Barber, as they were privileged to do, the result would be that the case would be barren of evidence tending to show due care on the part of Dodge. Underlying this statement of reasons is a serious disregard of the existence or importance of the physical facts in evidence attending the accident which the plaintiff relied upon and had the right to rely upon to show that Dodge was without fault."

[10] It is, in our judgment, idle to argue that there is no proof that the train moved after deceased went between the cars. It is likewise idle to contend that the train did not move after deceased had coupled the air hose. The location of the lantern and the position of the body of deceased both conclusively prove the contrary. The duty of the deceased required him to go between the cars, when they became stationary, to connect the air hose and open the angle cock. Going between the cars while the train was in motion was not in the exercise of reasonable care in the performance of his duty. The deceased did go between the cars and did connect the air hose. The proof shows that in order to do that it was necessary for him to bring the two ends of the air hose together; that the air hose on the coal car was on the right-hand side of the coupling

on that car, and the air hose on the caboose was on the left-hand side of the coupling on that car. It was therefore necessary for deceased to reach over or under the coupling in order to bring the ends of the air hose on the two cars together. It may be that can be accomplished by an expert railroad man while the train is in motion, but it hardly seems probable, and it would be in disregard of reasonable care to do so. In any event, to justify refusing to submit the question of negligence on that issue to a jury, the court must hold, as matter of law, that it was just as reasonable and probable that the deceased placed his lantern upon the ground while the train was in motion, or that it fell from his hands in an upright position while the train was moving, as it is that he placed the lantern upon the ground at a time when the train was standing still. It was the duty of the deceased, after connecting the air hose and opening the angle cock, to transmit a signal, by way of waving or other movement of the lantern, indicating to the engineer and conductor that the train was ready to go forward. Notwithstanding that duty, and the fact that it was to be accomplished by waving the lantern, it is argued that the deceased may have placed his lantern upon the ground while the train was still moving. To assume that the deceased did or may have done that would be to assume that his conduct was contrary to that of a reasonable man placed in such circumstances.

[11] The engineer stopped the train by the application of the air brakes. It should be remembered that so long as the air on the brakes was not released the train could not move. Therefore, if the train moved after becoming stationary, it could only do so by one of two ways, either by the engineer releasing the brakes on the train and permitting the slack to run out, or by some movement of the engine. It is in the testimony that the train did stop. The air on the train was not released until after the train came to a full stop. The engineer testified to that fact. The engineer also received the stop or slow down signal. It is not clear from his testimony on the second trial whether he received the signal from the conductor as relayed to him, or whether he saw the signal as given by the deceased, but that he received the signal and immediately applied the air is without dispute. The engineer, as an experienced railroad man, knew that when the train stopped it was the duty of the deceased to go between the cars and connect the air hose and open the angle cock. When that was accomplished it was his duty to give the signal indicating that the train was ready to proceed. The conductor testified that at about the time the train became stationary the lantern light disappeared, apparently going between the cars. It must be held, there-

fore, that not only the conductor, by reason of actually seeing the lantern disappear, but the engineer, by reason of his expert knowledge of railroading, is charged with knowledge of the fact that the deceased was between the cars in the discharge of his duty. Any act which would permit the train to move while deceased was in that position would be an act of negligence on the part of defendant.

It is strenuously argued on behalf of appellant, both in the original brief and in the brief on rehearing, that there is no proof of negligence on the part of appellant; that negligence is never inferred or presumed; that until there is some testimony showing negligence the court has no right to indulge in presumption or inferences, and in doing so is departing from the rule that has been frequently recognized by this court. Numerous cases are cited from this and other courts holding generally that it is incumbent upon the plaintiff in a damage case to prove negligence, and that negligence can never be presumed or inferred. We have no intention of departing from that rule, but it is likewise true that positive or direct proof of negligence is not required, but the same may be inferred from the circumstances surrounding the accident.

The Supreme Court of Oregon, in *Geldard v. Marshall*, 43 Or. 438, 73 Pac. 330, says:

"In an action by a servant against his master to recover damages for an injury, the burden of proof is on the plaintiff to show the negligence charged, and the mere happening of the accident is ordinarily not sufficient. * * * But it is not necessary that there should be positive proof of negligence. It, like any other fact, may be inferred from the circumstances. There may be, and are, cases in which the master's negligence is clearly inferable, although there is no positive proof thereof. The rule is that if two inferences may be legitimately drawn from the facts in evidence, one favorable and the other unfavorable to the defendant, a question is presented which calls for the opinion of the jury."

That rule of law received the approval of this court in *Dearden v. Railroad*, 33 Utah, 147, 93 Pac. 271. The court, at page 152 of 33 Utah, 93 Pac. 272, says:

"However, it is not essential, before a fact is made evident, that its existence be established by positive or conclusive evidence, especially when it pertains, as here, only to the identity of a thing. If such were the case, the rule of evidence permitting the drawing of inferences and the deducing of facts from other facts is rendered useless."

The same rule of law again received the approval of this court in the recent case of *Johnson v. Silver King Con. M. Co.*, 54 Utah, at page 34, 179 Pac. 61. See, also, *Galvin v. Brown & McCabe*, 53 Or. 598, 101 Pac. 871. The court, therefore, did not err in denying

the motion for a directed verdict or in refusing to give the peremptory instruction to return a verdict for defendant.

A majority of this court are of the opinion that no testimony is found in the record that the defective condition of the angle cock, if it was defective, contributed to or caused the injury. If it be conceded that there is testimony tending to show that the angle cock was in a defective condition, it is not shown that the deceased attempted to open the same, or that its condition in any way contributed to or caused the accident.

[12] No request was made to the district court to withdraw that issue from the consideration of the jury. No instruction was asked advising the jury that there was no evidence in the record upon which a judgment on that issue could be supported. No assignment is found in the record complaining of such issue having been submitted. It is first suggested in the petition for rehearing. It is therefore argued on behalf of respondent that any error the district court may have made in submitting that issue to the jury is not before this court for review. This court is not authorized, either by statutes or rules of the court, to review any ruling of the district court unless error is assigned designating or specifying the alleged error.

In *Teakle v. Railroad*, 32 Utah, at page 284, 90 Pac. 405, 10 L. R. A. (N. S.) 486, the court says:

"If the court erred in directing a verdict, such ruling ought to have been assigned, in order to authorize us to review it. The assignment of error is the foundation upon which rests the right of the appellate court to review the errors imputed to the trial court, and this court has repeatedly held that only such errors as are assigned will be reviewed, unless it is something which goes to the jurisdiction of the court."

Again, in *Andrews v. Free*, 45 Utah, at page 508, 146 Pac. 556, it is said:

"If the defendants are right in their contention, then should the case have been withheld from the jury? For the actionable negligence is predicated on an alleged failure of the defendants to furnish him a safe place to work. Whether a duty was or was not imposed on the defendants as a master to furnish a safe place to work was for the court. If, on the undisputed evidence, as is argued, no such duty was imposed, then should the case have been withheld? But to impute error to the court in such particular required a motion or request on that ground to so withhold the case. No such motion was interposed."

See, also, *Van Cott et al. v. Wall*, 53 Utah, 282, 178 Pac. 42; *Sargent v. Union Fuel Co.*, 37 Utah, 392, 108 Pac. 928; *Smith v. Nelson*, 23 Utah, 512, 65 Pac. 485.

The motion for a directed verdict is not based upon the theory that there was no evidence authorizing the submission of the de-

fect to the jury. The error of the court, if error was committed in submitting the question of the defective angle cock to the jury for consideration, is not before this court for review.

[13] Error is also assigned for certain statements made by counsel in arguing the case to the jury, to which statements appellant noted an exception. The court was not requested to withdraw the remarks or to instruct the jury to disregard that part of the argument of counsel. Under the authority of *Andrews v. Free*, supra, any error, if error was committed in that regard, is not reviewable by this court.

[14] As stated, the defendant was engaged in interstate commerce, and this action is brought under the congressional act known as the federal Employers' Liability Act. By the third section of that act (U. S. Comp. St. § 8659) the fact that the deceased may have been guilty of contributory negligence would not bar recovery, but such fact could be considered by the jury in reducing the amount which the respondent would otherwise be entitled to recover. The court, in its instructions, advised the jury that such is the law applicable to this case.

[15] It is also contended that the deceased assumed the risk of the dangers incident to his employment. If it be conceded that the defendant has presented by its pleadings the issue of assumption of risk, it is a sufficient answer to that contention to say that, if the injury resulted from the negligence of the defendant, the deceased did not assume the risk of such negligence. The injury in this case did not result from any usual and ordinary danger incident to the business or occupation in which the deceased was engaged. It resulted either from the neglect of the defendant in the operation of its train or from the contributory negligence of the deceased.

Some complaint is made of the failure of the court to give instructions requested by appellant and of certain instructions given. A careful examination of the instructions convinces us that the court fully and fairly instructed the jury upon the issues presented by the pleadings, and upon which there was testimony for the consideration of the jury.

The former opinion of this court is recalled. This opinion will be published as the opinion of the court.

We find no reversible error in the record. The judgment is affirmed. Respondent to recover costs against appellant.

WEBER and THURMAN, JJ., concur.

FRICK, J. (dissenting). I am unable to concur in either the reasoning or the conclusions of Mr. Justice GIDEON. In view, however, that the differences between us are radical and irreconcilable, a mere formal dissent would do justice neither to my Associate nor to myself. I shall therefore state the

material facts as I understand them, and, in connection therewith, also state my view of the law which, in my judgment, controls this case.

The case was tried twice in the district court of Weber county. The first trial resulted in a verdict in favor of the defendant. Plaintiff, in due time, filed a motion for a new trial, which motion was granted by the district court, and the case proceeded to trial for the second time. At the second trial the jury found for the plaintiff, and judgment was entered in her favor. The defendant made a motion for a new trial, which motion was denied.

While the appeal in this case is from the last judgment, the defendant has, nevertheless, preserved the proceedings had on the first trial in the bill of exceptions, and it asks us to review the proceedings had on both the first trial and the second trial.

The case was first submitted in this court in the October, 1920, term. An opinion affirming the judgment of the district court was duly filed. A petition for rehearing was, however, filed in due time, and a rehearing was granted in April of this year. The case was reargued and resubmitted in the May term of this year. While the writer hereof had prepared a dissenting opinion, he nevertheless did not file the same, but, with much reluctance, concurred in the opinion as first filed. He voted for a rehearing, however, for the reason that he entertained grave doubt respecting the correctness of the conclusions reached in the first opinion. Since then, the writer has had occasion to more carefully read the record, and also to more fully examine into the law which, in his judgment, controls this case.

I have now become thoroughly convinced that the findings of the jury and the judgment on the last trial are contrary to both the law and the facts, and hence should not prevail. I shall, as briefly as I consistently can, state the reasons which have impelled me to arrive at a conclusion contrary to that reached by my Associate, Mr. Justice GIDEON.

The defendant insists that the district court committed prejudicial error in setting aside the verdict in its favor which was returned at the close of the first trial, and asks that the first verdict be reinstated, and that judgment be entered upon the same. The court granted a new trial, for the reason that in its judgment it had erred in not submitting to the jury a certain issue respecting the condition of an angle cock. In granting the new trial, the court, upon that subject, said:

"I think that the question of whether or not the injury and death of plaintiff's intestate was caused either wholly or in part by the condition of the angle cock ought to have been submitted to the jury."

In granting the new trial upon that ground the court erred, for the reason that, even though the angle cock had been defective, yet there was no evidence whatever that such defect was the proximate cause of the accident, and this court has so held.

The next proposition is that the district court erred in refusing plaintiff's request to instruct upon the question of contributory negligence. In my judgment there was not the slightest evidence upon which to base a finding of contributory negligence on the part of the deceased, and hence such a request was useless, and could not be the basis for a new trial.

It is next suggested that the court nevertheless did not err in granting a new trial, because, as stated in Mr. Justice GIDEON'S opinion, the district court in considering the motion for a new trial had the right to determine whether in its "judgment the jury had failed to give such weight to the testimony as it was entitled to receive." Mr. Justice GIDEON, therefore, concludes that if the jury did not do so the court did not abuse its discretion in granting a new trial. That, in my judgment, is stating the right of trial courts to interfere with jury verdicts too broadly.

Our statute (Comp. Laws Utah 1917, § 6802), so far as material here, provides that when a case is tried to a jury:

" * * * If it [the court] state the testimony of the case, it must inform the jury that they are the exclusive judges of all the questions of fact."

That section is divided into six subdivisions, and, with some changes, was adopted from the Code of Civil Procedure of Kansas. It was incorporated into our Code of Civil Procedure in 1898, and has been in force ever since that time. The clause above quoted, however, is not copied from the Kansas Code, but was written into our Code, and, so far as the writer is aware, is not found in any other Code. It certainly is not in the California Code, and is not a part of the Kansas Code, as before stated. Section 7122 provides that the jury are the exclusive judges of the credibility of the witnesses.

This court, as a matter of course, takes judicial notice of the general practice and procedure that prevails in the courts of this jurisdiction. Pursuant to the foregoing statutory provisions the courts of this state, in all cases tried to juries which have come to this court in the past 20 years, have uniformly charged the juries that they are the exclusive judges of the weight of the evidence and the credibility of the witnesses. Such an instruction was given to the jury in this case. The foregoing practice has therefore been firmly established in this jurisdiction.

Now, I do not contend that the trial courts may not exercise a sound legal discretion in granting or denying new trials. Indeed, I

contend that the trial courts should in all cases carefully scrutinize the evidence respecting every essential fact that must be established in case a motion for a new trial is made; and if, after doing so, the court is convinced that the evidence is insufficient—that is, that it is lacking in substance upon any material fact—the court should grant a new trial upon the ground of the insufficiency of the evidence to support the verdict, just as our statute providing for new trials contemplates. By insufficiency of the evidence, however, is not meant that the court may weigh the evidence for and against every essential fact, and, if in its judgment the weight is against the finding of the jury that it in its discretion may either grant or deny a new trial. The question is not whether in the judgment of the trial court the finding of the jury is supported by the greater weight of the evidence, but the question is, Is the evidence lacking in substance upon any essential fact? That, in my judgment, is the intent and purpose of our statute. If there is substantial evidence upon every essential fact, then the weight and credibility that shall be given to it is the exclusive province of the jury to determine. This, in my judgment, is so because the jurors may have interpreted the evidence differently from the court. They may also have observed some things during the trial in the conduct and demeanor of the witnesses which may have escaped the notice of the court. Besides, the weight that is to be given to the evidence and the credibility of the witnesses must necessarily be lodged somewhere, and, in my judgment, it is just as safe to lodge it with a number of laymen of average intelligence and experience as it is to lodge it in one man, although he may be a trained lawyer.

By what I have said I do not mean that a court errs in setting aside a verdict which is clearly and manifestly against the weight of the evidence, but that more properly falls under the head of miscarriage of justice. The trial court, no doubt, may also grant a new trial if it is convinced that the jury has misconceived or misapplied the law, as stated in the instructions, to the facts, or in case they have failed to follow the instructions, or have entirely disregarded the evidence upon some material subject or question, or if the court is convinced that upon the whole case the verdict would result in a miscarriage of justice. In all of these instances the trial courts must exercise a sound legal discretion, but, in my judgment, they may not, as is broadly laid down in the prevailing opinion, grant new trials because in their judgment the juries have not given such weight to the evidence, or to some part thereof, as the trial courts think it should have received.

I am not unmindful of the fact that numerous cases can be cited where it is broadly stated that the trial court may exercise its

discretion in granting a new trial upon the ground that the verdict is against the weight of the evidence; in other words, that the trial court may pass upon the weight of the evidence. When the cases are critically examined, however, it will be found that only a few go to that extent, although many cases are cited as having that effect. But, as I have pointed out, our statute is *sui generis* upon that subject, and should be given effect. I am constrained, therefore, to withhold my assent to the proposition stated in the prevailing opinion.

While, in my judgment, the district court erred in granting a new trial upon the specific grounds stated, yet the defendant was not injured in a substantial right by the granting of a new trial, for the reason that the action was based upon the federal Employers' Liability Act, and the instructions of the court upon the first trial were manifestly incomplete and insufficient upon the questions that arose under that act. For that reason, therefore, the court did not abuse its discretion in granting a new trial. Upon the second trial all the questions arising under that act were fully presented by the instructions, which, however, had not been done on the first trial.

This brings me to the proceedings had on the second trial. The plaintiff filed an amended complaint upon which that trial was had. The complaint covers more than 12 pages of the printed record, and is therefore too long for insertion here, or to make even a condensed statement of the allegations therein contained. It must suffice to say that the complaint is sufficient both in form and substance. The defendant, in addition to denying the alleged negligence on its part, also set up contributory negligence and assumed risk.

I shall confine my statement to the evidence produced by plaintiff at the second trial, all of which is without conflict. From that evidence it was made to appear that on September 22, 1916, the date of the accident, the deceased was employed by the defendant as a rear brakeman upon a special freight train consisting of 32 cars of coal, one tool car, and four "outfit" cars; that on the evening of that day, between the hours of 9 and 10 o'clock, the train arrived at Red Desert, a station of defendant's railroad about 50 miles west of Rawlins, in the state of Wyoming, going eastward toward Rawlins; that the train crew consisted of the engineer, fireman, conductor, head brakeman, and the deceased as rear brakeman; that upon arriving at Red Desert the train was stopped on the main line, and the caboose was detached therefrom for the purpose of "setting out" the four "outfit" cars which were immediately ahead of the caboose; that the tool car referred to was set out either at Red Desert or a station west of it, the evidence not being clear as to that; that after the caboose had

been detached the train was moved forward on the main line a sufficient distance to permit the "outfit" cars to be switched backward onto what is called the business track, which was by backing the train and by placing the cars upon that track; that when that had been done the train was moved forward on the main line to be again attached to the caboose, which was standing on the main line; that the train was accordingly moved backward on the main line.

The conductor, who was called as a witness for plaintiff, testified that the train was moved backward slowly and at about the speed that a man would walk if he were "walking leisurely;" that he was standing on the south side of the track about 10 or 12 car lengths—that is, between 400 and 500 feet—from the caboose where the deceased was standing on the south side of the track waiting for the rear end of the train to reach the caboose, which was about 1,200 feet from the engine; that when the rear end of the train was about to reach the caboose the deceased gave the usual stop signal, which the conductor relayed to the head brakeman, and which the latter gave to the engineer; that upon giving the stop signal the train moved backward very slowly and when the coupling with the caboose had been made the train stopped; that, while the night was clear—that is, cloudless—it was, nevertheless too dark for the conductor to see the deceased, who was at the side of the train at or near the caboose; he, however, did see the light of the lantern carried by the deceased, and which disappeared as soon as the train had stopped and the coupling had been effected; that when the light disappeared the conductor assumed that its disappearance was caused from the fact that the deceased had stepped onto the track between the rear car of the train and the caboose for the purpose of coupling the air hose so as to connect the air with the caboose; that after the light had disappeared the conductor waited to receive the forward signal from the deceased, which he expected would be given as soon as the air hose was connected; that, not receiving such a signal for several minutes (the conductor is not clear as to the length of time), he walked back to the caboose, and upon arriving there found the deceased's body lying across the south rail of the track, his head and shoulders extending south of the south rail, and the front wheel—that is, the east one of the rear truck of the car next to the caboose—resting upon his breast; that when the conductor arrived the deceased was "still gasping," but soon died; that in order to move the truck from the body of the deceased the conductor immediately signaled the engineer to back the train slowly, which was done; that as soon as the train commenced to move backward the conductor stepped in between the caboose and

the rear car and opened the angle cock to permit the air to pass backward "into the caboose," and by that means set the brakes, which stopped the train abruptly and so that the body of the deceased could be taken from the track, which was done.

The body of the deceased was lying "about 6 or 8 feet" east of the rear or west end of the rear coal car, and his lantern, with the light burning, was standing about "2 or 3 feet east of his body in the middle of the track," under the car. The conductor further testified that the only thing which was left undone which the deceased was required to do was the opening of the angle cock, so as to connect the air with the caboose. He also testified that, while he was standing opposite the train waiting for the deceased to connect the air hose, and to give the signal for the train to move forward, he did not notice any movement of the cars or the running out of the slack. Further, that the movement of the train was the usual and ordinary movement in making a switch such as was made, and that the appliances were all in good order and were working all right; that the angle cock worked all right when he opened it, as before stated.

The engineer was also called as a witness by the plaintiff, and he stated in detail how the train was being operated in switching the cars; that as soon as he had received the signal to stop the train, when the rear coal car had reached the caboose, he moved the train very slowly backward, and when he felt that the train had been coupled to the caboose he at once set the independent brake on the engine, and, in accordance with what he said were the instructions, "always to release the air" when the independent brake on the engine was set, he did "release the air" on the train. He also said that the switching and coupling was done in the ordinary and usual way, and that he did not notice any slack running out. The engineer, however, testified that there was a slight downward grade westward, so that the engine was slightly higher than the caboose, and that it was possible that the slack ran out without his noticing it. He was positive, however, that after he set the independent brake on the engine the engine did not move. He also said that by reason of the slight downward grade the slack, in his judgment, had run out when the rear end of the train had reached the caboose.

The evidence is also to the effect that the play or slack between the cars was, if anything, greater than was the distance that the cars moved backwards, so that the rear end of the train might have moved backward without any movement on the part of the engine. It also was shown that within about 10 minutes after the train was moved from the body of the deceased his body was placed on a passenger train which passed at the

time, and was removed from the scene of the accident; that the special freight train was then removed from the main line and placed upon the side track, where it remained until about 3 o'clock the next morning, when it was taken by a special train crew to Rawlins; that after arriving at Rawlins the next morning the rear brakeman of the special crew, in attempting to work the angle cock which was on the rear end of the coal car, and the one the conductor had opened the night before when the accident happened, found that it worked hard. He said:

"Why, I went to turn the angle cock; it was a little stiff, and had to pound it over with a hammer, and pounded it over with a hammer and cut the air hose in by the caboose."

He afterwards explained that the angle cock was one in general use, and that in order to turn the "handle" it had to be "lifted a little." There was also evidence on the part of the defendant, which was not disputed, that proper inspection of the angle cock and appliances had been made, etc., and that they were all in good working order. This latter evidence is, however, not material.

At the close of plaintiff's evidence, and again at the close of all the evidence, the defendant requested the court to instruct the jury to return a verdict in favor of the defendant upon the grounds: (1) That there was no evidence showing negligence on the part of the defendant; (2) that the deceased assumed the risk as an incident to his employment; (3) that, if it be assumed that the angle cock was defective, there nevertheless is no evidence that such defect was the proximate cause of the injury and death of the deceased, and that if there were a defect there is no evidence whatsoever that the defendant had any notice or knowledge of such defect in time to have cured it. The court refused the request and submitted the case to the jury, which, as before stated, returned a verdict for the plaintiff.

The defendant assigns the court's ruling as error and in its brief and argument insists that the ruling of the district court was prejudicial for the reasons before stated.

By the first assignment referred to the defendant squarely raised the question as to whether there is any substantial evidence upon which to base a finding of negligence on the part of the defendant or of any of the train crew. Where that question is raised, as it is here, by a request to direct a verdict, then the question of whether there is any substantial evidence of negligence under the federal act is a question for the court, and will be reviewed by the Supreme Court of the United States. *Chicago, R. I. & P. R. Co. v. Devine*, 239 U. S. 52, 36 Sup. Ct. 27, 60 L. Ed. 140, 18 R. C. L. p. 866, § 328. This court is therefore bound to consider the question of whether there is any substantial evidence in

this record authorizing a finding of negligence on the part of the defendant or of any of the train crew. If there is not, then the district court erred in refusing to direct a verdict. 18 R. C. L. p. 826, § 281. I am thus required to make at least a brief review of the evidence.

As before pointed out, in this case the evidence upon the question of negligence all comes from the plaintiff's witnesses, and is without dispute. Plaintiff proved at the trial that the switching was done in the ordinary and usual way; that there was no movement of the engine from the time the train was coupled onto the caboose, and that if there was any movement of the cars it was due solely to the "running out" or the "taking up" of the slack between the cars. While it is true that the circumstances clearly indicate that the rear end of the train must have moved backward after the deceased stepped between the rear coal car and the caboose, yet the evidence is also clear and positive that the engine did not move, and that there was ample play or slack between the cars to account for the backward movement of the rear end of the train. In view of those undisputed facts there is no room for an inference that the engineer moved the train backward, and therefore there is no basis for any inference of negligence on his part. Nor is there the slightest evidence that any other member of the train crew was guilty of any act either of omission or commission constituting negligence. Moreover, there is not the slightest evidence in this record that the running out of the slack was not an ordinary and usual occurrence; nor is there any that it could have been prevented. Neither is there any evidence as to what caused the deceased to be under the wheels of the car. What caused him to be there is left entirely to conjecture. No doubt it may be assumed that the accident occurred in the course of his employment, but that is not enough. It must also be shown that it was caused through the negligence of the defendant or some of the train crew. 18 R. C. L. p. 826, § 281.

It is contended, however, on behalf of the plaintiff that to permit the slack to run out after the deceased had gone between the caboose and the coal car to connect the air hose and to turn the angle cock constituted negligence; or, at least, was such an occurrence from which the jury could infer negligence. May the jury, however, infer negligence from the switching of cars which plaintiff's own evidence shows was done in the usual and ordinary way? May they infer negligence from the mere fact that the cars, in accordance with the law of gravitation, slowly moved down grade until the slack had run out? How can a jury of laymen, without any experience in operating trains, legitimately arrive at such a conclusion? In the absence of any evidence that what was done in the usual and

ordinary way was improper or dangerous, how can a jury be permitted to declare it to be so? If a finding of negligence can be sustained in this case, then it will be practically impossible to switch cars upon a track that to any extent inclines one way or the other so as to cause the slack to run out from the engine or to run in toward the engine, and thus to cause the cars to move, without being guilty of negligence. While there is no doubt in this case that the cars moved backward after the train had been stopped and the engine brakes had been set by the engineer, yet, upon the other hand, the evidence is clear and explicit that the engine did not move, and that the movement of the cars was due solely to the slack running out. As pointed out by Mr. Justice Woodward in the case of *Lane v. New York, O. & W. R. Co.*, 141 App. Div. 145, 125 N. Y. Supp. 971, such an occurrence is but natural and to be expected. In the course of the opinion it is said:

"The common experiences of mankind establish that a heavy freight train, this one having 32 cars, brought to a standstill upon a slight grade, will relax a trifle when the drawing power is released."

No one can successfully controvert the foregoing statement. Nor can it be successfully disputed that cars will not move to some extent after a train has come to a sudden standstill in case the track inclines one way or the other, which is a very usual thing. How can such an occurrence, without more, constitute negligence in the operation of trains? There is therefore no substantial evidence of negligence in this case, and for that reason the court erred in not directing a verdict.

There is, however, still another reason why the court erred in refusing to direct a verdict. In view of the undisputed evidence the deceased in entering into the employment as brakeman assumed all the ordinary risks which were incident to that employment. The district court so charged the jury. In view that under the evidence the death of the deceased was not caused by reason of defendant's failure to comply with any of the provisions of the federal act in providing the appliances in the act specified, the defense of assumed risk is available to it. *Seaboard Air Line v. Horton*, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; *Southern Ry. Co. v. Crockett*, 234 U. S. 725, 34 Sup. Ct. 897, 58 L. Ed. 1564.

In *Taylor v. Rock Island, A. & L. R. Co.*, 121 La. 543, 46 South. 621, the rule respecting the assumption of the risk of moving cars is stated thus:

"Adjusting or taking up slack is a common and necessary incident to the stopping of all trains, and one the risk of which the brakeman assumes when he undertakes to uncouple cars before the train is at rest."

(201 P.)

In *Cincinnati, N. O. & T. P. Ry. Co. v. Evans*, 129 Ky. 152, 110 S. W. 844, the rule is stated in the headnote in the following words:

"When decedent became a railway brakeman, he assumed all the risks of the employment as usually conducted, *including the negligence of his fellow brakemen*, and jerks of cars resulting from the taking up of the slack in the movement of cars made with ordinary care by the engineer." (*Italics mine.*)

I have italicized the seven words in the quotation for the purpose of directing the reader's attention to the fact that under the federal act the fellow-servant rule does not apply, and hence those seven words must be eliminated. Excepting the seven words, however, none of which has any bearing in this case, the law is correctly reflected in the statement.

To the same effect is the case of *Briggs v. Union Pac. R. Co.*, 102 Kan. 441, 175 Pac. 105. In that case it was held that a fireman assumed the risk under the facts there stated. In that case, as in this, the jury found that the defendant was negligent, but the court held otherwise. In the course of the opinion it is said:

"The fireman had a right to assume that the engine would not be started until he was in the engine cab. It was started, however, without him. When he came out of the lunchroom the engine and a number of cars had already gone by, and the train was going forward. He was immediately and manifestly confronted with all the difficulties and dangers to be encountered in reaching his place on the engine. It would be fatuous to say he was not aware of them, and it would be an impeachment of the mental capacity of a competent man to say he did not appreciate them. * * * The whole situation created by the engineer's negligence lay before the open eyes of this experienced trainman the moment he stepped out of the lunchroom. He voluntarily chose his course, and voluntarily assumed the risk attending his choice."

In the foregoing case the Supreme Court of Kansas, in concluding the opinion, points out that that case, like the one at bar, was based upon the federal act. With regard to that the court said:

"The case being governed by federal law, the court has applied that law, as expounded by the Supreme Court of the United States."

The judgment of the district court in entering judgment for the defendant notwithstanding the verdict of negligence by the jury was therefore affirmed. It should be remembered that in the foregoing case the assumption of risk was based upon the ground that the fireman was aware of and appreciated the danger, and therefore assumed the risk upon that ground.

In *Pete v. N. O., T. & M. R. Co.*, 134 La. 608, 64 South. 485, it is held that a brakeman's "going between cars while they were in motion was uncalled for and was an unnece-

sary assumption by him of a known risk," for which he could not hold the master.

In *L. & N. R. R. Co. v. Greenwell's Adm'r*, 144 Ky. 796, 139 S. W. 934, the rule is stated in the headnote thus:

"The ordinary jerking and bumping which always accompanies the switching of freight cars within the yards of the company does not, of itself, constitute negligence on the part of the company."

"Those who accept employment as switchmen and brakemen and whose duty requires them to be on and about the cars are fully advised as to the risks incident to their employment, which they must assume if they expect to take part in that employment."

In *Stool v. So. Pac. Co.*, 88 Or. 350, 172 Pac. 101, the Supreme Court of Oregon states the rule thus:

"The general rule is that an employé of a railroad company assumes all the risks ordinarily incident to his employment, including those arising from the ordinary operation of trains upon the railroad."

In that case the rule just stated was applied to a section man working on the track. If that rule applies to a section man, how much more strongly does it apply to an employé like the deceased who is actually engaged in operating the trains upon the track.

In this connection it is important not to confuse contributory negligence with assumption of risk. That is sometimes done, and under certain circumstances is of no importance. In this case, however, the distinction is important. It has frequently been pointed out by the courts that assumed risk and contributory negligence may arise out of the same set of facts. In *Wheeler v. C. & W. I. R. R. Co.*, 267 Ill. 806, 108 N. E. 330, it is said: "Assumed risk and contributory negligence" may both "arise under the facts of a case." Many illustrations are found in the decided cases, to which it is not necessary to refer.

In view of the undisputed facts of this case it is very clear that the risk, if there was one, in passing between the caboose and the rear coal car before the slack had entirely run out was one which was incident to the employment, and hence was assumed by deceased. Moreover, in view of plaintiff's evidence, this case is not one where it can be inferred that the movement of the train or of the cars was caused by any act or omission of the engineer. The movement, what movement there was, is accounted for by the declining grade of the track and the running out of the slack.

If it be assumed, however, that the angle cock was defective, still the plaintiff should not recover. It is elementary that in order to recover the burden was upon her to show that the defect in the angle cock was the proximate cause of the injury and death of the deceased. Here again there is nothing upon which an inference can be based that

the defect, if any, in the angle cock was the proximate cause of the accident. The evidence is positive that the angle cock was in good condition and working all right immediately after the accident. True, there is evidence that it worked "hard," or was "stiff," the next morning after the train had been moved about 50 miles from where the angle cock had been last tried, and where it was found to be in good order. If the angle cock had not been tried and had not been found to work by the conductor immediately after the accident, then the fact that it worked "hard," or was "stiff," the next morning might at least furnish some basis however weak, upon which to base an inference that it was not in good order the evening before when the accident occurred. There is, however, no room for such an inference in view of the conductor's evidence that it worked all right. It must be remembered that that was plaintiff's own evidence, and which, under the circumstances was not overcome—not even affected—by what occurred the next morning. There is therefore no substantial evidence that the angle cock was not in good working order when the accident happened.

But, as before stated, if there were such evidence, still the plaintiff should fail because there is not the slightest evidence that the defect, if any existed, was the proximate cause of the accident. There is not the slightest evidence that the deceased attempted to work the angle cock, or that he even touched it before the accident happened. Nor is there any fact from which an inference can be deduced that, if the deceased did touch or attempt to work the angle cock, that caused him to fall under the wheels of the car. The attempt to work the angle cock would not naturally result in his falling under the wheels. Then again there is no evidence whatever respecting the time when the angle cock became defective, if it were in fact defective. There is evidence, however, which is undisputed, that it had been inspected in proper time and had been found in good working order, and that it was one in ordinary use. There is therefore nothing upon which an inference can be based as to how long the defect existed, if a defect did exist. If, therefore, the angle cock is one of the appliances which comes within the federal act and hence had to be provided by the defendant at its peril, still the evidence is beyond question that the defendant had complied with the federal act in that regard. The defendant having once complied with the federal act by providing a proper angle cock, but which, in operating the train, became defective or out of order it nevertheless was entitled to a reasonable time within which to cure such defect. While the defendant would be required to exercise all reasonable care to maintain its appliances in good repair and working order and would

have to exercise diligence in discovering any defect therein, and to remedy the same at the earliest possible moment in view of the circumstances, yet it would not be absolutely liable under the federal act if it exercised such care and diligence where, as here, the appliance once provided had suddenly become defective and out of working order. *St. L. & S. F. R. Co. v. Delk*, 158 Fed. 931, 86 C. C. A. 95, 14 Ann. Cas. 233; *U. S. v. Ill. Cent. R. Co.*, 170 Fed. 542, 95 C. C. A. 628; *M. P. Ry. Co. v. Brinkmeier*, 77 Kan. 14, 98 Pac. 621.

I am of the opinion therefore that under the law applicable to such facts the judgment based on the erroneous verdict should be reversed and the cause remanded to the district court of Weber county, with directions to grant a new trial, with costs of this appeal taxed against respondent.

CORFMAN, O. J., concurs.

**COURT OF INDUSTRIAL RELATIONS v.
CHAS. WOLFF PACKING CO.**
(No. 23702.)

(Supreme Court of Kansas. Oct. 8, 1921.)

(*Syllabus by the Court.*)

1. Public Service Commissions §21—Court of Industrial Relations may sue to compel obedience to its orders.

Under chapter 29 of the Laws of 1920, an action may be brought in the Supreme Court by the Court of Industrial Relations to compel obedience to an order made by it.

2. Master and servant §13, 69—Industrial court's order fixing wages and hours of service enforced by mandamus.

Obedience to an order made by the industrial court, fixing a schedule of wages and hours of labor, may be compelled by an action in mandamus.

3. Constitutional law §70(1)—Action to enforce industrial court's order not exercise of legislative powers.

An action in the Supreme Court to compel obedience to an order made by the Court of Industrial Relations does not call for the exercise of legislative powers.

4. Public Service Commissions §19(1)—Order of Court of Industrial Relations does not require Supreme Court's approval to become effective.

An order, made by the Court of Industrial Relations does not require the approval of the Supreme Court before becoming effective and binding.

5. Master and servant §69—Wage regulation by industrial court held justified.

The petition filed in this action alleged that such an emergency existed as justified the Court of Industrial Relations in making an investigation.

8. Constitutional law \S 238(2), 275(2)—Master and servant \S 69—Public Service Commissions \S 2—Court of Industrial Relations Act held valid.

Chapter 29 of the Laws of 1920, the Court of Industrial Relations Act, does not violate the Fourteenth Amendment to the Constitution of the United States; those affected by the orders made under that law are not deprived of liberty or property without due process of law, and are not denied the equal protection of the law. Employees in the kinds of business named in the law are governed by the orders of the Court of Industrial Relations; the wages paid such employees are affected with a public interest so as to subject such wages to regulation by the court; orders made under the law do not deprive employers nor employees of the freedom of contract concerning wages in violation of the Fourteenth Amendment to the Constitution of the United States; and classification of the businesses to which the law applies is not arbitrary nor unjust.

Original proceeding in mandamus by the Court of Industrial Relations against the Chas. Wolff Packing Company, to put in effect a scale of wages, and to establish hours of labor as ordered by the Court of Industrial Relations. The defendant answered, presenting a number of questions of law, to which the plaintiff demurred. Demurrer sustained.

Baxter D. McClain, of Iola, for plaintiff.

D. R. Hite and John S. Dean, both of Topeka, for defendant.

MARSHALL, J. This is an original proceeding in mandamus to compel the Wolff Packing Company, hereinafter named the defendant, to put in effect a scale of wages to be paid by it to its employees and to establish hours of labor as ordered by the Court of Industrial Relations, hereinafter named the plaintiff. The defendant answers, and presents a number of questions of law in addition to those of fact. The plaintiff requests that the questions of law be disposed of in advance of the final hearing.

The defendant is operating a packing house in the city of Topeka. On March 21 and May 2, 1921, the plaintiff made orders, and afterward served them on the defendant, fixing wages to be paid and hours of labor to be observed by it in operating its business. The defendant refused to obey those orders.

The questions of law at the direction of the court, have been briefed and argued, and will be disposed of at this time. This is authorized by section 278 of the Code of Civil Procedure (Gen. St. 1915, \S 7178). It may be considered that the plaintiff has demurred to that part of the defendant's answer which presents questions of law.

[1] 1. The defendant contends that the

Court of Industrial Relations "cannot sue in its own name," and argues that the statute creating the court does not authorize it to so prosecute actions in this court. Section 12 of the industrial court act in part reads:

"In case of the failure or refusal of either party to said controversy to obey and be governed by the order of said Court of Industrial Relations, then and in that event said court is hereby authorized to bring proper proceedings in the Supreme Court of the state of Kansas to compel compliance with said order."

Section 27 of the Code of Civil Procedure (Gen. St. 1915, \S 6917) in part reads:

"A person expressly authorized by statute, may bring an action without joining with him the person for whose benefit it is prosecuted."

Section 265 of the Code of Civil Procedure (Gen. St. 1915, \S 7163) provides that:

"An injunction may be granted to enjoin the illegal levy of any tax, * * * and any number of persons whose property is or may be affected by a tax or assessment so levied * * * may unite in the petition filed to obtain such injunction."

Under the last statute the parties named may not only file the petition, but may prosecute the action to final completion. Section 419 of the Code of Civil Procedure provides for an action by the personal representative of a deceased person for his wrongful death, and section 420 provides that if the party whose death has been caused is a resident of this state, and no personal representative has been appointed, the action may be brought by the widow, or, where there is no widow, by the next of kin of such deceased. Under this section actions for wrongful death are constantly commenced and prosecuted to final judgment by the widows or the children of the deceased persons.

Section 846 of the General Statutes of 1915, a part of the law establishing the Board of Railroad Commissioners, in part reads:

"In case any railroad company, or any such officer, agent, employé, or person, shall violate or shall refuse or fail to obey any such order lawfully made by said Board of Railroad Commissioners, any person aggrieved thereby may institute and prosecute mandamus proceedings in the Supreme Court, in the name of the state on the relation of such person, to compel compliance with and obedience to such order; and in any case where in the opinion of the Board of Railroad Commissioners the interest of the public requires it, such board shall require such proceeding to be brought, and such proceeding shall then be brought by the Attorney General in the name of the state." Laws of 1901, c. 286, \S 38.

Section 8447 in part reads:

"Whenever a proceeding brought in the Supreme Court under section 38 of this act by the attorney for the board, or the Attorney General, upon the direction of the Board of Railroad Commissioners," etc. Laws 1901, c. 286, § 39, as amended by Laws 1907, c. 263, § 8.

Under these statutes it was held that:

"The attorney for the Board of Railroad Commissioners is the proper officer to bring an action in the name of the state to compel compliance with an order of the board." *State ex rel. v. Railroad Companies*, 85 Kan. 649, 118 Pac. 872 (Syl. § 1).

Section 8367 of the General Statutes of 1915 reads:

"The commission may compel compliance with the provisions of this act and compel compliance with the orders of the commission by proceeding in mandamus, injunction or other appropriate civil remedies, or by appropriate criminal proceedings in any court of competent jurisdiction." Laws 1911, c. 238, § 39.

In *City of Emporia v. Telephone Co.*, 90 Kan. 118, 127, 133 Pac. 858, 861, this court said:

"Section 39 empowers the Utilities Commission to compel compliance with its orders by proceedings in mandamus, injunction, or other appropriate civil or criminal remedies."

State ex rel. v. Gas Co., 88 Kan. 165, 127 Pac. 639, was an action brought under the Public Utilities Law by the state on the relation of the attorney for the Public Utilities Commission, and no question was raised about the authority of the attorney to so prosecute the action.

The industrial court law is a remedial statute, and should be liberally construed to promote its object. Gen. Stat. 1915, § 11829; *Lumber Co. v. Douglas*, 89 Kan. 308, 318, 131 Pac. 563, 44 L. R. A. (N. S.) 843. A liberal construction is that the statute gives to the court authority to prosecute in its own name actions of this character. The statute expressly authorizes the Court of Industrial Relations to bring proper proceedings to compel compliance with its orders. Mandamus is a proper proceeding, and the court can bring it. The industrial court is not directly interested in the result of this action; the state is the party that is interested, but the state has authorized the court to bring the action. This is at least one of the ways in which it may be brought.

[2] 2. The defendant contends that the purpose of this action cannot be accomplished by proceedings in mandamus, as the action is brought to compel the payment of definite wages to certain employes, and those employes have a right to bring actions against the defendant to recover judgments for wages legally due them. The argument is unsound, for the reason that the action

is not brought for the purpose named. It is brought to compel the defendant to obey an order of the Court of Industrial Relations, fixing a scale of wages and establishing hours of labor to be observed by the defendant in its business. Under the law directing that actions shall be brought by the real party in interest, unless otherwise specifically authorized by statute, the plaintiff cannot, by an action in mandamus, compel the defendant to pay any wages that may be due under the schedule ordered to be put in effect; such an action must be prosecuted by the workman to whom the wages are due. The present action is analogous to one brought by competent authority to compel a public service corporation to put in effect rates ordered by a proper, controlling body. The public service corporation can be compelled, in an action in mandamus, to put in effect such rates. Damages sustained by reason of the refusal of the public service corporation to obey the order of the controlling body can be recovered only in an action brought by the party injured.

[3] 3. Another contention of the defendant is that the nature of proceedings under section 12 of the industrial court act is legislative and not judicial. This contention is based on that provision of this section which gives to those who are governed by it the right to commence proceedings "to compel said Court of Industrial Relations to make and enter a just, reasonable and lawful order in the premises." It is argued that whether or not a legislative regulation is just and reasonable is not a judicial question. The statute does not require the Supreme Court to say what are just, reasonable, or lawful wages, and then direct the industrial court to issue an order putting those wages into effect. If the latter court should refuse to make any order on a proper application, then this provision of the statute will operate, and the party complaining can, by prosecuting a proper proceeding in the Supreme Court, compel the industrial court to make an order which when made would be subject to judicial investigation in a proper action the same as any other order made by that court.

One difficulty with this contention of the defendant is that no one is complaining of the refusal of the industrial court to put in effect a schedule of wages just and reasonable or otherwise, but the defendant is resisting a schedule ordered by the Court of Industrial Relations, an altogether different question, one that is not involved in the position now taken by the defendant nor in the answer filed by it. For this reason the defendant cannot now avail itself of the objection, even if it were good. *City of Kansas City v. Railway Co.*, 59 Kan. 427, 53 Pac. 468, 52 L. R. A. 321; *State v. Smiley*,

65 Kan. 240, 69 Pac. 199, 67 L. R. A. 903; State v. Jack, 69 Kan. 387, 398, 76 Pac. 911, 1 L. R. A. (N. S.) 167, 2 Ann. Cas. 171; Brown v. Gilpin, 75 Kan. 773, 90 Pac. 267; State v. Railway Co., 76 Kan. 467, 490, 92 Pac. 606; State v. Railway Co., 96 Kan. 609, 612, 152 Pac. 777, Ann. Cas. 1917A, 612; 8 Cyc. 787; 12 O. J. 760; Hatch v. Rear-don, 204 U. S. 152, 160, 161, 27 Sup. Ct. 188, 51 L. Ed. 415, 9 Ann. Cas. 736.

[4] 4. The defendant insists that the orders of the industrial court are not effective until approved by the Supreme Court. This is based on a statement made by this court in State v. Howat, 109 Kan. 376, 392, 198 Pac. 696, 694, as follows:

"Resort to this court was authorized in terms which afford opportunity for the determination of issues upon the court's independent judgment, both with respect to the law and the facts. Ohio Valley Co. v. Ben Avon Borough, 253 U. S. 287, 40 Sup. Ct. 527, 64 L. Ed. 908. The appellate jurisdiction of this court not being available because the Court of Industrial Relations is a nonjudicial body, its constitutional jurisdiction in mandamus was utilized. This jurisdiction is precisely the same as that of any court of general jurisdiction in mandamus, that is to say, is plenary, may be exercised to control the action of inferior tribunals (Bishop v. Fischer, 94 Kan. 105, 145 Pac. 890, Ann. Cas. 1917B, 450; In re Pettitt, 84 Kan. 637, 114 Pac. 1071), and comprehends the power of superintending control to the full extent of which the writ of mandamus is capable."

The defendant says:

"This ruling leads to the conclusion that it is contemplated by the act that this court is to pass upon the facts and render judgment as to the reasonableness and justness of the orders."

The conclusion reached by the defendant is not warranted by the language quoted, and the industrial court law does not contain any such provision. An order of the industrial court takes effect in the manner prescribed by law, and does not require the approval of the Supreme Court.

[5] 5. It is argued that the Court of Industrial Relations cannot exercise the extraordinary power of regulating wages to be paid by employers, except in cases of emergency, and it is urged that no emergency is alleged. Section 7 of chapter 29 of the Law of 1920 provides that:

"In case of a controversy arising between employers and workers, * * * engaged in any of said industries, * * * if it shall appear to said Court of Industrial Relations that said controversy may endanger the continuity or efficiency of service of any of said industries, * * * authority and jurisdiction are hereby granted to said Court of Industrial Relations, upon its own initiative, * * * to investigate said controversy, and to make such temporary findings and orders as may be necessary to preserve the public peace * * *

to settle and adjust all such controversies by such findings and orders as provided in this act. It is further made the duty of said Court of Industrial Relations, upon complaint of either party to such controversy, * * * if it shall be made to appear to said court that the parties are unable to agree and that such controversy may endanger the continuity or efficiency of service of any of said industries, * * * to proceed and investigate and determine said controversy in the same manner as though upon its own initiative."

In the present action the petition alleges that complaint in writing was made by certain persons, authorized by section 7 of the industrial court act to make such complaint, a copy of which is attached to and is made a part of the petition filed in this action. That complaint alleged that a controversy had arisen between the defendant and its employes engaged in the operation of the defendant's packing business, and "that said controversy has endangered and is continuing to endanger the continuous operation and efficiency of service of said packing plant, and does affect and will affect the manufacture and production of the commodities necessary for human food within the state of Kansas and within the vicinity where said packing plant is now operating, and will and does endanger the orderly operation of said packing plant." The petition sufficiently alleges that an emergency had arisen which justified the industrial court in taking cognizance of the complaint.

[6] 6. The defendant contends that the industrial court law and the orders sought to be enforced in this action violate the Fourteenth Amendment of the Constitution of the United States, in that the law and the orders made thereunder deprive the defendant of its liberty and property without due process of law, and deny to it the equal protection of the laws. To support this contention the defendant argues that employes cannot be governed by the orders of the industrial court; that the wages of the defendant's employes are not affected with a public interest so as to subject such wages to regulation by the state; that the law and orders made by the industrial court deprive the defendant and its employes of the freedom of contract concerning wages; and that the classification of the businesses to which the law applies is arbitrary and unjust. These matters will be discussed in the order named.

The statute must be construed so as to uphold its validity, if possible. Com'rs of Cherokee Co. v. State ex rel., 36 Kan. 337, 13 Pac. 558; In re Burnette, 73 Kan. 609, 85 Pac. 575; Young v. Regents of State University, 87 Kan. 239, 124 Pac. 150, Ann. Cas. 1913D, 701; State ex rel. v. City of Lawrence, 98 Kan. 808, 811, 160 Pac. 217.

"The principle is universal that legislation, whether by Congress or by a state, must be

taken to be valid, unless the contrary is made clearly to appear." *Reid v. Colorado*, 187 U. S. 137, 153, 23 Sup. Ct. 92, 98 (47 L. Ed. 108).

The basis of the contention that the defendant's employes cannot be governed by the industrial court is that those employes cannot be compelled to work for the wages fixed, while the defendant is compelled to operate its plant and to pay those wages. Section 17 of the act provides:

"That nothing in this act shall be construed as restricting the right of any individual employe engaged in the operation of any such industry, employment, public utility, or common carrier to quit his employment at any time, but it shall be unlawful for any such individual employe or other person to conspire with other persons to quit their employment or to induce other persons to quit their employment for the purpose of hindering, delaying, interfering with, or suspending the operation of any of the industries, employments, public utilities, or common carriers governed by the provisions of this act, or for any person to engage in what is known as 'picketing,' or to intimidate by threats, abuse, or in any other manner, any person or persons with intent to induce such person or persons to quit such employment, or for the purpose of deterring or preventing any other person or persons from accepting employment or from remaining in the employ of any of the industries, employments, public utilities, or common carriers governed by the provisions of this act."

It must be noted that this provision of the act takes from employes some of that which has been heretofore considered their legal right. Let us look now to the restrictions placed on the employer. Section 6 of the act reads:

"It is hereby declared and determined to be necessary for the public peace, health and general welfare of the people of this state that the industries, employments, public utilities and common carriers herein specified shall be operated with reasonable continuity and efficiency in order that the people of this state may live in peace and security, and be supplied with the necessities of life. No person, firm, corporation, or association of persons shall in any manner or to any extent, willfully hinder, delay, limit or suspend such continuous and efficient operation for the purpose of evading the purpose and intent of the provisions of this act; nor shall any person, firm, corporation, or association of persons do any act or neglect or refuse to perform any duty herein enjoined with the intent to hinder, delay, limit or suspend such continuous and efficient operation as aforesaid, except under the terms and conditions provided by this act."

Part of section 16 reads:

"It shall be unlawful for any person, firm, or corporation engaged in the operation of any such industry, employment, utility, or common carrier willfully to limit or cease operations for the purpose of limiting production or transportation or to affect prices, for the purpose of

avoiding any of the provisions of this act; but any person, firm or corporation so engaged may apply to said Court of Industrial Relations for authority to limit or cease operations, stating the reasons therefor, and said Court of Industrial Relations shall hear said application promptly, and if said application shall be found to be in good faith and meritorious, authority to limit or cease operations shall be granted by order of said court."

Part of section 17 reads:

"It shall be unlawful for any person, firm or corporation, * * * engaged in any of said industries, employments, utilities or common carriers to do any act forbidden, or to fail or refuse to perform any act or duty enjoined by the provisions of this act, for the purpose or with the intent to hinder, delay, limit, or suspend the operation of any of the industries, employments, utilities or common carriers herein specified or indicated, or to delay, limit, or suspend the production or transportation of the products of such industries, or employments, or the service of such utilities or common carriers."

Section 20 in part reads:

"In case of the suspension, limitation or cessation of the operation of any of the industries, employments, public utilities or common carriers affected by this act, contrary to the provisions hereof, or to the orders of said court made hereunder, if it shall appear to said court that such suspension, limitation, or cessation shall seriously affect the public welfare by endangering the public peace, or threatening the public health, then said court is hereby authorized, empowered and directed to take proper proceedings in any court of competent jurisdiction of this state to take over, control, direct and operate said industry, employment, public utility or common carrier during such emergency."

An analysis of these statutes reveals that the defendant is restricted from doing certain things with the intention of violating the law, or in other words is restricted from doing those things prohibited by the law. But the defendant is not, by the law, compelled to operate its plant at a loss, nor is it prohibited from changing its business, nor from quitting the business, if it desires to do either of these things in good faith, not intending thereby to violate any provision of the act. The language of the act will bear this construction; it will uphold the validity of the act and not deprive the defendant of any constitutional right that has been urged by it.

The law governing public service corporations is somewhat closely analogous to the law now under consideration. The United States Supreme Court has held that a railroad may be compelled by mandamus to perform those duties that are required by law. *Northern Pacific Railroad v. Dustin*, 142 U. S. 492, 12 Sup. Ct. 283; 35 L. Ed. 1092; *Union Pacific R. R. Co. v. Hall et al.*, 91 U.

(201 P.)

S. 343, 23 L. Ed. 428; Covington Stockyards Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. Ed. 73. In *City of Potwin Place v. Topeka Ry. Co.*, 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312, the Supreme Court of Kansas said:

"The performance of the duties which a street railway company owes to the public to operate its lines in accordance with the provisions of a city ordinance under which its road was constructed may be enforced by mandamus." Syl. § 1.

In *State ex rel. v. D. O. M. & T. Ry. Co.*, 53 Kan. 377, 86 Pac. 747, 42 Am. St. Rep. 295, the following language was used:

"The roadbed and superstructure of a railroad built under a charter obtained in accordance with the laws of this state are charged, not only in the hands of the original corporation, but of purchasers as well, with the burden of the company's charter obligations, and cannot be diverted from the purpose to which it was devoted, nor relieved from this burden without the consent of the state, duly expressed by the Legislature or other competent authority." Syl.

In *City of Topeka v. Water Co.*, 58 Kan. 349, 49 Pac. 79, this court held that:

"Mandamus may be employed to compel a water company to extend its mains in a city, where under the contract between the city and the company it is the duty of the company to make such extension." Syl. § 2.

See, also, *Railroad Co. v. Nyce*, 61 Kan. 394, 407, 59 Pac. 1040, 48 L. R. A. 241.

In *State ex rel. v. Postal Telegraph Co.*, 96 Kan. 298, 150 Pac. 544, this court said:

"Where a telegraph company maintained a telegraph station for a number of years at an average deficit of \$134.33 per annum it should have applied to the Public Utilities Commission to discontinue it, and it was unlawful to close the station and quit business thereat until such permission was granted." Syl. § 3.

Those were public utilities cases, in each of which a franchise had been granted either by the state or a municipal corporation, and a contract had been entered into, either express or implied, that the public utility would perform the service named. It is now well settled that the services performed by public service corporations are affected with the public interest, but the time was when that principle was earnestly denied. These cases might lead to the conclusion that a public service corporation is compelled to perform its duties even at a loss, but that principle is denied in a number of cases, one of which is *Brooks-Scanlon Co. v. R. R. Comm.*, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323, where the Supreme Court of the United States said:

"A common carrier cannot, under the Fourteenth Amendment, be compelled by a state to continue operation of its railroad at a loss." Syl. § 1.

This rule is followed in *Bullock v. R. R. Comm. of Florida*, 254 U. S. 513, 41 Sup. Ct. 193, 65 L. Ed. —. In the *Brooks-Scanlon Co. Case* it was said that—

"A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage." 251 U. S. p. 399, 40 Sup. Ct. 183, 64 L. Ed. 323.

A note on this subject is found in 11 A. L. R. 252, appended to a case (*Lyon & Hoag v. Railroad Commission*, 190 Pac. 795), where the Supreme Court of California held that the state had no power to compel the continued operation of a public utility at a loss. The authorities lead to this conclusion that public utilities can be compelled to operate but not at a loss. Control of public service corporations is justified by the fact that they are affected with a public interest. The defendant is operating a packing plant. It is not a public service corporation, but the Legislature has declared that its business is affected with a public interest, and for that reason has assumed to exercise control over it. For a recital of the facts justifying that declaration, *State v. Howat*, 109 Kan. 376, 198 Pac. 686, is referred to.

If the defendant is conducting a business that is affected with a public interest, it ought to be subject to legislative control the same as if it were conducting a waterworks system, an electric light plant, or a railroad. When the defendant's business became affected with a public interest, the public had the right to say something about the manner in which it should be conducted. The Legislature has undertaken to do so, has provided for the regulation of that business, and has placed certain prohibitions on the manner in which it shall be conducted; but the Legislature has not said that the defendant cannot under any circumstances cease to operate its packing plant if it desires so to do. The permission that must be obtained from the industrial court by the defendant is not permission to do those things which it may rightfully do under the law, but is permission without which the defendant, in doing other things, would be violating the law. In *State ex rel. v. Howat*, 109 Kan. 376, 414, 198 Pac. 686, 704, the court said:

"Limiting production and withdrawing from production are expressly permitted for any purpose which does not contemplate circumvention of the law."

The defendant argues that the compensation paid to its employees for services rendered is not affected with a public interest, but does not argue that the defendant's business is not affected with a public interest. In response to the defendant's argument we begin by quoting from *Munn v. Illinois*, 94 U. S. 113, 125, 126 (24 L. Ed.

77), where the Supreme Court of the United States said:

"This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than 200 years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 73, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

This principle has been followed so many times in so many states that a review of the legislation and of the decisions arising thereunder would be a herculean and useless task. A résumé of the decisions following this principle is found in Rose's Notes, 24 L. Ed. pp. 519-542. But the question argued is not that the business of the defendant is not affected with a public interest, but is that the wages of the defendant's employes is not affected with a public interest. The state may control the rates to be charged by those who are engaged in a business affected with a public interest. Wages is one of the largest factors that go to make up the expense of conducting a business, and must be considered in determining what the rate shall be. In many instances wages cannot be increased unless rates or charges are increased, and in many instances rates or charges cannot be decreased unless wages are decreased. In all business enterprises affected with a public interest rates or charges and wages are so bound together that they cannot be separated. Rates cannot be completely controlled unless wages are controlled, and wages cannot be controlled unless charges are controlled.

The compensation paid to workmen for their labor is the most fruitful cause of industrial unrest and of the conditions produced thereby. The state is not powerless to regulate the wages to be paid for labor in those enterprises without the continuance of which the people must suffer. Hours of labor have been the subject of legislative action, and a number of laws fixing hours of labor have been upheld. In *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923, and *Soon Hing v. Crowley*, 113 U. S. 708, 5 Sup. Ct. 730, 28 L. Ed. 1145, an or-

dinance of the city of San Francisco fixing the hours between which washing and ironing must be done in public laundries, was upheld. In *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, the Supreme Court approved a law of the state of Utah fixing 8 hours as the period of employment for men working in underground mines, smelters, and other institutions for the reduction or refining of ores or metals. The principle that was followed in *Holden v. Hardy* was followed in *Matter of Application of Martin*, 157 Cal. 51, 57, 106 Pac. 235, 26 L. R. A. (N. S.) 242; *State v. Cantwell*, 179 Mo. 245, 78 S. W. 569; *State v. Livingston Concrete, etc., Mfg. Co.*, 34 Mont. 570, 87 Pac. 980, 9 Ann. Cas. 204; *Ex parte Boyce*, 27 Nev. 299, 75 Pac. 1, 65 L. R. A. 47, 1 Ann. Cas. 66; *Ex parte Peter Kair*, 28 Nev. 127, 80 Pac. 463, 113 Am. St. Rep. 817, 6 Ann. Cas. 893; *Id.*, 28 Nev. 425, 82 Pac. 453, 6 Ann. Cas. 893.

A law prohibiting those engaged in manufacturing or repairing to work their employes more than 10 hours per day except in cases of emergency, or where necessity requires it, was upheld in *State v. Lumber Co.*, 102 Miss. 802, 59 South. 923, 45 L. R. A. (N. S.) 851, and 103 Miss. 263, 60 South. 215, 45 L. R. A. (N. S.) 858. The Court of Appeals of New York held that the Legislature had power to enact a law making it unlawful for a railroad employe in charge of a block signal tower to be on duty more than 8 hours in 24, in *People v. Erie Railroad Co.*, 198 N. Y. 369, 91 N. E. 849, 29 L. R. A. (N. S.) 240, 139 Am. St. Rep. 828, 19 Ann. Cas. 811. A law fixing a day's work for conductors, gripmen, and motormen on street railways at 10 hours, to be performed within 12 consecutive hours, was declared valid in an opinion to the governor by the Supreme Court of Rhode Island, in 24 R. I. 603, 54 Atl. 602.

Numerous laws fixing and regulating the hours of labor for women have been held valid under the police powers of the states. *Muller v. Oregon*, 208 U. S. 412, 28 Sup. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957; *Riley v. Massachusetts*, 232 U. S. 671, 34 Sup. Ct. 469, 58 L. Ed. 788; *Matter of Application of Miller*, 162 Cal. 687, 124 Pac. 427; *Ritchie & Co. v. Wayman*, 244 Ill. 509, 91 N. E. 695, 27 L. R. A. (N. S.) 994; *People v. Elerding*, 254 Ill. 579, 98 N. E. 982, 40 L. R. A. (N. S.) 893; *Commonwealth v. Hamilton Manufacturing Co.*, 120 Mass. 383; *Commonwealth v. Riley*, 210 Mass. 387, 97 N. E. 367, Ann. Cas. 1912D, 388; *Withey v. Bloem*, 163 Mich. 419, 128 N. W. 913, 35 L. R. A. (N. S.) 628; *Wenham v. State*, 65 Neb. 394, 91 N. W. 421, 58 L. R. A. 825; *People v. Charles Schweinler Press*, 214 N. Y. 395, 108 N. E. 639, L. R. A. 1918A, 1124, Ann. Cas. 1916D, 1059; *Commonwealth v. Beatty*, 15 Pa. Su-

per. Ct. 5; *State v. Buchanan*, 29 Wash. 602, 70 Pac. 52, 59 L. R. A. 342, 92 Am. St. Rep. 930; *State v. Somerville*, 67 Wash. 638, 122 Pac. 324.

In *Muller v. Oregon*, *supra*, one of the headnotes reads:

"As healthy mothers are essential to vigorous offspring, the physical well-being of woman is an object of public interest. The regulation of her hours of labor falls within the police power of the state, and a statute directed exclusively to such regulation does not conflict with the due process or equal protection clauses of the Fourteenth Amendment." Syl. § 3.

In *Atkins v. Kansas*, 191 U. S. 207, 24 Sup. Ct. 124, 48 L. Ed. 148, a law fixing 8 hours as a day's work for all laborers employed by or on behalf of the state or any of its municipalities was upheld. Similar laws have been upheld in *People v. City of Chicago*, 256 Ill. 558, 100 N. E. 194, 43 L. R. A. (N. S.) 954, Ann. Cas. 1913E, 305; *Sweeten v. State*, 122 Md. 634, 90 Atl. 180; *People ex rel. W. E. & C. Co. v. Metz*, 193 N. Y. 148, 85 N. E. 1070, 24 L. R. A. (N. S.) 201; *Byars v. State*, 2 Okl. Cr. 481, 102 Pac. 804, Ann. Cas. 1912A, 765; *Ex parte Steiner*, 68 Or. 218, 137 Pac. 204.

Laws establishing minimum wages for women have been passed in a number of states, and have been upheld by courts. *State v. Crowe*, 130 Ark. 272, 197 S. W. 4, L. R. A. 1918A, 567, Ann. Cas. 1918D, 460; *Williams v. Evans*, 139 Minn. 132, 165 N. W. 495, 166 N. W. 504, L. R. A. 1918F, 542; *Stettler v. O'Hara*, 69 Or. 519, 139 Pac. 743, L. R. A. 1917C, 944, Ann. Cas. 1916A, 217; *Simpson v. O'Hara*, 70 Or. 261, 141 Pac. 158; *Larsen v. Rice*, 100 Wash. 642, 171 Pac. 1037.

Appeals in *Stettler v. O'Hara* and *Simpson v. O'Hara* were affirmed by the United States Supreme Court equally divided. 243 U. S. 629, 37 Sup. Ct. 475, 61 L. Ed. 937. A very able opinion on this question is by the Court of Appeals of the District of Columbia. *Children's Hospital v. Adkins*, 276 Fed. —, recently decided. There an act of Congress fixing a minimum wage for women and minors was held valid.

Laws fixing minimum wages and hours of labor for women are justified on moral and physical grounds; laws fixing wages for men may be justified on similar, although not the same, ground. Sex is a proper basis for classification of the subjects of this kind of legislation, but it does not answer constitutional objections. The dangers to a man while working should be reduced to a minimum; the conditions under which he labors, so far as possible should be conducive to health and comfort. Intensive work of either mind or body, or both, should not be continued beyond his powers. A laboring man with a family, for honest work, should receive wages sufficient to enable him to feed, clothe, and shelter his family, and educate his children. If the wages received by him

are not sufficient to do these things, he becomes discontented, and the evil consequences that flow from such discontent may follow. The state should—it does—have power to protect laboring men to the same extent that it protects working women.

Before the law the rights of men and women ought to be equal; they are equal. If a man has an absolute right under all conditions to contract for the wages that he shall receive, a woman ought to, and does, have the same right. If the state under its police power can interfere with that right on the part of a woman it ought to be, and is, able to interfere with that right on the part of a man. The state is as much interested in the protection of the one as it is in the protection of the other. A statute may very properly be enacted for the protection of women, but that would not in any way weaken the constitutional right to object to it on any valid ground.

In *Lochner v. New York*, 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 937, 3 Ann. Cas. 1133, the Supreme Court said:

"Section 110 of the labor law of the state of New York, providing that no employes shall be required or permitted to work in bakeries more than 60 hours in a week, or 10 hours a day, is not a legitimate exercise of the police power of the state, but an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract, in relation to labor, and as such it is in conflict with, and void under, the federal Constitution." Syl. § 4.

That case seems not to have been overruled, but what appears to this court to be a contrary rule was declared in *Wilson v. New*, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024. In 1916 a general strike of railroad employes in the United States was threatened. To avoid that strike Congress passed the Adamson Law (U. S. Comp. St. §§ 8680a-8680d) which fixed 8 hours as a day's work, and fixed the wages that should be paid at not less than the then standard per day and a pro rata wage for overtime. That law was upheld in *Wilson v. New*, *supra*, where the court declared that Congress had authority to pass the law under the commerce clause of the Constitution. If under the commerce clause of the federal Constitution Congress can regulate wages and hours of labor of those working on railroads, the state under the police power should be able to regulate the wages and hours of labor of those working in a packing plant operating wholly within the state. The powers of Congress under the commerce clause of the Constitution are no greater than the authority of the state under the police power. Congress is controlled by the Fifth Amendment to the Constitution, which provides that no person shall be deprived of life, liberty, or property

without due process of law, while the state is bound by the Fourteenth Amendment, which provides that no state shall deprive any person of life, liberty, or property without due process of law. Congress in its entire field of legislation must be obedient to the Fifth Amendment the same as the states in their field of legislation must be obedient to the Fourteenth Amendment to the federal Constitution. In *Wilson v. New*, supra, one basis for upholding the Adamson law as expressed in the syllabus was as follows:

"In an emergency arising from a nation-wide dispute over wages between railroad companies and their train operatives, in which a general strike, commercial paralysis and grave loss and suffering overhang the country because the disputants are unable to agree, Congress has power to prescribe a standard of minimum wages, not confiscatory in its effects, but obligatory on both parties, to be in force for a reasonable time, in order that the calamity may be averted and that opportunity may be afforded the contending parties to agree upon and substitute a standard of their own." Syl. § 4.

Legislation to meet emergencies arising in the state similar to those arising in the nation ought to be upheld for reasons the same or similar to those given in *Wilson v. New*. The duty of the federal government to protect from suffering the people of the nation is no more binding than that of the government of the state to protect its people from suffering. If the Adamson law was compelled by an emergency, the Kansas industrial court law was likewise compelled by an emergency. The purpose of the latter law is to meet such emergencies as will prevent a suspension or interference with the operation of the several kinds of business named in that law. This purpose is revealed by the entire act. Section 9 of the act might bear a contrary interpretation, but in *State v. Howat*, 109 Kan. 876, 198 Pac. 686, concerning section 9 this court said:

"Section 9 does not authorize a general revision of labor contracts." In congruity with other sections, it does no more than provide that contracts shall not thwart achievement of the public purposes of the statute. No contract may be modified except in an action or proceeding properly before the court; that is, an action or proceeding relating to a controversy. If, in dealing with the emergency created by a controversy, the court encounters a contract which would hamper the making of a necessary order, the contract may be treated as any other element of the situation. No contract is to be regarded as unfair, unjust, or unreasonable that is not an impediment to settlement of a controversy, and orders respecting contracts of the obstructive character are merely ancillary to determination of the controversy. The power exercised in making such orders is the same power which takes entire charge of a mine and operates it during an emergency."

A part of the subject that has just been discussed and inseparably connected with it is the defendant's contention that the law deprives employers and employes of the freedom of contract concerning wages. Practically every law regulating the conduct of men restricts their freedom of action, and practically every law regulating business affected with a public interest restricts the freedom of contract. Every law that has been passed regulating wages or the hours of labor has been a law restricting the freedom of contract. A large number of these have been upheld, and they must continue to be upheld, if the state is to perform its governmental functions and prevent violence caused by controversies between employers and employes over these questions. If the state can make regulations for the government of a business affected with a public interest, it ought to be able to extend that regulation to the wages paid to the employes of that business. The flow of food supply from producer to consumer should not be stopped by conditions produced by industrial unrest arising out of wage problems. If that flow is threatened and the state under its police power can remove the danger, that should be done. That and that alone the Kansas industrial court law attempts to do.

The statute separates those engaged in the business of manufacturing or preparation of food products, manufacturing of clothing and wearing apparel, the mining and production of fuel, and transportation of food products, clothing and fuel, and public utilities, from those engaged in all other kinds of business within the state. The defendant says that this classification of the subject-matter of legislation is arbitrary and unjust. This is an old field of legal debate; it has been before the courts, both state and federal, on a large number of occasions. The rules declared by the courts may be summarized as follows: The Fourteenth Amendment to the Constitution of the United States does not require state statutes to operate indiscriminately, but does admit of the classification of the subject-matter of legislation; the Constitution does not prohibit special legislation merely as such; a state law may be limited in its operation as to persons, but must be uniform for all in like circumstances within the sphere of operation of the statute; rigid equality is not required; the Legislature is permitted a wide discretion, but the classification must be reasonable and not arbitrary nor hostile. 4 Enc. U. S. Supreme Court Reports, pp. 858-367; 6 R. C. L. 397, 406; 12 C. J. 1128-1138. The successful operation of the four classes of business named, one of which includes packing houses, is necessary for the peace, comfort, and welfare, and particularly of the health, of the people. These industries are subject to interruption on account of con-

ditions now existing. Those engaged in these industries constantly work in the presence of danger. Long hours of continuous employment will render them less able to avoid those dangers because of the weariness that overtakes any one who for a long period of time continuously works at any one thing. Constant employment at the same task for long hours day after day will render the worker both physically and mentally less able to perform his labor. Protection to the workman in these industries demands that his daily hours of labor be not so extended as to prematurely exhaust his powers.

The Legislature had power to enact the industrial court law and to make it apply to the classes of business named therein, without including any other class.

The demurrer of the plaintiff to that part of the answer of the defendant presenting questions of law is sustained.

All the Justices concurring.

SILSBY v. WILLIS.

(Supreme Court of Oregon. Oct. 28, 1921.)

Appeal and error \Rightarrow 1011 (1)—Court findings on conflicting evidence not disturbed.

Where the parties differed as to the terms of an agreement employing the plaintiff as to the compensation, the finding of the court on conflicting evidence will not be disturbed on appeal.

In banc.

Appeal from Circuit Court, Multnomah County; F. M. Calkins, Judge.

Action by W. E. Silsby against Adelaine B. Willis. Judgment for plaintiff, and defendant appeals. Affirmed.

This action was brought by W. E. Silsby, who is a moving picture art and technical director, against Adelaine B. Willis, who is an author of photo plays. The plaintiff is seeking to recover for services rendered to the defendant. The cause was tried without the intervention of a jury. The findings of the court were for the plaintiff, and the defendant appealed from the consequent judgment.

The plaintiff alleges in his complaint that he and the defendant entered into an agreement—

"by the terms of which this plaintiff was to act as a technical director for the preparation and production of a moving picture film, which the defendant herein was to produce, and also to give knowledge and advice regarding the production of certain other moving picture films and plays, and vaudeville acts, claimed to have been written by the defendant, and to perform any and all services requested to be performed

by the defendant, for a period of one year from said date, and for which the said plaintiff was to be paid the sum of \$5,000, * * * and that in and by said contract the said plaintiff was to have a drawing account from the defendant to the amount of \$100 per month, * * * and the balance to be paid at the expiration of said year, and in addition to that said defendant promised and agreed to pay all traveling expenses of the plaintiff during said period of one year."

It is further alleged by the plaintiff that he performed his agreement in every particular from March 7, 1919, to July, 1919, when without just cause the defendant canceled the agreement and discharged the plaintiff; that by reason of the cancellation of the contract he is entitled to receive his salary for the months of March, April, May, and June, or one-third of a year, amounting to \$1,666.87, less, however, certain payments admitted to have been made by the defendant.

The answer avers that the parties entered into an agreement whereby the plaintiff was to render services for the defendant, and this pleading contains a statement in detail of all that Silsby agreed to do. The defendant alleges that the parties agreed that the plaintiff should receive as his compensation—

"\$100 per month for each month he was employed, and that, in the event that through his efforts the materials of said defendant were made to earn \$5,000, then that sum less any and all other sums already paid to him, other than for his transportation as hereinafter mentioned, should be paid to said plaintiff by said defendant, on a date optional with said defendant within the above described year; * * * that if defendant desired to send plaintiff upon any trips in connection with said employment, the defendant would advance his railroad fare upon any of said trips, which was not to apply upon said \$5,000."

It is further alleged in the answer that the plaintiff "failed, neglected, and refused to perform any of the terms and conditions of said agreement," and that because of such failure the defendant was damaged in the sum of \$5,000. The only point attempted to be made by the defendant or discussed by her in her printed brief is that the allegations of the complaint and the proof do not coincide.

Wilbur, Spencer, Becket & Howell and E. K. Oppenheimer, all of Portland, for appellant.

Joseph, Haney & Littlefield, of Portland, for respondent.

HARRIS, J. (after stating the facts as above). As stated by the trial judge, when both parties rested and the cause was submitted for decision:

"It is a question here of what the contract was and whether or not it was performed."

There was no substantial difference between the parties as to the terms of the contract, except so far as it related to the compensation to be paid to the plaintiff. The parties differed widely upon the terms of the agreement fixing the plaintiff's compensation. There was also a difference between the parties as to whether or not the plaintiff was, during a portion of the time between March 7, 1919, and July 7, 1919, giving his time and services to the defendant's brother instead of to the defendant.

Upon the subject of compensation the evidence is contradictory, but the testimony of the plaintiff coincided with the allegations of his complaint. The testimony of the defendant supported the averments in her answer. The testimony of the plaintiff likewise corresponded with his complaint, so far as it related to the remaining terms of the agreement. The plaintiff testified that what work he did under the supervision of the defendant's brother was done pursuant to her directions and for her. The adopted son of the plaintiff gave testimony corroborating the latter. The defendant gave testimony contradicting that of the plaintiff with reference to the work done under the supervision of the defendant's brother. The plaintiff testified that he gave all his time to the defendant and did all that he agreed to do, giving in detail and at much length an account of what he claimed he did.

There was testimony upon both sides of each issue of fact. The evidence offered by the plaintiff did not, as we read the record, depart or vary from the allegations of the complaint. The findings of fact made by the trial court coincided with the allegations of the complaint. The contradictions in the evidence were by the circuit court resolved against the defendant, and the conclusion reached by that court cannot now be disturbed.

The judgment is affirmed.

IN RE PITTOCK'S ESTATE.

LEADBETTER v. PRICE.

(Supreme Court of Oregon. Oct. 28, 1921.)

1. Courts §200—Circuit court held to have probate jurisdiction.

Where the Organic Act as amended has abolished county courts in certain counties, the jurisdiction of the circuit court in such counties was increased by the addition of probate jurisdiction, including that involving partnership estates.

2. Partnership §3—Ownership by two or more individuals of all corporate stock or entire estate in land does not make them partners.

That two or more individuals hold some or all of the stock in a given corporation, or own

the entire estate in land, does not make them partners.

3. Partnership §63—Is a distinct entity.

A partnership is a separate and distinct entity.

4. Partnership §76—Property does not belong separately to individual partners.

A partnership holds the partnership property in trust for the payment of its debts, and such property does not belong separately to the individual partners.

Department 2.

Appeal from Circuit Court, Multnomah County; George Tazwell, Judge.

Petition by F. W. Leadbetter against O. L. Price, as executor of the will of H. L. Pittock, deceased, claiming an interest as partner in the assets of the estate. Decree for executor, and petitioner appeals. Reversed and remanded.

See, also, 199 Pac. 633.

By his petition in the matter of the estate of H. L. Pittock, deceased, F. W. Leadbetter asserts that he and the deceased were partners, holding as such some shares of stock in certain corporations, and sundry tracts of real estate, and that the executor of Pittock's will has listed as the individual property of the decedent only one-half of those properties, both real and personal, of the partnership, ignoring the other moiety, and proposes to sell part of the partnership estate. The petition schedules shares of several corporations and concludes the list with this statement, "one-half of which belongs to the estate of deceased." Concerning realty, the petition says:

"All the following real property [referring to the list on designated pages of the inventory], one-half of which said real property belongs to the estate of deceased."

By stipulation a copy of the inventory has been made part of the record, and by comparing that document with the petition, it appears that in each instance the executor has inventoried only one-half of the property mentioned in the petition, both real and personal. The answer denies all the allegations of the partnership or partnership property. Affirmatively, it avers the appointment of O. L. Price as executor of the last will and testament of H. L. Pittock, deceased, and his filing of an inventory, which included all the property belonging to the deceased at the time of his death which had come to the knowledge and possession of the executor. Referring to the shares of stock mentioned in the inventory, the answer alleges the issuance to Pittock, during his lifetime, of certain certificates, in each instance covering in his name the number of shares inventoried, which the

answer avers were the individual property of the decedent. The reply traverses the new matter in the answer.

Essentially the issue is whether or not there was a partnership existing between Pittock and Leadbetter at the time of the death of the former. The matter was presented to the circuit court on the pleadings on the question of whether or not that court had jurisdiction of the subject-matter, and that was also the form of the issue presented at the argument in this court. The decision in the circuit court on that point was against the petitioner, it being the only one presented, and he appealed.

L. A. Liljeqvist, of Portland (Coke & Cake, of Portland, on the brief), for appellant.

D. P. Price, Charles H. Carey, and James B. Kerr, all of Portland (John F. Logan, of Portland, on the brief), for respondent.

BURNETT, C. J. (after stating the facts as above). The following sections of Oregon Laws are here set down:

"The executor or administrator of a deceased person, who was a member of a co-partnership, shall include in the inventory of such person's estate, in a separate schedule, the whole of the property of such partnership; and the appraisers shall estimate the value thereof, and also the value of such person's individual interest in the partnership property, after the payment or satisfaction of all the debts and liabilities of the partnership." Section 1166.

"After the inventory is taken, the partnership property shall be in the custody and control of the executor or administrator for the purposes of administration, unless the surviving partner shall, within five days from the filing of the inventory, or such further time as the court or judge may allow, apply for the administration thereof, and give the undertaking therefor hereinafter prescribed." Section 1167.

"In case the surviving partner is not appointed administrator of the partnership, the administration thereof devolves upon the executor or general administrator; but before entering upon the duties of such administration he shall give an additional undertaking in double the value of the partnership property." Section 1170.

Provisions are made for the government of the surviving partner, if he elects to take upon himself the ancillary administration covering the partnership property. Under section 1177, the executor is required to file with the clerk of the court an inventory, verified by his own oath, of all the property of the decedent, both real and personal, which shall come to his possession or knowledge, and this shall be done within one month after his appointment, unless further time is granted by the court. Before the inventory is filed it must be appraised by competent appraisers appointed

by the court or judge thereof. Section 1179, Or. L.

Unquestionably, a surviving partner, if there is one, has a right to have the partnership estate properly administered according to the statutory formula, in connection with the estate of the deceased partner. The question to be determined is whether or not that can be adjudicated in the circuit court of Multnomah county. The argument of the petitioner is that the title of the property is not involved, while the executor makes the opposite contention, and insists that the probate court cannot adjudicate the question. The executor maintains that the petitioner is not only claiming an interest in certain individual properties mentioned in the inventory, but also seeks to surcharge that document and make the executor liable for additional property as the administrator of a partnership.

[1] Following the line of reasoning as to the jurisdiction of the circuit court in this instance which was adopted in the case of Pittock's Will, 199 Pac. 633, we are compelled to the conclusion that the circuit court in which this proceeding was litigated had jurisdiction to decide all the questions presented, not only those formerly committed exclusively to the county courts, but also to decide cognate issues rightly joined in that tribunal. The petitioner, if he was a surviving partner, presented his grievance to a court having jurisdiction of the subject-matter, and it had authority at his suit to decide the issues arising on the resultant pleadings. The court had no right to ignore the issues presented, although such a result would have been proper under the old régime of the county courts under the former Constitution. The Legislature, however, has seen fit, under the amended form of the Organic Act, to abolish county courts in districts having but one county, which shall contain over 100,000 population. The act did not lessen the jurisdiction of the circuit court in such districts, but increased it by the addition of probate jurisdiction, which was formerly vested exclusively in the county courts. When this litigation was presented to the circuit court, that tribunal was acting, not only with respect to the probate jurisdiction, but also to the general jurisdiction originally vested in such courts.

[2-4] Of course, the issue is yet to be determined, whether there was in fact a partnership or not. As to the shares of stock, it often happens that corporations are formed as a means of shielding the promoters from the personal liability attaching to partners; but it does not follow, because two or more individuals hold all of the stock in a given corporation, or each owns stock in the same corporate concern, that they are partners. Neither does such a result neces-

sarily follow because these individuals together own the entire estate in land. The statement in the petition already referred to, to the effect that the decedent owned one-half of the listed stock and one half of the land would indicate that he was a tenant in common of the land, and the individual owner of one-half the stock. As said in *Jensen v. Wiersma*, 185 Iowa, 551, 170 N. W. 780, 4 A. L. R. 298:

"A partnership is a separate and distinct entity, and holds the partnership property in trust for the payment of its debts. The property does not belong separately to the individual partners, but to the distinct entity."

In the last-named publication is an extensive note, pointing out the difference between partnership holding of real estate and title as tenants in common. If, indeed, Pittcock owned so many shares of stock in his own right, and Leadbetter owned certain other shares of stock in his own right, the executor has no business with the holdings of the latter. Likewise, if they were tenants in common of certain realty, the executor has no right to inventory the part belonging to Leadbetter, but is concerned only with the undivided share of Pittcock. These, however, are questions to be litigated on proper issues submitted to the circuit court in addition to the issue of partnership or no partnership.

The decree is reversed, and the cause remanded.

BEAN, BROWN, and McCOURT, JJ., concur.

STATE ex rel. ERICKSON, Dist. Atty., v. SANBORN et al.

(Supreme Court of Oregon. Oct. 28, 1921.)

1. Municipal corporations \S 120—"Construction of ordinances" primarily dependent on ordinary sense of language.

The construction of an ordinance is ascertaining the intention thereof, in accordance with well-settled legal rules which are the same as those governing the construction of statutes; such intention being primarily to be gathered from the language of the ordinance itself in the ordinary and popular sense.

2. Municipal corporations \S 120—No exposition contrary to express words permissible where ordinance unambiguous.

If an ordinance is free from ambiguity, no exposition is permissible contrary to its express words.

3. Municipal corporations \S 120—Ordinances construed to effectuate intent.

In case of doubt an ordinance will be liberally construed to effectuate the legislative intent.

4. Municipal corporations \S 120—Statutes \S 225½—Special prevails over general act or ordinance.

Where two statutes or ordinances treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the special act or ordinance will prevail.

5. Municipal corporations \S 46—General ordinance as to time of municipal charter amendment election held impliedly repealed by special provision.

Where by a general provision in a city ordinance no charter amendment election could be held at a time less than 60 days from the passage of an ordinance submitting the amendment, a special provision in another ordinance for a particular election held to impliedly repeal the general ordinance so far as it applied to such election.

6. Municipal corporations \S 116—General ordinance will not repeal by implication a former special ordinance.

A general ordinance providing for the time of holding municipal charter elections, where there were no negative words, held not to repeal by implication a former special ordinance relating to the same subject.

7. Municipal corporations \S 106—City held authorized to pass special election ordinance in disregard of general ordinance provisions.

A city, having power in the first instance to prescribe the method to be employed in the exercise of the initiative and referendum, could change such method and pass a special election ordinance in disregard of the general ordinances on the subject, in view of Const. art. 4, § 1a.

8. Elections \S 10—Statutes regulating elections liberally construed in favor of electors acting in good faith.

A narrow or technical rule of construing a statute regulating elections should not be adopted against electors acting in good faith within the letter of the statute or ordinance.

In Banc.

Appeal from Circuit Court, Clatsop County; J. A. Eakin, Judge.

Action in the nature of quo warranto by the State, on the relation of J. O. Erickson, District Attorney for Clatsop County, against Geo. W. Sanborn and others. Demurrer to the complaint overruled, and defendants appeal. Reversed and remanded, with directions.

This is an action in the nature of quo warranto. It challenges the right of the defendants to hold the office of civic center commissioners of the city of Astoria, Or. From a judgment adverse to defendants they appeal.

At a special election held in the city of Astoria on January 15, 1920, a charter amendment of the city creating a civic center commission received the vote of 987 in favor thereof and 461 against. After a canvass of the vote the amendment was duly

proclaimed as adopted, and the defendants were appointed as civic center commissioners thereunder, and took office and continued to exercise the same until the judgment was rendered. The right of the commissioners to hold office depends upon the validity of the charter amendment referred to creating the office. The legality of the charter amendment depends upon the construction of the ordinances adopted by the common council of Astoria. All of the facts are fully set forth in the complaint, to which, a demurrer was interposed by defendants and overruled by the court. The defendants refusing to plead further, the judgment was entered.

The steps taken by the common council of Astoria leading up to the adoption of the amendment in question, as shown by the complaint, are as follows. On October 17, 1906, the common council of Astoria adopted an ordinance, No. 3315, providing for the exercise of initiative and referendum powers by the legal voters of the city of Astoria. Until January 10, 1916, there was no method existing whereby ordinances and charter amendments of the city of Astoria might be submitted to the voters by the common council for their approval or disapproval, and on this last-mentioned date an ordinance was adopted, No. 4799, providing for the manner of submitting charter amendments to the legal voters of the city by the common council. This last-mentioned ordinance, No. 4799, contained a provision, section 3, to the effect that no special election be called for the purpose of voting on any proposed charter amendment at a time less than 60 days after the passage of the ordinance by the common council referring the proposed charter amendment to the people. In other words, this last-mentioned ordinance provided that 60 days must elapse between the passage of the ordinance submitting the amendment to the people and the date upon which the special election was to be held. At a meeting of the common council held on November 21, 1919, ordinance No. 5616 was adopted, approved November 24, 1919, proposing an amendment to the city charter creating a civic center commission authorizing the city as such to acquire and maintain play grounds, athletic parks, etc., and further authorizing the issuance of bonds by such commission, the levying of a tax for civic purposes, and the appointment of the defendants herein as such civic center commissioners, and containing an emergency clause. Ordinance No. 5616 provides that the charter amendment be submitted to the electors of the city of Astoria for approval or rejection at a special election to be held thereafter. Thereafter, on December 15, 1919, the common council of Astoria adopted an ordinance, No. 5640, which was properly

approved, calling a special election to be held in the city of Astoria on January 15, 1920, for the purpose of voting on proposed amendments to the city charter, as referred to the people by the common council. The ordinance contained an emergency clause. This last-mentioned ordinance also specifically called the special election for the purpose of voting upon the charter amendments proposed by ordinances adopted at the meetings of the common council November 21, 1919, and December 15, 1919. This ordinance, No. 5640, contained various provisions for the holding of such special election, such as qualification of voters, punishment for illegal voting, the hours which the polls would be open, designation of polling precincts, and appointment of judges and clerks of the election. It contained nothing in the way of an express repeal of the provisions of ordinance No. 4799, nor did it contain any provision for the giving of notice of such special election. On the same date, December 15, 1919, and at the same meeting, that ordinance No. 5640, calling for the special election for January 15, 1920, was adopted. There was also adopted and approved an ordinance No. 5641, expressly repealing ordinance 4799, and reordaining a method of submitting proposed charter amendments to the vote of the people. By section 8 of this last-mentioned ordinance it is provided that no election for the purpose of voting on charter amendments be held until after the lapse of 60 days from the passage of the ordinance submitting such amendments to the people, and section 4 thereof provides that five notices of such election be posted in each ward or voting precinct stating the time of such election. Section 5 thereof provides further that such notices be posted for 10 days prior to the time of the holding of such election. Section 6 of this last-mentioned ordinance also provided that notice of such special election be published in the Astoria Evening Budget for ten issues, the first insertion to be on January 2, 1920, and the last on January 14, 1920. Section 7 provides for the publishing of notices in the same paper under the same dates as to each proposed charter amendment to be voted upon. The election was held in the city of Astoria on January 15, 1920, in pursuance of ordinance No. 5640, which called such special election and designated the date upon which it was to be held, and specifically referring to the people all ordinances proposing charter amendments adopted at the meetings of the common council held on November 21, 1919, and December 15, 1919.

J. W. Mott, City Atty., James L. Hope, G. C. Fulton, and C. W. Halderman, all of Astoria, for appellants.

J. O. Erickson, Dist. Atty., of Astoria, for respondent.

BEAN, J. (after stating the facts as above). The one question involved as to the validity of the charter amendment creating the civic center commission, referred to the electors by ordinance No. 5616, is whether or not due compliance was had with the provisions of the ordinances then in force which provided a method of submitting charter amendments proposed by the common council to a vote of the people, and particularly where one ordinance provided that no such elections be held at a time less than 60 days from the passage of such ordinance of reference, and another ordinance passed at the same meeting designating a specific day, which was less than 60 days, at which the proposed charter amendments adopted at the specified meetings of the common council should be voted upon by the people.

From the facts above stated it will be observed that ordinance No. 5616, creating the civic center commission, and referring the same to the people, was adopted while ordinance No. 4799, which provided a method of submitting charter amendments to a vote of the people, was still in full force and effect; that ordinance No. 4799 provided by section 3 thereof that 60 days must elapse from the time an ordinance submitting a charter amendment is passed by the common council and the date of the election. Hence it is noted that 60 days could not elapse between the passage of ordinance No. 5616 and January 15, 1920, the date upon which the special election was held, and at which time the charter amendment creating a civic center commission was voted upon. However, it must be observed that at the meeting of the common council of the city of Astoria held on December 15, 1919, ordinance No. 5640 was adopted, which by section 1 thereof specifically ordered that a special election be held in the city of Astoria on Thursday, January 15, 1920, at which there be submitted to the electors of the city of Astoria the proposed charter amendments as passed by ordinances of the common council at its meetings held on November 21, 1919, and December 15, 1919. It must be borne in mind that at the same meeting of the common council held on December 15, 1919, at which ordinance No. 5640, designating the date of the special election, was adopted, another ordinance, No. 5641 was adopted, which by section 11 thereof repealed ordinance 4799, and reordained in general the method of submitting proposed charter amendments by the common council to the people, particularly reordaining many of the provisions of ordinance No. 4799, and which by sections 4 and 5 thereof directed the posting of certain no-

tices of election, and by section 6 thereof directed the publication of notice of such election on specified dates in a designated newspaper. There is no question but what the notices of the special election so held were posted and published in strict accordance with the provisions of ordinance No. 5641. Section 3 thereof provided that no election upon a proposed charter amendment be held at a time less than 60 days from the passage of the ordinance submitting such amendment to the people. This section continued in force a similar provision of ordinance No. 4799, which was effective when ordinance No. 5616, proposing the charter amendment in question, was adopted. Ordinance No. 5640 by its provisions apparently disregarded the 60-day limitation contained in ordinance No. 4799 and ordinance 5641, and specially ordained that an election be held on January 15, 1920, for the purpose of submitting the proposed charter amendment passed at the meeting held on November 21, 1919.

The complaint challenges the validity of the charter amendment creating the civic center commission solely on the ground of the conflict in the ordinances of the city, particularly for the reason that the election held was within the prohibited 60-day limitation.

[1-4] The construction of an ordinance is ascertaining the intention thereof, in accordance with well-settled legal rules. Primarily that intention is to be gathered from the language of the ordinance itself in the ordinary and popular sense. If the ordinance is free from ambiguity, no exposition is permissible, contrary to its express words. But in case of doubt courts lean towards the presumed intention of the legislative body, and will so construe the ordinance as to effectuate such intention. A reasonable liberal construction should be invoked so as to give the effect to the ordinance intended, and that it may be sustained if this can be done in reason. Ordinances are construed by the same rules that govern the construction of statutes. 7 McQuillin, *Municipal Corporations*, p. 6983, §§ 810, 811; 25 R. C. L. 1062, § 286; *Smith v. Kelly*, 24 Or. 464, 33 Pac. 642; *Duncan v. Dryer*, 71 Or. 548, 143 Pac. 644. It is the rule that, where two statutes or ordinances treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the special act will prevail. 1 *Lewis' Sutherland, Statutory Construction* (2d Ed.) 528, 529, and cases cited. Where ordinances are contemporaneously passed, a specific provision relating to a particular subject will govern in respect to that subject as against general provisions. 1 *Lewis' Sutherland, Statutory Construction* (2d Ed.) 531.

[5, 6] Ordinance No. 4799 of the city of Astoria was general in its provisions for the calling of a special election. This ordinance was practically amended by ordinance No. 5641, which was also a general ordinance except as to its provisions relating to dates of publication of notice which have now passed. This provision of the latter ordinance was special in its nature. Although repeals by implication are not favored, when the common council of the city of Astoria on December 15, 1919, passed ordinance No. 5640, with special provisions for the election to be held January 15, 1920, the general provision that no election be held at a time less than 60 days from the passage of an ordinance submitting an amendment to the people was impliedly repealed in so far as it affected the special election to be held January 15, 1920. As we view the matter, ordinances No. 4799 and No. 5641 contain general rules for the guidance of the common council which that legislative body had the power to amend or suspend at any time by the adoption of another ordinance. *State ex rel. v. Kelsey*, 66 Or. 70, 133 Pac. 806. The specific provision as to the date of the special election contained in ordinance No. 5640 was not impliedly repealed by ordinance No. 5641 adopted at the same session of the common council. A general ordinance without negative words will not repeal by implication from their repugnancy the provisions of a former special ordinance. Where two ordinances are contemporaneously passed, a specific provision relating to a particular subject will govern in respect to that subject as against general provisions, unless a different intent of the lawmakers is manifest. 1 *Lewis' Sutherland on Statutory Construction*, 526-531. In 25 R. C. L. p. 1062, § 286, it is stated:

"The rule that statutes in *pari materia* should be construed together applies with peculiar force to statutes that are contemporaneous or nearly contemporaneous; for in such case we have the same minds acting upon the one subject, and it is not to be presumed that the same body of men would pass conflicting and incongruous acts. The presumption is that they had in mind the whole subject under consideration; that, while the one general subject is touched in several separate acts, yet the legislative intent was that of a harmonious whole. Hence statutes passed at or at nearly the same time should be construed together in determining their effect."

[7, 8] The city council of Astoria had the power in the first instance to prescribe the method employed in the exercise of the initiative and referendum. It also had the power to change such method at any time. Therefore the city had the power wholly to disregard the 60-day provision and prescribe the place and notice to be given for a special

election to be held on January 15, 1920. Article 4, § 1a, Constitution of Oregon; *Colby v. City of Medford*, 85 Or. 485, 512, 167 Pac. 487; *State ex rel. v. Kelsey*, 66 Or. 70, 133 Pac. 806. A narrow or technical rule of construing a statute regulating elections should not be adopted against electors acting in good faith within the letter of the statute or ordinance. *State v. Wolf*, 17 Or. 119, 20 Pac. 316.

It is portrayed in the complaint that the special election held in the city of Astoria January 15, 1920, was regularly held according to the provisions of ordinances 5640 and 5641. When construed together, the notice thereof was sufficient. A full fair expression of the legal voters of the city was had at the polls, and by the amendment to the city charter created a civic center commission. This election was the vitalizing force adopting the charter amendment, and should not be annulled by reason of any mere informality in calling the election. It is well known that ordinances, as well as statutes, are not always drawn with the precision to be desired; yet the legislative intent must be declared and enforced, when possible, in conformity to well-established principles of interpretation, and without doing violence to the fundamental rights of any individual. *O'Malley v. Sebastopol*, 24 Cal. App. 32, 139 Pac. 1082.

We think the demurrer to the complaint should have been sustained. The judgment of the lower court will therefore be reversed, and the cause remanded, with directions to sustain the demurrer to the complaint and for such further proceedings as may be necessary, not inconsistent with this opinion.

VINCENT v. RUSSELL.

(Supreme Court of Oregon. Oct. 25, 1921.)

1. Evidence ~~§~~ 444(6)—Testimony that note was to become binding only if a certain payment made held admissible.

In an action on a note, evidence that it was manually delivered to the payee, but was not to become a binding obligation, unless the purchaser of defendant's ranch made a certain payment to defendant for the payee's benefit, held admissible.

2. Evidence ~~§~~ 432—Testimony of want of consideration admissible.

In an action on a note, evidence that it was not to become a binding obligation, except on certain payments being made by a third party, held admissible as showing want of consideration.

3. Evidence ~~as~~ 444(6)—Parol evidence that note is to become binding only in a certain event admissible.

Parol evidence is admissible to show that a negotiable note, absolute in form, although manually delivered to the payee, was not to become a binding obligation, except upon the happening of a certain further event, especially if such event affects the consideration, in view of Or. L. § 713, subd. 2, and section 798, subd. 3.

In Banc.

Appeal from Circuit Court, Crook County; T. E. J. Duffy, Judge.

Action by Henry H. Vincent against G. H. Russell. Judgment for defendant, and plaintiff appeals. Affirmed.

M. R. Elliot, of Prineville, F. B. Sharpstein, of Walla Walla, Wash., N. G. Wallace, of Prineville, and Donald M. Graham, of Portland, for appellant.

Jay H. Upton, of Prineville, for respondent.

BEAN, J. Plaintiff appeals from a judgment in favor of defendant, rendered upon the verdict of a jury. The complaint is based upon a promissory note for the sum of \$5,000, dated at Prineville, Or., April 18, 1918, due November 5, after date, payable to the order of A. A. Piper, in the usual form, signed by J. H. Russell, indorsed to Paxton Bros., a corporation, May 15, 1918, and on the same date indorsed to Baker & Boyer National Bank, and on March 18, 1919, indorsed to plaintiff, Henry H. Vincent. Each indorsement is alleged to be for value received in due course of business.

Defendant answered, denying the allegations of the complaint, and further pleaded an entire want of consideration for the note; that the note was not intended for a promissory note, but merely as a memorandum of the money that would be payable to Piper and Paxton upon the completion of a certain sale contract, and therefore no stamp, tax, or internal revenue stamp was placed thereon or canceled as required by law; that the note is irregular on its face; and that the holders thereof took the note subject to all defenses existing between defendant and the original payee. The answer set forth all the details of the transaction. The reply put in issue the new matter of the answer.

The circumstances relating to the note, as shown by the record, are substantially as follows: On March 5, 1918, defendant arranged with A. A. Piper and J. A. Paxton, of Walla Walla, Wash., to sell his ranch, live stock, and certain personal property for the sum of \$276,900 for a commission of \$5,000. Piper and Paxton represented that they had a buyer for the property, one Claud M. Stewart, and requested defendant to name a price of \$286,900 to Stewart, and pay the added sum of \$10,000 to Piper and Paxton as additional

compensation. Stewart was to pay \$40,000 as an initial payment, and \$46,900 on November 1, 1918, and the balance on terms. Defendant was to pay Piper and Paxton the additional compensation of \$10,000 upon payment to the defendant of the second installment of \$46,900, due November 1, 1918, and not otherwise. The deal was made upon those terms. The first payment of \$40,000 was made April 18, 1918, and the commission of \$5,000 paid. Piper and Paxton asked of defendant an evidence in writing that they would be entitled to receive the additional \$10,000 upon payment of the \$46,900 due upon the purchase price November 1, 1918. Defendant agreed to give them such an instrument in writing, with the promise that no moneys would be due to Piper and Paxton unless Stewart paid the next installment. Thereupon Piper drew up two promissory notes, each for the sum of \$5,000, one of which is set out in the complaint. The notes were to mature November 5, 1918. Piper represented to the defendant that the notes would not be transferred, negotiated, or assigned, and would not become due or payable unless Claud M. Stewart made his next payment of \$46,900 on November 1, 1918. Stewart failed to make the payment of \$46,900, and abandoned the contract. J. F. Paxton is one of the stockholders and managing officers of the Paxton Bros. Company, and knew the circumstances in regard to the deal, and was interested therein. The indorsement to Baker & Boyer National Bank was made for collection, and the indorsement to Harry H. Vincent, plaintiff, was not made for value or in due course of business.

Upon the trial, defendant Russell testified in his own behalf in regard to the note sued on, in part as follows:

"Q. Just tell the jury now, Mr. Russell, what that note represents and the circumstances under which it was given. A. This note was given for a half of \$10,000 that was to be paid by me to Piper & Paxton on the 5th day of November, 1918, after Stewart Bros. paid me \$46,900 and six months' interest."

Counsel for plaintiff moved to strike out this testimony, and saved an exception to the overruling of the motion. Russell further testified, over the objection of defendant, thus:

"Q. Referring again, Mr. Russell, to this particular note and the circumstances under which it was executed, may I ask you this: Whether or not the money represented by this note was commissions to be paid to Piper and Paxton on this real estate deal, or did it represent some other item of consideration? A. It represented some other consideration.

"Q. Well, what was it? A. That the money, this \$10,000 came from Stewart Bros.; I merely handling this to get them their \$10,000,

so that it did not fall on Piper and Paxton at Walla Walla.

"Q. That \$10,000, as I understand, was money they were charging their clients for making this deal, and not taking it out of you? A. Yes, sir; that is it.

"Q. And you were to pay it in to them when the money was paid in through your hands on the deal? A. Yes, sir.

"Q. Was that \$10,000 ever paid you by Stewart Bros.? A. No, sir.

"Q. Was any part of the \$46,900 ever paid you by Stewart Bros.? A. No, sir.

"Q. Or by Claude M. Stewart? A. No, sir."

Russell also testified that, when Piper and Paxton brought the party over to buy the ranch, the first thing they told Russell was:

"Now, we have this party, but don't you say anything about the price. You make that \$285,000, and you can hold us out our \$10,000. We don't want them to know it, and we don't want them to know your price."

Russell also stated that:

"Then, when Stewart threw up the ranch in November, Mr. Piper came down here, and I asked him, 'What are you going to do about this note?' right in front of Michel's store. He said, 'We will just let that go; you will not need to pay that note.'"

At the close of the case counsel for plaintiff requested the court to direct a verdict in favor of plaintiff, which was refused, and an exception reserved. The objections and motion to strike out the main portion of defendant's testimony, and the request for a verdict in favor of plaintiff, raise the question as to the right of defendant to make the defense offered to the note. The motion to strike was based upon the grounds that the note "is a direct promise to pay on its face without any contingency annexed whatever; it is not made payable upon the happening or nonhappening of any event, to happen in the future; it is payable on a specific date"; and any evidence that the note was only to be paid upon the contingency of Stewart paying Russell a certain sum of money was incompetent.

[1,2] We think the testimony challenged was admissible. It tended to show that the note was manually delivered to Piper, the payee, but was not to become a binding obligation unless Stewart paid to Russell the \$10,000, which was added to the price of the ranch, for the benefit of Paxton and Piper, and which Russell was only to handle for them. The testimony objected to also indicated that there was an entire want of consideration for the note. It is not contended upon this appeal, as we understand the record, that the evidence fails to show that the plaintiff was not a holder in due course.

[3] The rule sanctioned by a practically uniform line of authorities is that parol evidence is admissible to show that a negotiable note, absolute in form, although manually

delivered to the payee, was not to become a binding obligation, except upon the happening of a certain further event, since such evidence does not vary or alter the instrument, but tends merely to show that it never became a valid undertaking. Especially is this rule if such event or contingency affects the consideration of the note: Section 713, subd. 2, and section 798, subd. 3, Or. L.; La Grande Nat. Bank v. Blum, 26 Or. 49, 37 Pac. 48; Colvin v. Goff, 82 Or. 314, 325, 161 Pac. 568, L. R. A. (N. S.) 1917C, 300, note pp. 306, 409, et seq.; note 18 L. R. A. (N. S.) 288; McNight v. Parsons, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265, 15 Ann. Cas. 665; Lavalleur v. Hohn, 152 Iowa, 649, 182 N. W. 877, 89 L. R. A. (N. S.) 24. The following cases support this rule:

It was held in *Smith v. Dotterweich*, 200 N. Y. 299, 93 N. E. 985, 33 L. R. A. (N. S.) 892, that parol evidence is admissible to show that a note given in payment of the premium on a life insurance policy was not to take effect as a valid and enforceable obligation unless the maker should be furnished with a loan of money.

In *Holt v. Gordon* (Tex. Civ. App.) 176 S. W. 902, it was ruled that parol evidence is admissible to show that, at the time the note was executed, it was agreed in parol that it should not become operative and binding unless the maker should succeed in procuring a loan upon certain land owned by him.

We find the rule again in the case of *Equitable Trust Co. v. Halpert* (Sup.) 132 N. Y. Supp. 776, that parol evidence is admissible in an action on a written instrument to show that the instrument would only be enforceable if the payee would issue a life insurance policy to the maker, entirely satisfactory to him, and this whether the instrument in question is a negotiable instrument or nonnegotiable.

In *Newgass v. Shulhof* (Sup.) 128 N. Y. Supp. 664, parol evidence was held to be admissible to show that a note was delivered to the payee upon condition that it should not become effective unless the maker received a certain sum from a transaction then pending.

It was held in *Stoughton v. Chu Fong* (Sup.) 130 N. Y. Supp. 228, that an answer that the note sued upon would have no validity whatever until a certain institution was established, and that no such institution was ever established, pleads a condition precedent to the validity of the note, and a complete provable defense.

To the same effect is the case of *Hughes v. Crooker*, 148 N. C. 318, 62 S. E. 429, 128 Am. St. Rep. 606, holding parol evidence admissible to show that a note was signed upon the inducement that the payee would perform certain obligations, and that until the maker or his son should sign a paper signifying

ing that the payee had performed his obligation the entire transaction was unfinished. The action in this case was by the maker against the payee, who had negotiated the note, which the maker had been compelled to pay, and was for the purpose of recovering the amount so paid by him.

It was held in *Garrison v. J. I. Case Threshing Mach. Co.*, 159 N. C. 285, 74 S. E. 821, that parol evidence is admissible to show that a note secured by a mortgage was not to take effect until it was determined that an engine for which the note was given would pass a certain test. The action was brought to recover damages for the sale of the land under the mortgage.

See, also, *Daniel, Negotiable Instruments* (6th Ed.) § 81a; *Gamble v. Riley*, 39 Okl. 363, 135 Pac. 390; *Street v. J. I. Case Threshing Mach. Co.* (Tex. Civ. App.) 188 S. W. 725; *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. 174, 32 L. Ed. 563.

We think the testimony complained of was properly admitted, and that the refusal to direct a verdict for plaintiff was correct.

It is contended by plaintiff that the testimony to which the motion was directed was of a different purport than the later testimony of Russell, which more fully explained the transaction. If this claim is correct, then it was a question for the jury to determine as to what Russell meant, or which portion of his testimony was true. His version of the affair should be taken altogether.

Willson v. Wilson, 26 Or. 251, 38 Pac. 185, is cited and relied upon by plaintiff in support of the motion to strike out a part of the testimony. That was a case in which the defense offered to the note involved unsettled partnership mining affairs, which it was held should have been settled in a suit in equity. The note there involved was given by one partner for money which had been advanced for the partnership business by the other partner, who retired from the partnership at the time the note was executed. The court, after discussing the partnership question, said:

"So it would appear that an action at law is maintainable by one partner against another upon a promissory note executed by the one to the other involving particular items or transactions of the partnership business, upon the ground that the giving of the note is an isolation or separation of the particular matter from the general partnership account, and that an accounting and final settlement of the partnership affairs is not necessarily involved in such action; that the execution of the note is such an acknowledgment of isolation or elimination of the particular transaction from the general partnership account as that the maker will be estopped at law from questioning the holder's right of action thereon."

That case differs from the one in hand. We find no error in the record.

The judgment of the circuit court is affirmed.

RUSSELL v. PIPER.

(Supreme Court of Oregon. Oct. 25, 1921.)

1. Judgment \Leftrightarrow 139—Power to open default within court's legal discretion.

The discretion lodged in the court by Or. L. § 103, to relieve from judgments by mistake or excusable neglect, is a legal one, to be exercised in furtherance of justice and in accordance with the rules of modern jurisprudence.

2. Judgment \Leftrightarrow 169—Payment of plaintiff's costs as condition to opening default held proper.

On motion to open a default judgment on the ground of a misunderstanding as to whether defendant's attorney had been retained to appear, it was proper to require defendant to pay plaintiff's costs to the date of the order as a condition to opening the default.

3. Judgment \Leftrightarrow 169—Undertaking to pay plaintiff's future costs proper as condition to opening default.

Requirement of an undertaking to pay any costs and disbursements that might thereafter be adjudged in favor of plaintiff held proper as a condition to granting relief.

4. Judgment \Leftrightarrow 167—Undertaking to pay any judgment recovered improper condition to opening default.

Requiring defendant to give an undertaking, with sureties, conditioned to pay any judgment that plaintiff might recover, held not a proper condition to setting aside a default judgment because of mistake or excusable neglect.

In Banc.

Appeal from Circuit Court, Crook County; T. E. J. Duffy, Judge.

Action by G. H. Russell against A. A. Piper. From an order opening a default judgment, but requiring defendant to pay any costs and disbursements, and to furnish an undertaking to pay any judgment that plaintiff might recover, defendant appeals. Remanded, with directions to modify.

On March 9, 1920, plaintiff brought an action against the defendant for the sum of \$5,000. Personal service was regularly had upon the defendant on the same date, and after the expiration of more than 10 days, the time for answering, a default judgment was regularly entered. On April 2, 1920, the defendant filed a motion to set aside the default and be allowed to defend the action upon the merits, and tendered an answer. Section 103, Or. L., provides in this regard that the court may in its discretion, and up-

on such terms as may be just, at any time within one year, after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion was accompanied by affidavits on behalf of defendant tending to show that at the time of the service of the summons of the complaint upon defendant he had a conversation with an attorney at Walla Walla, Wash., in regard to the time for appearance in the case and probable time of trial, and fully expected the attorney to appear for the defendant in the action, and thought he made it plain to the attorney. The attorney did not understand from the conversation that the defendant had retained him or expected him to appear in the action, and did not appear. In a conversation between the defendant and attorney on March 23, one day after the default was entered, the mistake and misunderstanding were discovered, and soon thereafter the motion, affidavit, and answer were prepared and forwarded to Crook county.

Briefly stated, the complaint shows that on April 18, 1918, plaintiff, G. H. Russell, executed a negotiable note in favor of defendant, A. A. Piper, in the sum of \$5,000, with interest, receiving no consideration therefor. The note was given as a memorandum for a sum of money that would be due defendant in the event one Stewart paid plaintiff \$46,900 on a contract on or before November 1, 1918. It was agreed the note never should be paid until Stewart made such payment. Piper, in violation of his agreement, wrongfully negotiated the note for value before maturity, and plaintiff was compelled to pay the note. The answer tendered denies that the note was made payable to the order of defendant, A. A. Piper; denies each allegation of the complaint as to the want of consideration for the note; denies the conditions upon which it is alleged to have been given; admits that Stewart never completed the contract referred to in the complaint; denies that Piper negotiated the note, but admits that the note was negotiated before maturity; and avers the same was before Stewart abandoned his contract and with the consent of plaintiff.

Upon the hearing of the motion on July 3, 1920, the court found that the default and judgment were entered through defendant's mistake, inadvertence, and excusable neglect; that the motion should be granted, and the defendant permitted to be heard upon the merits, on the conditions that the defendant should be required to pay the costs and disbursements then incurred by plaintiff, and by July 20, 1920, furnish an undertaking, with good and sufficient sureties, conditioned to pay any judgment that plaintiff might recover in the cause. Defendant appeals from this order.

N. G. Wallace, of Prineville, and Sharpstein, Smith & Sharpstein, of Walla Walla, Wash., for appellant.

Jay H. Upton, of Prineville, for respondent.

BEAN, J. (after stating the facts as above). Defendant assigns that the court erred in imposing as a condition precedent in setting aside the default and allowing a defense upon the merits, the filing of the undertaking after finding from the motion and affidavits that the default and judgment were entered against him through mistake and excusable neglect, and that the order was an abuse of discretion. We glean from the briefs that the defendant, Piper, is a resident of Walla Walla, Wash., engaged with another in the real estate business. At the time of the service of the summons and complaint upon him he was at the county seat of Crook county, Or., in attendance as a witness upon the trial of a cause involving a similar note, executed at the same time, for the same amount, which had also been negotiated. Counsel for plaintiff mentions in his brief that the judge who made the order appealed from heard the testimony in that case, *Vincent v. Russell*, 201 Pac. 433.

[1] The discretion lodged in the court by the statute above noted is a legal one, to be exercised in furtherance of justice and in accordance with the rules of modern jurisprudence. In employing the power conferred by the statute, by granting or withholding permission to defend upon the merits after a default judgment against a party, when it is shown that such default was occasioned through the mistake, inadvertence, surprise, or excusable neglect of such person, and an answer on the merits is tendered, it is not contemplated by the law that the court will pass upon the merits of the case, or decide the issues. That matter is left to be determined at the trial of the cause, if such hearing is permitted. The trial court adjudged that the default order and judgment were entered by reason of the mistake and excusable neglect of defendant, and that an answer was timely tendered by defendant. There is no appeal by plaintiff from such findings. Counsel for plaintiff suggests that only a part of the averments of the complaint are denied in the answer tendered. Unless the defendant's answer goes to the merits, the default should not have been opened. The answer denies the gist of the allegations of the complaint, although it does not disclose the amount of the consideration for the note.

[2] The courts of this state are open to the residents of other states and countries to maintain and defend actions substantially upon the same conditions as though such litigants were residents of this state. A slight difference as to security for costs, in cases of a plaintiff who is a nonresident, or

a foreign corporation, is provided for in sections 579 and 580, Or. L. Under all the circumstances of the case, as shown by the record, we approve that part of the record requiring defendant to pay the plaintiff's costs of the action to the date of the order.

[3] The judgment was regularly rendered and entered of record. Defendant is now the moving party in attacking the judgment, and we think it appropriate that as a further condition to opening the judgment he should be required to furnish an undertaking with sufficient sureties to pay any costs and disbursements that may hereafter be adjudged in favor of plaintiff in the action. It would also have been proper to have allowed the judgment to stand as security for plaintiff, in order that he might not be placed in any less favorable position as to the satisfaction of any judgment that he may obtain against defendant.

[4] The defendant properly made an application to be heard upon the merits of the case. No counter showing was made by plaintiff. We do not think that the law justifies the requirement that defendant furnish an undertaking with sureties conditioned to pay any judgment that plaintiff may recover upon the trial of the cause. For precedents in cases arising under various circumstances, see 23 Cyc. 972; *Kosher v. Stuart*, 64 Or. 123, 121 Pac. 901, 129 Pac. 491; *Brown v. Brown*, 37 Minn. 128, 38 N. W. 546; *Glickman v. Loew*, 29 App. Div. 479, 51 N. Y. Supp. 1078; *Brickel v. Train* (Sup.) 86 N. Y. Supp. 292; *Union Bank v. Benjamin*, 61 Wis. 512, 21 N. W. 523; note to *Farmers' Loan, etc., v. Hale*, 41 L. R. A. 222.

The cause will be remanded, with direction to the circuit court to modify the order in accordance with this opinion.

GRANT v. STATE INDUSTRIAL ACCIDENT COMMISSION.

(Supreme Court of Oregon. Oct. 28, 1921.)

1. Master and servant \S 417(4½)—Notice of final action on compensation claim held given for purpose of appeal.

Within Or. L. \S 6637, providing that any beneficiary not satisfied with the decision of the Industrial Accident Commission may within 30 days after "notice" of the "final action" of the Commission appeal to the circuit court, *held* that, though the question of compensation for temporary total disability was closed on the injured employé returning to work, yet the Commission having thereafter continued to exercise jurisdiction, and treated as open the question of permanent partial disability because of a floating cartilage of the kneejoint, its subsequent determination that nothing should be awarded on that account unless he submit-

ted to operation, and letter to his attorneys to that effect, was final action and notice thereof, as regards time to appeal on that branch of the case.

2. Master and servant \S 385(18)—Compensation claimant's duty to submit to "reasonably essential" operation defined.

In Or. L. \S 6633, providing that, if a workman entitled to compensation under the act refuses to submit to such surgical treatment as the Commission deems "reasonably essential" to promote recovery his right to compensation shall be suspended, the words "reasonably essential" are used in a relative sense, and imply the necessity of considering not merely the opinions of medical men, though all of them agree, but all the facts before attempting to decide; and right to compensation is suspended only if the workman refuses to submit to an operation to which an ordinarily reasonable man would submit if similarly situated.

3. Master and servant \S 417(7)—Reasonableness of compensation claimant's refusal to submit to operation jury question.

Whether the conduct of a workman in refusing to submit to a surgical operation directed under Or. L. \S 6633, is unreasonable, and so suspends his right to compensation, is one of fact for the jury demanded on appeal under section 6637, and not of law for the court, where either the facts are in dispute, or where, they being admitted, reasonable men would draw different inferences therefrom.

4. Master and servant \S 417(7)—Reasonableness of compensation claimant's refusal to submit to operation held question for jury.

Whether a workman, in refusing to submit to an operation for a floating cartilage of the kneejoint, acted reasonably, so that his right to compensation was not suspended thereby, *held*, in view of the risk of a stiff knee, one of fact for the jury, though the medical men agreed that an operation was advisable.

5. Master and servant \S 417(7)—Jury's decision on appeal in compensation case conclusive.

Where the reasonableness of a compensation claimant's refusal to submit to an operation directed under Or. L. \S 6633, is a question of fact for the jury demanded under section 6637, on appeal from the Industrial Accident Commission to the circuit court, the court is bound by the jury's decision, though the verdict does not follow the exact language of the statute.

6. Master and servant \S 417(7)—Percentage of disability of compensation claimant held for jury.

The question of percentage of disability of an injured workman because of a floating cartilage of the kneejoint *held*, in view of the conflicting testimony, one for the jury, on appeal from Commission.

In Banc.

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

The State Industrial Accident Commission refused to make an award to C. Grant for an alleged permanent partial disability, and he appealed to the circuit court. Not being satisfied with the result of the trial in the circuit court, the Commission appealed to this court. Affirmed, with directions.

J. A. Benjamin, Asst. Atty. Gen. (I. H. Van Winkle, Atty. Gen., on the brief), for appellant.

Walter T. McGuirk and W. H. Bard, both of Portland (O. G. Schneider, of Portland, on the brief), for respondent.

HARRIS, J. The questions presented are: (1) Was the appeal to the circuit court taken within time? And (2) Is Grant entitled to compensation for permanent partial disability notwithstanding his refusal to submit to an operation?

It is necessary first to give a history of the case. Grant was employed by the Columbia Shipbuilding Corporation as a riveter and as such employé was subject to the Workmen's Compensation Law. While Grant was at work on September 23, 1919, a plank gave way causing his left knee to strike against a piece of steel, thus producing what was finally determined to be a floating semilunar cartilage of the kneejoint. On October 4, 1919, Grant returned to work. On October 23d Grant filed with the Industrial Accident Commission a formal claim for compensation, and the Commission promptly and without delay allowed \$18.17 as compensation for temporary total disability for the nine working days between September 23d and October 4th.

Ordinarily the Commission permits the injured workman to choose his own doctor, and such was the course pursued in this case. Grant was first treated by Dr. Besson. On October 29th L. J. Moore, an examiner for the Commission, reported to the Commission that Grant had called upon him and stated:

"That his kneecap was still giving him trouble and thought that he would have to lay off again. Dr. Besson some time ago told him he might have to operate if the knee caused any more trouble, but as the doctor had been out of town for the last week or more, * * * I advised Mr. Grant that he was free to go to some other doctor if he wished."

Acting upon the permission given by the examiner, Grant consulted Dr. S. H. Sheldon. Grant was obliged again to quit work on October 27th. Under date of October 29th Dr. Sheldon reported to the Commission that Grant had been sent to him for treatment and that—

In his opinion "the lateral capsule of left knee is torn and advised that the knee be put in plaster cast for at least two weeks, which has been done."

On December 9th the examiner reported to the Commission that—

Grant had returned to work December 5, 1919, "at a job where he is able to sit down, and wishes compensation from November 11th to December 5th be put through as promptly as possible."

And under date of December 13, 1919, the examiner wrote to the Commission stating that—

"Dr. Sheldon called up yesterday and reported that Mr. Grant was able and did return to work December 5, but that he is still under his surveillance and care for the loose cartilage of his knee."

In the record made by the Commission is a copy of "findings and final action" by the Commission showing that on December 15, 1919, the Commission found that Grant was disabled one month and fifteen days, "is entitled to payment" of \$82.79 for temporary disability, of which sum \$42.40 has been paid, and "is now entitled to receive the further payment of \$40.39 in full settlement for any and all claims arising out of the above injury." However, subsequently and under date of February 20, 1920, Dr. Besson wrote to the Commission stating that—

Grant "comes in to-day, giving a typical history of frequent 'throwing out' of the knee and subsequent pain for two weeks or so. Examination shows the tender point at the location of the internal cartilage, and probably a rupture of the capsule of the joint, with a herniation at the synovial sac behind the joint. I would like to have an X-ray, and the man will probably need an operation. If you desire corroboration of these findings, kindly let me know at once, and also advise the man."

The Commission's reply was as follows:

"Replying to your kind letter of February 20, beg to advise that it is agreeable with this Commission that you proceed with such treatment as your professional judgment would indicate necessary in an effort to obtain the best result possible in the above case."

On February 28th, Dr. Besson gave to the Commission a statement of the conditions found by him and also the conclusions drawn by him, and, among other things, he stated that in his opinion an operation was necessary, but that since he would be "out of town for about two weeks" he "would prefer not to undertake the case until" his return. The Commission replied saying: "It is agreeable with this Commission" that "operative action be deferred until such time as you return from out of town."

On March 23, 1920, the Commission wrote to Dr. Besson requesting that he "furnish us with a report as to the condition and progress this workman is making under your treatment." Dr. Besson replied on March 25th saying that—

Grant "was scheduled for operation and failed to appear. I * * * was informed that

Grant wanted to wait awhile, and was resting up. Grant may improve somewhat under various forms of treatment, but I am certain that complete recovery will only come about through an operation. He seemed to approve my findings and I am at a loss to account for his delay."

Under date of December 18, 1920, the examiner wrote to the Commission stating that—

"Mr. Grant wishes an appointment at the Portland session on Friday, December 24, at 10:15 a. m. He is still having trouble with the loose cartilage in the knee."

Grant presented himself on December 24th at the Portland session, which was conducted by one member of the Commission and the Commission's chief medical examiner. There is in the record a copy of the entry which was made and signed by the commissioner and chief medical examiner who conducted the Portland session. The entry reads as follows:

"Left knee has definitely loose internal semilunar cartilage that has given trouble intermittently by slipping out with resultant effusion into knee, since date of injury. Agreed to go to Dr. Dillehunt for removal of same. TTD to be reopened when operated."

On December 27th the Commission wrote to Dr. Dillehunt as follows:

"From the Portland session memo of December 24, we learn that the above-named workman has been referred to you for operative care. In order that we may properly compensate this man we request that you advise us the date he reports to you for treatment and also be particular to state the length of time he will be disabled in your opinion."

Under date of December 29, 1920, the attorneys for Grant wrote to the Commission as follows:

"Mr. Grant states that on Friday last he was finally examined by Dr. Thompson (the chief medical examiner) to establish the amount of permanent partial disability which he had, and he was instructed at that time to report to Dr. Dillehunt at 3:30. Upon calling at Dr. Dillehunt's office he advised him that an operation was to be performed upon his knee that afternoon. Mr. Grant states that there must have been some misunderstanding in the matter as he has been informed by the physicians examining him and also I believe by Dr. Dillehunt and other physicians that they could not assure him that the operation would not cause him to have a stiff knee for life, and he feels that he does not want to take that chance but rather prefers to permit it to remain in the condition that it is now in, and therefore has requested that we write you and advise you of that fact and ask that you make such permanent partial disability as the records now before you warrant you in making.

"We believe that Dr. Besson and some other physician examined Mr. Grant a year or more ago and ascertained that he was permanently injured about the knee, and requested

that time that he await for about a year's time before being finally examined; this, however, your records will divulge, Mr. Grant was finally examined on Friday last in compliance with the request of the Commission and your physicians."

The attorneys concluded their letter with a request that the Commission make its final award before January 1st and "advise Mr. Grant or ourselves of your final decision in the matter." Under date of December 30th the Commission replied to the attorneys, saying:

"We acknowledge herewith receipt of your letter of December 29, asking that the Commission make a lump sum payment in the above-named case.

"As there has been no award made in this case nor do our records indicate that the man will suffer a permanent partial disability, it will be impossible for the Commission to consider the payment of any compensation in a lump sum.

"Mr. Grant was examined at our Portland office on December 24, by Dr. F. H. Thompson, our chief medical examiner, and in the presence of Commissioner F. W. Ferguson he agreed to report to Dr. Dillehunt for an operation to remove a loose internal semilunar cartilage. This condition apparently has been giving him trouble since the date of his injury and the Commission agreed to allow him time loss during the time he was disabled as result of the operation. The Commission is willing to live up to its agreement with Mr. Grant, but we certainly will expect Mr. Grant to keep his part of the agreement.

"If he will report to Dr. Dillehunt for the operation to correct his condition, he will be paid time loss while disabled and his bill for medical attention will be taken care of by the Commission. If, however, he does not care to submit to the proper treatment, the Commission will not be in a position to allow him further compensation."

[1] In the circuit court the Commission moved to dismiss the appeal on the ground that the award made by the Commission on December 15, 1919, was the last decision made by the Commission. The statute, section 6637, Or. L., provides that "any beneficiary not satisfied with the decision or findings" of the Commission may within 30 days after notice of the final action of the Commission appeal to the circuit court. The motion to dismiss the appeal was denied, and the Commission assigns this ruling as error.

Grant contends that at no time did the Commission consider or award or refuse to award compensation for permanent partial disability until December 30, 1920; that the letter of December 30, 1920, was notice of the decision made by the Commission concerning the allowance of compensation for permanent partial disability, and that therefore his appeal was taken in time. It may be assumed that, since Grant returned to work on December 5, 1919, it was proper to

discontinue compensation for temporary total disability, and that the award made on December 15, 1919, was a final decision closing the question of compensation for temporary total disability. The reports and correspondence and conduct of the Commission make it plain that the Commission was at all times treating the case as one which was still open for consideration and for their decision, because of the uncertainty of future developments. Although the question of temporary total disability was closed, the question of permanent disability was regarded as being still open. The Commission did not stand upon technicalities by requiring a formal written application to be filed with red-tape precision before exercising jurisdiction subsequent to December 15, 1919; but upon the contrary the Commission continued to exercise jurisdiction after that date, and, as shown by the letters and reports received by the Commission and the letters written and orders made by it, the Commission was not only willing but laudably desirous of doing from time to time whatever developments might indicate was proper to be done. The Commission approved and paid bills rendered to it for medical and hospital services rendered in the months of February and March of 1920. Moreover, these services were authorized by the Commission before they were rendered.

Grant testified that Dr. Besson "wanted to operate on it," but "Dr. Sheldon told me to let it go for a year, and maybe it would come back and be all right." Grant says that he was requested by physicians and by the officers of the Commission to suspend the making of a claim for permanent partial disability for about one year in order that the development of the injury might be ascertained and a fixed condition made known before any order for permanent partial disability was made. The willingness of the Commission to retain jurisdiction and the fact that it did retain jurisdiction is made clear by one of the commissioners who testified:

"When a man returns to work his time loss ends. He was returned to work with the idea of coming up later on when it is determined whether his condition was chronic, or, as the doctor explained, it would entirely recover. He came back in the fall of 1920, saying his condition was still remaining. We had a consultation and examination by doctors to determine what would be done for him. The result of the consultation was he should submit to an operation for the removal of the cartilage, because it had become chronic. * * * He reported trouble with his knee. We said, 'All right, we will take care of it,' and called in the medical examiner. * * * As soon as he reported back to us he had trouble with his knee we immediately took steps to take care of him. We called in the doctors to examine him, and advise what should be done. We told him, 'When you

enter the hospital your time loss will be paid, your hospital bill and doctor bill.' * * * When the doctor reported him able to go back to work on December 5th, that was notice to the Commission to close his time loss. If there is any further care required later on, the jurisdiction is continued, which we wanted to do in this case, and want to do still."

Having retained jurisdiction, and, acting under the authority of section 6633, Or. L., the Commission considered the question of the advisability of an operation and deemed an operation reasonably essential to promote recovery, and announced that further compensation would not be allowed if Grant refused to permit an operation. The conclusion reached by the Commission constituted a decision made in response to Grant's application for compensation for permanent partial disability. The letter of December 30, 1920, was notice of such decision; and consequently the appeal to the circuit court was taken within the time prescribed by the statute, for Grant appealed immediately after receiving the letter of December 30th.

The statement of facts already made should be supplemented by a narrative of such additional facts as are properly involved, before any attempt is made to answer the second question presented by this appeal. The doctor who first treated Grant advised him to submit to an operation. Dr. Sheldon, whom Grant consulted a few weeks after the injury, told Grant that it would be better to wait a year "before considering an operation," because "very often these cases make a complete recovery without operation, and if this recovery is to take place it usually takes place within a year. After it goes on over a year it probably becomes chronic." Grant says that he acted upon the advice of his physician and waited a year to ascertain what results might develop. At any rate, whether he acted upon the advice of the doctor or upon his own inclination and judgment, Grant did in fact wait a year before further considering the advisability of an operation.

The cause was tried in the circuit court on February 7, 1921. Every doctor who saw Grant at any time between November, 1920, and the date of the trial, gave it as his opinion that an operation was advisable. This was the view of Dr. Sheldon, who, as previously explained, had soon after the injury advised Grant to wait a year; it was also the opinion of two other surgeons who had examined Grant. Two surgeons who had not examined Grant gave testimony which tended to lend support to the conclusions reached by the medical men who had examined Grant. Apparently Grant's disability had by December, 1920, become chronic and permanent. The evidence is sufficient to support the inference that unaided nature will

not cure the present condition of the knee and that no kind of medical treatment, except a successful operation, can correct the present disability.

In obedience to directions given at the Portland session of December 24, 1920, Grant presented himself to Dr. Dillehunt. It appears from the record that Grant knew of a man who "got hurt, he got operated on, and he got a stiff knee," and Grant was afraid that he, too, would have a stiff knee if operated upon. When Grant presented himself to Dr. Dillehunt, he asked the doctor if the latter would guarantee that an operation would not result in a stiff knee; and when the doctor stated he would not give such an assurance, Grant refused to submit to an operation.

All the medical men declared that the operation required to correct the disability is known as a major operation. One surgeon said that it was a serious operation, using the word "serious" in the sense that "if anything did go wrong it is serious to the individual." An anesthetic is necessary. One witness testified:

"It is not a common operation. I don't know of any surgeon that has done a great number of those operations. We occasionally operate on one."

An operation terminates either in a cure or ankylosis. The principal danger is the risk of infection. One witness declared that infection was practically the only danger. One surgeon testified, and no witness denied, that—

"The kneejoint is a very complicated joint, and infection is more apt to take place in the kneejoint than any other place in the body. The asepsis must be absolutely perfect in an operation on the kneejoint."

One of the medical witnesses had personal knowledge of about 20 operations, all of which were successful; another witness was present at two operations which were not successful. The medical men were agreed that the operation is usually successful. One witness stated that about one operation in a hundred resulted in a stiff knee.

Witnesses who undertook to estimate the percentage of Grant's present disability differed in their estimates. One witness stated that the disability was between 30 and 40 per cent.; another placed the disability at 50 per cent.; and still another said that the percentage of disability was between 25 and 75 per cent., explaining that it was difficult to figure the degree of disability, because there is no way of knowing in advance "when it (the knee) is going to lock and give him trouble." The present condition of the knee is such that—

"Every once in a while a part of the cartilage in the knee slips out of place, and sort of locks

his knee. It doesn't do that all the time, but if he makes a certain motion it gets into a tight place, causes a locking of the knee. * * * Every time that cartilage slips out of place, it causes an irritation of the joint. A swollen joint has pain, and impairment of function, loss of motion, so he cannot step on it. * * * Gets out of place * * * every once in a while; no telling how often it will do that, but it usually does that quite frequently. * * * It will cause total disability at times, partial disability at other times."

Speaking of the advisability of the operation, one surgeon thought a stiff knee would be preferable to Grant's present condition. Another surgeon stated that—

He "would hardly be prepared to say which would be preferable. It would depend on how much interference this cartilage is in performing his duties. It also depends on what position the knee would be ankylosed in if it became stiff."

And continuing with his testimony this same witness declared:

"In a stiff knee you have complete limitation of motion;" but with a loose cartilage and bandage "he would have practically full flexibility, part of the time, except the time when there was locking of the knee or immediately after there was any pain or swelling. It would be a question I think up to the individual."

The verdict of the jury consisted of special findings as follows:

"We, the jury, * * * find that the plaintiff has reasonable ground for the refusal to be operated upon for a correcting of the loose semilunar cartilage of the left knee; and we * * * do hereby find for the plaintiff that he is 75 per cent. permanently partially disabled in the loss of efficiency and use of his left knee."

Based upon the verdict the circuit court adjudged that Grant is entitled to an award of 75 per cent. disability "of the loss of function of the left knee and the left knee joint," and ordered the Commission to make an award to Grant based upon such loss.

Whether or not Grant is entitled to receive compensation for a permanent partial disability on account of the present condition of his knee depends upon whether he was or was not obliged to submit to an operation; and the question as to whether or not he was obliged to submit to an operation before he could be awarded compensation for permanent disability depends upon (1) the construction given to that provision of the statute which relates to surgical operations, and (2) the facts. We must therefore first determine the scope of the statute, and then ascertain whether the facts of the instant case are such as to make submission to an operation a condition precedent to the right of compensation.

So far as it is material here, section 6633, Or. L., reads as follows:

"* * * For such period of time as any workman * * * shall refuse to submit to such medical or surgical treatment as the Commission deems reasonably essential to promote his recovery, his right to compensation shall be suspended and no payment shall be made for such period, and the Commission may reduce the period during which such workman would otherwise be entitled to compensation to such an extent as they shall determine his disability shall have been increased by such refusal."

The important words in section 6633, Or. L., are: "Such medical or surgical treatment as the Commission deems reasonably essential to promote his recovery." These important words did not appear in the Workmen's Compensation Law as it was originally enacted in 1913, but they first appeared in an amendment adopted in 1917. Laws 1913, c. 112, § 28; Laws 1917, c. 288, § 14.

Perhaps the task of construing section 6633, Or. L., will be lightened if we now inquire about the rule prevailing in other jurisdictions; for possibly any seeming ambiguity in the language of our statute may be clarified when it is read in the light of the rule prevailing in other jurisdictions.

In practically all, if not all, the Workmen's Compensation Statutes, it is provided that every workman shall receive compensation for an injury resulting from an accident arising out of and in the course of his employment. The workman's right to compensation depends upon whether the accident arises out of and in the course of his employment, and if it does the workman is entitled to compensation. The loss sustained by the injured workman is attributed to the employment and the workman is given a legal right to compensation. The statute does not create a charity, nor does it allow damages in the sense in which the word "damages" is commonly employed; but, taking notice of the inequalities growing out of the old system, Legislatures have responded to the public demand for a new system which would obviate the delays attending personal injury litigation and at the same time shift the burden of economic waste from the workman to the industry, in order that it may ultimately be borne by the consumer as a part of the necessary cost of production. *State v. Industrial Com.*, 92 Ohio St. 434, 111 N. E. 299, L. R. A. 1916D, 944, Ann. Cas. 1917D, 1162. After the injury is sustained, however, it may appear that an operation will diminish or correct the disability which originated in the employment. There are some operations to which a workman must submit or else lose his right to compensation; and so, too, there are cases where the workman may refuse to be operated upon without

losing his right to compensation. The doctrine debarring the workman from compensation in cases where his refusal operates as a bar proceeds on the theory that continuance of his disability is due to his own unreasonable conduct and not to the employment. This is only a recognition of the legal principle that an individual whose person or property is injured must do whatever is reasonably proper to lessen the loss. Such being the theory of the doctrine, we would expect to find, as we do, that the test for determining the rights of the workman is whether his conduct is that of a reasonable man. When the issue arises, with the workman contending that his refusal is reasonable and the Commission asserting that it is not reasonable, it is an issue of fact, and is to be decided like the issue of negligence in an action at law. Of course, in cases involving claims of workmen for compensation, just as in cases alleging negligence, the facts may be such that it can be said as a matter of law that the workman's refusal is unreasonable; but usually the question is one of fact to be determined by the triers of the facts. Courts take notice of that which is common knowledge and experience; and therefore, when the admitted facts disclose a case which the general knowledge and experience of men condemn at once as unreasonable, it is the duty of the court to declare it unreasonable as a matter of law. *Walsh v. O. R. & N. Co.*, 10 Or. 250, 255. The American courts with practical unanimity have adopted the formula prescribed by Lord McLaren in *Donnelly v. William Baird & Co.*, Scotch Sess. Cas. (1908) 536, Scot. L. R. 394, 1 B. W. C. C. 95:

"In view of the great diversity of cases raising this question, I can see no general principles except this, that if the operation is not attended with danger to life or health, or extraordinary suffering, and if according to the best medical or surgical opinion the operation offers a reasonable prospect of restoration or relief from the incapacity from which the workman is suffering, then he must either submit to the operation or release his employers from the obligation to maintain him. In other words, the statutory obligation of the employer to give maintenance during the period of incapacity resulting from an accident is subject to the implied condition that the workman shall avail himself of such reasonable remedial measures as are within his power. I think that this statement is in accordance with all the decisions that have been given in similar cases, but in whatever way the condition is defined each case must be considered as a circumstantial case depending on the nature of the proposed operation and its probable results. I do not think that in principle any distinction can be taken between medical treatment and surgical treatment as regards the duty of the patient to co-operate with his professional advisers towards his own restoration to health and working capacity. The distinction only begins when an operation is proposed which may be attended

with danger, or, the results of which are not in the region of reasonable and probable success."

See, also, *Vonnegut Hardware Co. v. Rose*, 68 Ind. App. 385, 120 N. E. 608, 610; *Enterprise Fence & Foundry Co. v. Majors*, 68 Ind. App. 575, 121 N. E. 6; *Flocchers' Case*, 221 Mass. 54, 108 N. E. 1032; *McNally v. Hudson & M. R. Co.*, 87 N. J. Law, 455, 95 Atl. 122; *O'Brien v. Albrecht*, 206 Mich. 101, 172 N. W. 601, 6 A. L. R. 1257; *Lesh v. Ill. Steel Co.*, 163 Wis. 124, 157 N. W. 539, L. R. A. 1916E, 105; *Jendrus v. Detroit S. P. Co.*, 178 Mich. 265, 144 N. W. 563, L. R. A. 1916A, 381, Ann. Cas. 1915D, 476; *Kricinovich v. American Car & Foundry Co.*, 192 Mich. 687, 159 N. W. 362; and note in 6 A. L. R. 1260. The opinion in *Guild v. Portland R. L. & P. Co.*, 64 Or. 570, 131 Pac. 310, is of interest in connection with the question under discussion.

We have not discovered any jurisdiction where the Commission or other body administering the statute is given arbitrary power to prescribe an operation under inevitable penalty of loss of compensation in case of refusal by the workman; nor does any statute to which our attention has been called make the right of refusal depend upon the balance of medical opinion. The opinions of medical men, whether divided or unanimous, are not alone and of themselves necessarily controlling. In every jurisdiction the right of the workman is dependent upon his conduct, and his conduct is measured by the course which would be pursued by an ordinarily reasonable man.

[2] Our statute must not receive a narrow construction, nor should it be so freely interpreted as to give a right which the words themselves do not fairly import; and yet it must be liberally construed. Manifestly, the Legislature did not intend to confer upon the Commission any arbitrary power to prescribe an operation regardless of the pain and suffering accompanying it or the consequences flowing from it. Finding as we do that now as well as prior to 1917 other jurisdictions, both American and British, have adopted and consistently adhered to the rule of reasonableness, we should expect also to find the same rule in our own statute; and it would be surprising to find a provision in our statute giving arbitrary power to the Commission, or making the workman's right of refusal dependent upon medical opinion alone, and entirely ignoring the viewpoint of the workman who is the only one who must take whatever risk is involved, must endure whatever suffering is to be borne, and must accept whatever ill effects may result from the operation. When the Commission "deems" it decides; and the Commission cannot decide whether an operation is reasonably essential to promote recovery unless it takes into con-

sideration all the facts, including the present condition of the workman, the degree of pain accompanying and following the operation, the danger to life or health, and the probable results of the operation.

When the statute is read in the light of the humane purposes which it was designed to accomplish and is viewed in the light of the rule which elsewhere has been adopted without dissent or protest, and is then interpreted liberally, as it ought to be, it will clearly appear that the words "reasonably essential" are used in a relative sense and imply the necessity of considering not merely the opinions of medical men but all the facts before attempting to decide. It is appropriate in this connection to say that the Commission is not in the instant case charged with having exercised its power arbitrarily; but upon the contrary we understand from the record that the Commission has earnestly endeavored to carry out the spirit as well as the letter of the statute as it understood the statute. The present controversy arose out of a difference of opinion concerning the meaning of section 6633, Or. L. The Commission was guided by the opinions of the doctors, apparently on the theory that the opinions of the medical men were conclusive, especially when they agreed, as they did in the instant case, that an operation was advisable.

[3] Our conclusion is that our statute should be construed to mean that the workman's right to compensation is to be suspended if he refuses to submit to an operation to which an ordinarily reasonable man would submit if similarly situated. Usually the conduct of a workman is a question of fact to be decided by the triers of the facts. Our statute provides that in the circuit court "either party thereto may demand a jury trial upon any question of fact." Section 6637, Or. L. If the facts are admitted and reasonable men would draw the same inferences from those facts, generally the question for decision becomes one of law for the court to decide; but where the facts are in dispute, or where reasonable men would draw different inferences from admitted facts, the question is one of fact for the jury and not one of law for the court. *Greenwood v. Eastern Oregon Power Co.*, 67 Or. 433, 441, 136 Pac. 336; *Gibson v. Payne*, 79 Or. 101, 105, 154 Pac. 422, Ann. Cas. 1918C, 383; *Strang v. Ore. W. R. & N. Co.*, 83 Or. 644, 651, 163 Pac. 1181.

[4, 5] If in a given case it can be said that the workman is refusing to undergo a safe and simple operation, which if performed by a competent surgeon is fairly certain to result in removal of the disability and is not attended by serious risk or extraordinary pain, and one to which an ordinarily prudent and courageous person would submit for his

benefit and comfort, no question of compensation being involved, then it can be said that the continued disability of the workman is the direct result of his own unreasonable refusal. *Lesh v. Ill. Steel Co.*, 163 Wis. 124, 131, 157 N. W. 539, L. R. A. 1918E, 105. In the instant case the operation is a major one and there is a risk of producing a result which some persons might deem worse than Grant's present condition. Even though it be assumed that all the material facts are admitted, nevertheless it is obvious that reasonable men may differ as to whether Grant acted reasonably in refusing to submit to the proposed operation. Each case will depend largely upon its own facts and circumstances, but it appears to us that the facts and circumstances related in the record here were such as to make the question for decision one of fact for the jury and not one of law for the court. The jury decided that Grant's refusal was reasonable, and the court is bound by that decision of the jury. Section 6037, Or. L. It is true that the verdict of the jury did not follow the exact language of the statute, but we think that the verdict is sufficient when it is read in the light of our construction of the statute.

[8] We are also of the opinion that it was proper to permit the jury to determine the percentage of disability.

The order of the circuit court is affirmed, and the Commission is directed to fix the compensation in accordance with the findings in the verdict.

SUSTAR v. COUNTY COURT OF MARION COUNTY.

(Supreme Court of Oregon. Oct. 25, 1921.)

1. Criminal law §1071—Requisite of petition for writ of review stated.

Petition for writ of review must state enough facts to show plaintiff entitled to the writ, describe with certainty the judicial functions claimed to have been improperly exercised, and set forth the alleged errors, and not thus making a prima facie showing of error, but alleging only conclusions of law and meager facts, is insufficient.

2. Criminal law §1071—Writ of review to be disallowed for insufficiency of petition.

Petition for writ of review being insufficient, writ should be disallowed in the first instance.

3. Criminal law §1023½—Writ of review not of right, but of sound discretion.

One is not entitled to a writ of review as matter of right, but the granting or refusal thereof rests in the court's sound discretion, the court, however, exercising a liberal discretion.

4. Criminal law §273—Plea of guilty waives right to trial.

One by pleading guilty waives his right to trial, and admits the truth of the charge.

5. Criminal law §1071—Assertion in petition for writ of review held a conclusion.

Assertion in petition for review that the sitting of the court was private, and contrary to L. O. L. § 967, without any allegation of fact on which to base it, is a mere conclusion, and so insufficient.

6. Intoxicating liquors §211—Complaint charging possession of moonshine whisky contrary to statute charges a crime.

Complaint charging unlawful possession of moonshine whisky, contrary to the statute, charges a crime, Or. L. § 2224—4, declaring that except as hereinafter provided it shall be unlawful to possess any intoxicating liquor.

7. Criminal law §1147—Sentence within limits of statute generally discretionary, and not reviewable.

Generally speaking, a sentence to pay a fine and to imprisonment, within the limit prescribed by the statute, is within the discretion of the trial judge, and not reviewable.

8. Criminal law §1213—When punishment by reason of duration is "cruel and unusual" stated.

That a punishment may be declared "cruel and unusual" with reference to its duration, it must be so proportioned to the offense as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cruel and Unusual Punishment.]

9. Criminal law §1213, 1214—Prohibition statute not violation of Constitution as to excessive fines and cruel and unusual punishment.

Or. L. § 2224—61 declaring for violation of the prohibition statute a fine of not less than \$100 nor more than \$500, or imprisonment of not more than six months, or both, in the discretion of the court, does not conflict with Const. art. 1, § 16, forbidding the imposition of excessive fines or infliction of cruel and unusual punishment, and commanding that penalties shall be proportioned to the offense.

10. Criminal law §1134(8)—Evidence not reviewed on appeal from writ of review.

Writ of review being a special proceeding, the evidence cannot be reviewed on appeal from denial thereof.

En Banc.

Appeal from Circuit Court, Marion County; George Bingham, Judge.

Application of Peter Sustar for writ of review to the County Court of Marion County was denied, and he appeals. Affirmed.

This is an appeal from an order denying plaintiff's application for the issuance of a writ of review. On the 12th day of July,

1921, P. Sustar, plaintiff, filed in the circuit court of the state of Oregon in and for Marion county his verified petition, and certified to by his attorney, seeking a writ of review. From his petition it appears that plaintiff was accused by a complaint filed in the county court of the state of Oregon, for the county of Marion, charging:

"That the said P. Sustar, on the 30th day of June, 1921, in the county of Marion, state of Oregon, then and there being, did then and there wrongfully and unlawfully possess intoxicating liquor, to wit, two quarts of moonshine whisky * * * contrary to the statutes in such case made and provided and against the peace and dignity of the state of Oregon."

Petitioner entered a plea of guilty to this charge, and was sentenced by the court to pay a fine of \$500 and to serve six months in the county jail.

The petition alleges that the sentence imposed is illegal and unlawful, and in conflict with section 16, art. 1, of the Constitution of the state of Oregon, reading as follows:

"Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishment shall not be inflicted, but all penalties shall be proportioned to the offense * * *"

—and that it is otherwise illegal and unlawful for the reason that the so-termed state prohibition act does not denounce the mere possession of intoxicants as a crime, save and except possession of such liquor at a dance.

The petition further asserts that there was no process issued for petitioner's arrest, and that a night session of court was prearranged; that he was not informed of his rights, but pleaded guilty upon the promise of receiving a sentence not to exceed a fine of \$50; that the proceedings had violated section 11 of the organic law and section 967, L. O. L.

The petition prays:

"That the court declare and decree that said county court, in the exercise of its judicial functions, exercised the same erroneously and exceeded its jurisdiction to the injury and substantial rights of this petitioner; that all proceedings had therein be vacated and set aside, * * * and that the penalties already suffered by petitioner through the wrongful acts and proceedings herein complained of, be deemed full and adequate, provided a transgression of the law be found."

From the order denying his application, petitioner appeals to this court.

Paul C. Dormitzer, of Portland, for appellant.

John H. Carson, of Salem, for respondent.

BROWN, J. (after stating the facts as above). [1, 2] The petition in every applica-

tion for a writ of review should contain a sufficient statement of facts, when taken as true, to disclose to the court that the plaintiff is entitled to the writ. It must describe with certainty the judicial functions claimed to have been exercised to the substantial injury of the plaintiff's rights, and must set forth the errors of law alleged to have been committed. *Holmes v. Cole*, 51 Or. 483, 486, 94 Pac. 964; *Curran v. State*, 53 Or. 154, 99 Pac. 420; *White v. Brown*, 54 Or. 7, 101 Pac. 900; *Elmore Packing Co. v. Tillamook County*, 55 Or. 223, 105 Pac. 898.

A petition for a writ of review should state facts with sufficient certainty and detail to make a prima facie showing of error, and, when this is not done, but only conclusions of law and some meager facts are alleged, the petition is insufficient. *Fisher v. Union Co.*, 43 Or. 223, 72 Pac. 797; *Holmes v. Cole*, supra; *Raper v. Dunn*, 53 Or. 203, 99 Pac. 889; *Kinney v. City of Astoria*, 58 Or. 186, 113 Pac. 21. If the petition is insufficient, the writ should be disallowed in the first instance. *Holmes v. Cole*, 51 Or. 483, 488, 94 Pac. 964.

[3] The petitioner was not entitled to a writ of review as a matter of right. The granting or the refusing to grant the writ rests in the sound discretion of the court. *Burnett v. Douglas County*, 4 Or. 392; *Reiff v. Portland*, 71 Or. 421, 141 Pac. 167, 142 Pac. 827, L. R. A. 1915D, 772; 5 R. C. L. pp. 254, 255; 11 C. J. pp. 106, 107. That the court exercises a liberal discretion, see authorities in note, 50 L. R. A. p. 788; see, also, *Rutter v. Burke*, 89 Vt. 14, 93 Atl. 842.

[4] Now, turning to the allegations contained in the petition, what errors of law were committed by the court below? The petition asserts that the court violated the following provision of the Constitution:

"In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor." Article 1, § 11, Oregon Constitution.

In so far as the record appears, the rights guaranteed the defendant by this section were accorded him. The nature and cause of his accusation were set forth in the complaint. He was informed by that document that he was charged with the unlawful possession of two quarts of whisky. By pleading guilty he waived his right to trial, and admitted the truth of the charge.

[5] As to the assertion of petitioner that the sitting of the court was private and contrary to the terms of section 967, L. O. L., we find no allegation of fact in the petition upon which to base that conclusion. A mere

assertion of a conclusion does not satisfy the requirement that the facts be stated.

[6] Plaintiff asserts that the possession of intoxicating liquor under the circumstances was not a crime. He overlooks the amendment to the original prohibition law. The allegations of the complaint state a violation of the prohibition law as it now exists. The original dry act, designated chapter 141, General Laws of Oregon 1915, was amended by the legislative assembly of 1917 by the enactment of chapter 40, Laws of 1917. Section 1 of that act amended section 5 of chapter 141, General Laws of Oregon for 1915, to read as follows:

Sec. 5. "Except as hereinafter provided in this amendatory act it shall be unlawful for any person to * * * possess * * * any intoxicating liquor within this state. * * *"
Section 2224—4, Or. L.

Hence the complaint clearly charged a crime. The prohibition law denounces as a misdemeanor the act of the defendant as described in the complaint, and upon conviction therefor the law prescribes a penalty, consisting of a fine, or imprisonment in the county jail, or both such fine and imprisonment, in the discretion of the court. Laws 1915, c. 141, § 36; 2224—61, Or. L. The court, in passing sentence upon the defendant, went to the verge by inflicting the extreme penalty; nevertheless, this sentence was within the law.

[7] Generally speaking, a fine within the limit of the penalty prescribed by the prohibition statute is within the discretion of the trial judge, and is legal, and not the subject of review. *McCollum v. State*, 119 Ga. 308, 46 S. E. 413, 100 Am. St. Rep. 171. There is nothing in the petition that brings the instant case within any exception to this rule.

The following punishments for illegal sales of liquor have been held not to be cruel and unusual, or excessive, within the meaning of constitutional provisions such as section 16, art. 1, Oregon Constitution:

"A fine of \$300 and one year's confinement for violation of local option law has been held not excessive." *Ex parte Swann*, 96 Mo. 44, 9 S. W. 10.

"A fine of \$1,000 and costs, though the accused believed in good faith the law was unconstitutional and discontinued his business when the law was declared valid." *State v. Baker*, 74 Iowa, 760, 38 N. W. 880.

"In Georgia, a fine of \$500 for a single sale to a minor." *McCollum v. State*, 119 Ga. 308, 46 S. E. 413, 100 Am. St. Rep. 171.

"A fine of \$200 upon each of 16 counts in an indictment for selling without a license." *Fletcher v. Commonwealth*, 106 Va. 850, 56 S. E. 149.

"Or the full penalty upon each count, even though the penalty imposed be imprisonment fixed successively to commence at the expiration of the next preceding sentence." *Bolun v. People*, 73 Ill. 488; *Mullinix v. People*, 76 Ill.

211; *Lovelace v. State* (Tex. Cr. App.) 49 S. W. 801; *Briffitt v. State*, 58 Wis. 39, 16 N. W. 39, 46 Am. Rep. 621.

"A fine and costs amounting to \$4,000, which would cause imprisonment for about 12 years for nonpayment thereof, where defendant had willfully violated two conditional pardons for offense." *Ex parte Brady*, 70 Ark. 376, 68 S. W. 34.

"A penalty of two years in county jail." *State v. Dowdy*, 145 N. C. 432, 58 S. E. 1002.

"Two years in county jail and to work on county roads where defendant was habitual offender." *State v. Farrington*, 141 N. C. 844, 53 S. E. 954.

"A fine of not less than \$100 nor more than \$500 and costs, or imprisonment in county jail not less than 90 days nor more than 1 year, or both, for illegal sale by druggist." *Inton v. Palmer*, 69 Mich. 610, 37 N. W. 701.

"A fine of not less than \$100 or more than \$500 and imprisonment in county jail for not less than 60 days or more than 6 months." *State v. Becker*, 8 S. D. 29, 51 N. W. 1018.

"A fine of \$500 and sentence to work on streets for 30 days." *Loeb v. Jennings*, 133 Ga. 796, 67 S. E. 101, 18 Ann. Cas. 376.

"A maximum term of imprisonment of one year and fine of \$300, and, on failure to pay fine, imprisonment not to exceed three years in all." *State v. Hodgson*, 66 Vt. 134, 28 Atl. 1089.

"A fine of not less than \$200 or more than \$1,000 and imprisonment in the state penitentiary for not less than 90 days or more than 1 year is not cruel and unusual punishment for the violation of an order restraining the trafficking in liquor." *Ex parte Keeler*, 45 S. C. 537, 23 S. E. 865, 31 L. R. A. 678, 55 Am. St. Rep. 785.

And we could cite many other instances of like import.

A statute providing for a fine of not less than \$100 nor more than \$500, or imprisonment of not less than six months, or both such fine and imprisonment, in the discretion of the court is not an excessive fine nor the infliction of cruel and unusual punishment. *Cardillo v. People*, 26 Colo. 855, 58 Pac. 678. See *McDonald v. Commonwealth*, 173 Mass. 322, 53 N. E. 874, 73 Am. St. Rep. 293; *State v. Phillips*, 73 Minn. 77, 75 N. W. 1029; *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127; *People v. Crotty*, 22 App. Div. 77, 47 N. Y. Supp. 845; *Ex parte Bates*, 37 Tex. Cr. R. 548, 40 S. W. 269. See *State v. Edwards*, 109 La. 236, 33 South. 209.

That part of section 16 of the Oregon Bill of Rights referred to herein contains three prohibitions and one command:

- (1) "Excessive bail shall not be required."
- (2) "Nor excessive fines imposed."
- (3) "Cruel and unusual punishment shall not be inflicted."
- (4) "All penalties shall be proportioned to the offense."

In the case of *Weems v. United States*, 217 U. S. 349, 367, 30 Sup. Ct. 544, 549 (54 L. Ed.

793, 19 Ann. Cas. 705) the Supreme Court of the United States declared that:

"It is a precept of justice that punishment for crime should be graduated and proportioned to the offense."

[8] In order to justify the court in declaring punishment cruel and unusual with reference to its duration, the punishment must be so proportioned to the offense committed as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances. *Weems v. U. S.*, *supra*.

In considering the case at bar, it should be kept in mind that the state and federal Constitutions have declared intoxicating liquor for beverage purposes to be an outlaw. The dry law is not an ephemeral statute. It was enacted to carry out the policy of

prohibition written into the fundamental law by the people. The prohibition statute is a criminal statute. It has been committed to the officers of the law for the purposes of enforcement. Our government is a government of law.

[9, 10] There is nothing before this court authorizing it to declare that the penalty in the instant case is excessive. The statute is not in conflict with the constitutional provision hereinbefore noted. We assume that the penalty was proportioned to the offense as commanded by section 16, art. 1, Oregon Constitution. There may, or may not, have been aggravating circumstances. A writ of review is a special proceeding, and we cannot review the evidence.

The ruling appealed from is affirmed.

**PUGET SOUND POWER & LIGHT CO. v.
CITY OF SEATTLE et al.**

**CITY OF SEATTLE v. PUGET SOUND
POWER & LIGHT CO. et al.**

(No. 16497.)

(Supreme Court of Washington. Oct. 15,
1921.)

1. Taxation ⚡508 — Personal property tax does not cast cloud on title of taxpayer's real estate until charged with lien by county treasurer.

Under Rem. Code 1915, § 9245, a personal property tax does not cast a cloud on the title of taxpayer's real property until the real property has been selected and charged with the lien of the personal property tax by the county treasurer.

2. Judgment ⚡251(1)—Court's refusal to apportion amount of tax between railway and city, purchaser of railroad property, on upholding validity of tax, held proper.

In street railway's action against city, purchaser of its property, and against county to enjoin collection of taxes, or in the alternative to require the city to pay its proportionate part of taxes in accordance with agreement with plaintiff, in which the city filed cross-complaint against the county alleging the same facts as those alleged by the street railway and praying for the same relief, the failure of the court to adjudicate the respective portions of the taxes to be paid by the railway and the city, on upholding validity of the assessment, held proper, since there was no controversy between the railway and the city, and no issue as to apportionment thereof for the court to pass upon.

3. Taxation ⚡511—Assessment of street railway property made prior to transfer to city valid notwithstanding exemption of city's property.

Assessment of street railway property on March 15th transferred to the city under a contract and not pursuant to condemnation proceedings on March 31st held valid, though tax was not levied until after transfer of the property to the city notwithstanding Const. art. 7, § 2, exempting city property from taxation, since under Rem. Code 1915, § 9235, the lien attached at time of assessment and not at time of levy.

4. Taxation ⚡511 — Purchaser of personal property subsequent to assessment takes subject to lien.

Purchaser of personal property subsequent to assessment takes subject to a perfected and indestructible lien.

5. Statutes ⚡121(1) — Provisions as to assessment of street railroads held within title relating to assessment of "railroads."

Provisions as to assessment of property of street railroads held within title of Laws 1907, c. 78, entitled "An act to provide for the assessment of the operating property of railroads," and of Laws 1911, c. 21, entitled "An act to amend section 12 of chapter 78, Session

Laws of 1907, relating to the assessment of the operating property of railroads," as is indicated by section 2, subd. 6, c. 78, Laws 1907, Laws 1905, c. 81, and Laws 1907, c. 41.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Railroad—Railway.]

6. Taxation ⚡42(2)—Classification of operating property of street railway as personality for taxation purposes held not unconstitutional.

Laws 1907, c. 78, § 12, as amended by Laws 1911, c. 21, providing for taxation of operating property of street railroads as personal property, held not violative of constitutional provisions as to uniformity of taxes and Const. art. 7, § 3, providing for taxation of property of corporations as near as may be by same methods as provided for in taxation of individual property, notwithstanding taxation of land of commercial steam railroads as realty, the classification being reasonable in view of the fact that street railways have no fee in the streets, and that their properties are largely personality, while commercial steam railways own their rights of way, extensive freightyards, and terminal and station grounds.

7. Constitutional law ⚡229(3)—Taxation of operating property of street railroads as personality held not to deprive railroad of equal protection of the laws.

Laws 1907, c. 78, § 12, as amended by Laws 1911, c. 21, providing for taxation of street railroad's operating property as personal property, held not violative of Const. U. S. Amend. 14, guaranteeing equal protection of the laws, notwithstanding taxation of land of commercial steam railroads as realty.

8. Constitutional law ⚡92—No vested right to particular method of assessment of taxes.

There is no vested right either in a corporation or natural person to have property assessed in any particular way, such matters resting entirely within the control and discretion of the Legislature.

9. Taxation ⚡42(1)—Classification of property for assessment a matter of legislative policy.

The classification of property for assessment, where uniformity and equality exist in the classes, is a matter of legislative policy.

10. Constitutional law ⚡229(3), 284(1)—Assessment of street railroad property prior to filing of statement by railway held not to deny equal protection of law, or take property without due process of law.

Assessment of street railroad's property on March 15th held not to deny to the railroad, or city by whom property was subsequently purchased, the equal protection of the law, or deprive them of property without due process of law, in contravention of Const. U. S. Amend. 14, though the company had not, prior to assessment, filed report concerning its business, property, capital, and stock under Acts 1907, c. 78, § 5; the filing of such statement being directory and not mandatory upon the public authorities, in view of section 7 and Acts 1917, c. 54.

Department 2.

Appeal from Superior Court, King County; Clay Allen, Judge.

Action by the Puget Sound Power & Light Company (formerly named Puget Sound Traction, Light & Power Company) against the City of Seattle, the County of King, and others, in which the defendant city filed cross-complaint against defendant county. Judgment for the county and its officers and against plaintiff and defendant city, and plaintiff and the City appeal. Affirmed.

James B. Howe, Hugh A. Tait, Edgar L. Crider, and Norwood W. Brockett, all of Seattle, for appellants.

Walter F. Meier, Edwin C. Ewing, Malcolm Douglas, and Howard A. Hansen, all of Seattle, for respondents.

MITCHELL, J. The city of Seattle purchased from the Puget Sound Traction, Light & Power Company a street railway "system, property and equipment." The purchase was authorized by ordinances of the city duly approved by the mayor. The actual transfer of the property was effected by an instrument dated and delivered March 31, 1919, and a physical delivery of the property the same day. The conveyance contained in its provisions the following:

"It is also further agreed between the parties hereto that if at the time of the delivery of this deed any lien shall have attached to the property or any part thereof for the year 1919 for any tax for the year 1919 such lien shall not constitute a breach of warranty, and that if such tax shall become collectible the same shall be paid before the same shall become delinquent by the respective parties hereto in amounts proportional to the respective periods of time that the same parties are respectively in possession of said property during the year 1919."

On or after March 15, but prior to March 31, 1919, the state tax commissioner assessed that portion of the property of the company afterwards transferred to the city. The validity of that assessment is the one involved in this suit. It covered operating property and consisted of a substantial amount of real property but more largely of personal property and was assessed in solido as personal property. Subsequently the company unavailingly protested against the assessment to the state tax commissioner, and also before the state board of equalization, that the property was exempt from taxation. The assessment was in due time certified to the assessor for King county. Taxes were levied thereon and the county treasurer gave notice of his demand for the personal property taxes for the year 1919.

The company instituted this action to restrain the collection of the taxes and to have the same declared null and void and canceled as a cloud upon the title to other real property belonging to the company. The

city was made a defendant. The complaint prayed that if the taxes be upheld the judgment should require the city and the company to pay, each its proportionate part in accordance with the agreement between them. The company alleged that the property became public property before any lien for taxes attached. The city admitted the allegations of the complaint and filed a complaint alleging essentially the same facts as the company and praying for the same relief. The county and its tax officers who were the adversary defendants admitted that the property was assessed as alleged, and claimed it was properly assessed by the state tax commissioner on March 15, 1919; that at that time the lien for taxes attached; and that when the city acquired title on March 31, 1919, it did so subject to the lien.

The superior court gave judgment in favor of the county and its officers, against both the company and the city, and declined to adjudicate the relative rights and obligations of the company and the city to an apportionment of the taxes under the terms of the contract of conveyance between them. The company and the city have appealed.

[1, 2] The contentions of both appellants are similar. In the company's brief it is claimed of assignments 1 and 2 that if the property upon which respondents claim a lien was not subject to such lien the alleged tax would constitute a cloud upon the title, and if it was subject to such lien since appellants had contracted with each other to divide it the court should have adjudicated their respective portions. The propositions are not made clear by argument. If by the first it is meant that the tax being a personal property tax in the name of the company it thereby casts a cloud on the title of real property the company still owns, the answer is that by section 9245, Rem. Code (considered in *Scandinavian American Bank v. King County*, 92 Wash. 650, 159 Pac. 786) no such cloud can be cast until the county treasurer selects specific real property and charges it with the lien of the personal property tax. If it is meant that the cloud is cast upon the property assessed, then the answer is to be found in the disposition of the other assignments with reference to the validity of the tax. On the other point—apportioning the tax between the company and the city—it is claimed "equity having acquired jurisdiction it was error on the part of the superior court not to adjudicate the entire matter." But the pleadings in the case show that no issue was formed upon the subject. If the taxes are paid without sale the respondents care not how the amount may be divided if more than one person pays them, and between those parties their pleadings in this respect are identical. They present no controversy with each other; there is nothing to adjudicate.

Next it is claimed that the property sold

and delivered to the city was not subject to assessment or taxation for that year. In considering this assignment we assume for the moment that the assessment was made at a proper time, by the proper officer, and that all the property was for such purpose properly classified as personal property, which will be later discussed herein. Appellants rely on article 7, § 2, of the state Constitution, and subdivision 2 of section 9098, Rem. Code, to the same effect. The constitutional provision is:

"The property of the United States, and of the state, counties, school districts, and other municipal corporations, and such other property as the Legislature may by general laws provide, shall be exempt from taxation."

Section 9235, Rem. Code, enacted in 1903, provides:

"The taxes assessed upon real property shall be a lien thereon from and including the first day of March in the year in which they are levied until the same are paid. * * * The taxes assessed upon personal property shall be a lien upon all the real and personal property of the person assessed, from and after the day upon which such assessment is made, and no sale or transfer of either real or personal property shall in any way affect the lien for such taxes upon such property."

As to the lien the statute lays down one rule for real property and another for personal property. That, of course, is a matter of legislative policy, unimportant to the courts except as necessity arises to keep the difference clearly in mind. That difference is pointed out in the case of *State v. Snohomish County*, 71 Wash. 320, 128 Pac. 667. It was a case in which real property was sold to the state after it had been assessed but prior to the levy for that year. It was pointed out that in giving a lien for a real estate tax the statute contemplates a levy as well as an assessment, while as to personal property only an assessment is required; and it was decided that as the levy had not been made at the time of the purchase the state took the real property free of any lien for taxes. In the opinion the court said:

"We are not blind to the fact that a contrary view finds apparent support in the decisions of this court in *Klickitat Warehouse Co. v. Klickitat County*, 42 Wash. 299, 84 Pac. 860, and *Puyallup v. Lakin*, 45 Wash. 368, 88 Pac. 578. Those cases, however, construe only that part of the lien statute relating to taxes on personal property. * * * The lien is thus by statute made complete, perfect, and enforceable prior to the levy for the current year. Every purchaser of personal property subsequent to the assessment, therefore, takes subject to a perfected and indestructible lien. No such provision for acceleration and computation is found as to real property taxes. The lien as to them is inchoate and unenforceable until the tax has been fully imposed by the levy for the current year."

The case of *Puyallup v. Lakin*, 45 Wash. 368, 88 Pac. 578, just referred to, was one in which the court was asked to overrule the decision in the former case of *Klickitat Warehouse Co. v. Klickitat County*, 42 Wash. 299, 84 Pac. 860, holding that the lien attaches at the date personal property is assessed, but refused to do so and specifically decided that the city of Puyallup in purchasing a water plant after it had been assessed for taxation purposes but prior to the levy that year took the same subject to the tax and that the lien was not divested by devoting the property to a public use prior to the levy, stating:

"If the property had a lien upon it when it was purchased by the municipality, the municipality like an individual would take the property subject to the lien."

[3, 4] It is claimed the Puyallup Case was, in effect, overruled by *Gasaway v. Seattle*, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68. We do not so understand. It was a case in which the plaintiff sought to foreclose certificates of delinquent taxes upon lands condemned by the city that had paid the condemnation awards into court and the property was now devoted to a public use by the city. In the course of the opinion it was said:

"In *Puyallup v. Lakin*, supra, the property was purchased under a contract. The law of eminent domain and the special statute upon which this case rests were not under consideration. The city had the right of contract and, in the absence of any law exempting it from the burdens of its trade, it was bound to meet them. The difference between that case and this is that the one rests in simple contract, the other is sustained by the sovereign power of the state. We are unwilling to extend the doctrine announced in the Puyallup Case."

That is, there is a clear distinction between those cases where the city has acquired property by private treaty as compared with those cases where it has been acquired by condemnation—the one voluntary, the other involuntary. And the reasons for the difference are easily ascertained and shown by the decisions. Prior to the present statute creating a lien for taxes upon personal property from the date of the assessment it was common knowledge that under the former statutes where personal property was listed in one year and the lien for taxes did not attach until the following year, large amounts of personal property changed hands or were removed from the county after the assessment and before the levy attached, and the taxes could not be collected. For this reason the state adopted its present policy. It is otherwise with real property, and particularly so as to the rights of all parties including a lien for taxes where the condemning party pays into court the amount of the award, whereupon a proper apportionment of the

fund between the owner and any other having an interest therein or a lien thereon can be had by timely application to the court making the award. In the case of the disposition of personal property no such protection is afforded, and in such case:

"If the property had a lien upon it when it was purchased by the municipality, the municipality like an individual would take the property subject to the lien." *Puyallup v. Lakin*, 45 Wash. 368, 88 Pac. 578.

"The city had the right of contract and, in the absence of any law exempting it from the burdens of its trade, it was bound to meet them." *Gasaway v. Seattle*, 52 Wash. 444, 100 Pac. 991, 21 L. R. A. (N. S.) 68.

"Every purchaser of personal property subsequent to the assessment, therefore, takes subject to a perfected and indestructible lien." *State v. Snohomish County*, 71 Wash. 320, 128 Pac. 667.

[5] It is further contended that the statutes under which the state tax commissioner acted are void as to the assessment of street railway property because the subject-matter is not within the titles of the acts. The acts are Laws 1907, c. 78, entitled "An act to provide for the assessment of the operating property of railroads," and Laws 1911, c. 21, entitled "An act to amend section 12 of chapter 78, Session Laws of 1907, relating to the assessment of the operating property of railroads, approved March 6, 1907, and declaring an emergency." There is a mountain of authority upon this subject and scores of pages and cases are supplied us by counsel in their several briefs in this case. One can well understand how that in almost ancient days the word "railroad" did not convey to the common mind the idea of a street car drawn by a horse or a mule. But in the development of transportation facilities leading to the use of electricity and other power than steam, systems have been long since established often connecting different cities, which, together with the change by which for the purpose of equality of taxation all such operating properties are assessed by state rather than county officers, have caused the term to gradually broaden so that ordinarily the meaning of the word is not so restricted as formerly. That such is the case is illustrated by the acts of the Legislature of this state, for in 1905 (chapter 81), in providing for a railroad commission the Legislature found it necessary to declare that the terms "road," "railroad," "railroad company," "railroad corporation" shall not apply to street railroads, electric railroads, or suburban or interurban railroads. Again, Session Laws 1907, c. 41, in granting additional authority to cities of the first class to authorize the location, construction, and operation of railroads in, along, over, or across highways, streets, and public places, etc., it was deemed cautious to provide therein that the act should not be construed as applying

to street railroads, etc. It was this same Legislature that enacted chapter 78 to provide for the assessment of operating property of railroads, wherein for the purposes of the act certain terms were defined (a common practice in modern legislation). Subdivision 6 of section 2 declares that the word "railroad" or words "railroad company" shall be considered for all purposes of assessment and taxation as including street railways, suburban railroads, or interurban railroads, etc. In this case both sides quote from the case of *Omaha Street Ry. v. Interstate Commerce Commission*, 230 U. S. 324, 33 Sup. Ct. 890, 57 L. Ed. 1501, 46 L. R. A. (N. S.) 385. In that case it was said:

"The appellants cite decisions from 12 states holding that in a statute the word 'railroad' does not mean 'street railroad.' The defense cite decisions to the contrary from an equal number of states. The present record discloses a similar disagreement in federal tribunals. For not only did the commerce court and the circuit court differ, but it appears that the members of the Commission were divided on the subject when this case was decided and also when the question was first raised in *Wilson v. Rock Creek R. Co.*, 7 I. C. C. 83."

And further in the same case it was said:

"But all the decisions hold that the meaning of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word 'railroad' will include street railroad. On the other hand, if the act was aimed at railroads proper, then street railroads are excluded from the provisions of the statute."

The cases arise where the word or words are used in the body of statutes, and the apparent conflict is easily accounted for by reference to the rule of statutory construction requiring observance of the context of the act and the manifest intention of the Legislature; that is, the character of the statute and the purpose for which it was enacted. In the recent work, 22 R. O. L. 745 (railroads), it is said:

"The courts have held that the term 'railroad' is broad enough to include a street railway. Indeed, it seems that the words 'railroad' and 'railway' used in statutes will be held to apply to both commercial railroads and street railways, unless there is something to indicate the particular kind intended. Of course, though, by well-settled rules of statutory construction, where it is sought to bring a particular line within the statutory scope of either of these two words the controlling factor is the legislative intent. In accordance with that intent the line must be included or excluded."

The situation is illustrated by the case of *Front Street Cable Co. v. Johnson*, 2 Wash. 112, 25 Pac. 1084, 11 L. R. A. 693, cited and relied on by the appellants, wherein the word "railroad" was held not to mean "street

railroad," of which 1 Elliott on Railroads (2d Ed.) § 6, p. 14, in a note, properly says it was the case of a statutory lien extended to the land, and, as the street railway company did not own the fee, this was the principal reason for holding the statute inapplicable.

Concerning the relation of the title of an act to its object we have uniformly held that the title is sufficient if the object is fairly embraced therein and that it need not be a complete index thereof. In the very late case of *Fisher Flouring Mills Co. v. Brown*, 109 Wash. 680, 187 Pac. 399, former decisions of this court were reviewed to the effect that sound public policy and legislative convenience require a liberal construction of this provision of the Constitution; that it has to do with legislative procedure and not with those guarantees of personal rights which it is the peculiar province of the courts to protect. We think that street railroads were and are fairly included in the term "railroad" as used in the titles of the acts, and certainly such was the intention of the Legislature as manifested by the express language of the statutes.

In the amendatory act of 1911 it is provided:

"That all of the operating property of street railroads shall be assessed and taxed as personal property."

It is contended by the appellants that this plan violates both the Constitution of the state and the Fourteenth Amendment to the Constitution of the United States. The provisions of the respective Constitutions invoked are those pertaining to the equal protection of the laws, a uniform and equal rate of assessment and taxation on all property in this state, and section 3 of article 7 of the state Constitution, which latter is as follows:

"The Legislature shall provide by general law for the assessing and levying of taxes on all corporation property as near as may be by the same methods as are provided for the assessing and levying of taxes on individual property."

[6-9] That there might arise a necessity for or the advisability of some different method in detail was contemplated and provided for by the Constitution. Uniformity and fairness are the results to be achieved. In this case there is no question as to the amount of the assessment. In the trial, counsel for the company said:

"We are not raising any point as to the valuation, but we are taking the position that the property which is on the tax roll and on which we are assessed includes the value of all the operating property real and personal."

It was decided in *Moeller v. Gormley*, 44 Wash. 465, 87 Pac. 507, that a lease of real property for 30 years was properly taxed as

real property under the then existing statute. Thereafter (1907) the law was changed and provided that all leases of real property and leasehold interests therein for a term less than the life of the holder should be assessed and taxed as personal property, and in the case of *Metropolitan Building Co. v. King County*, 62 Wash. 409, 113 Pac. 1114, Ann. Cas. 1912C, 943, this court said:

"We are bound by the statute, therefore, to determine the value of the leasehold as personal property."

There is no vested right, either in a corporation or natural person, to have property assessed in any particular way. Such matters rest entirely within the control and discretion of the Legislature. *Heilig v. Puyallup*, 7 Wash. 29, 34 Pac. 164. It is a question of uniformity and equality in the classes. "The classification of property for assessment, where uniformity and equality exist in the classes, is a matter of legislative policy." *Ridpath v. Spokane County*, 23 Wash. 436, 63 Pac. 261. That there is ample reason for the classification made by the statute in this case is easily perceived. Street railways have no fee in the streets, their properties are largely personalty, while the commercial steam railways own their rights of way, and own extensive freight-yards, terminal and station grounds.

That the statute providing for the assessment of the operating property, both real and personal, in solido, does not violate the constitutional provision referred to, is well sustained by the doctrine of *N. P. R. Co. v. State*, 84 Wash. 510, 147 Pac. 45, Ann. Cas. 1916E, 1166. In fact, the undisputed testimony in this case shows that this manner of assessment specifically requested was all prior years after and including 1914 by the tax agent of the traction company upon the score, as stated by him, that it saved work in his office.

One of the most exhaustive and instructive cases upon this subject is *Chicago & N. W. Ry. Co. v. State*, 128 Wis. 553, 108 N. W. 557. It was contended in that case that the plaintiff's property was assessed upon an unjust and different basis from that of other property and particularly that of street railways and interurban railroads operated by electricity, and some other property, not belonging to railway companies, having to do with transportation of some sort, thus violating the constitutional rule of uniformity. But the Supreme Court of Wisconsin decided otherwise, saying:

"The discretion of the Legislature in this field is so broad that it is not competent for the court to mark the constitutional limitations of it other than at the farthest one might go without transcending all reason."

That case contains a lengthy discussion of the subject and references to a large number

of cases of the United States Supreme Court to show that this class of statutes does no violence to the Fourteenth Amendment to the federal Constitution, and "in general indicate that the federal Supreme Court does not assume to deal with state laws, under the Fourteenth Amendment, that fall with any fairness within the field of classification." We are in accord with that view.

[10] Lastly, it is contended that even assuming the validity, in all its parts, of the statutes under which the assessment was made by the state tax commissioner, nevertheless the administration of the statute by that official in the manner followed by him in making the assessment denied to the company and the city the equal protection of the law, and deprived them of property without due process of law in contravention of the Fourteenth Amendment to the federal Constitution. It has already been noticed that the assessment was made prior to the date the city acquired the property. Section 5 of the act of 1907 provides that every railroad company shall make and file with the board of state tax commissioners reports, showing a number of enumerated facts concerning its business, property, capital, and stock. Section 7 provides that every such company shall be entitled on its own motion to a hearing to present evidence of any kind between the 1st day of April and the 1st day of May relating to the value of the property of the company or to the value of the general property of the state. In the present case the assessment was made on March 15, at which time the company had not filed its reports, and it is claimed that such reports are mandatorily required to be before the board to enable it to make a valid assessment under the law. However, there are other provisions of the act to be considered. Section 5 provides that the company shall make its report between January 1 and April 1 of each year; so that this company had already had the unimproved opportunity of 2½ months to file its report prior to the assessment being made, and 2 months prior to March 1—the date arbitrarily fixed by statute for the commencement of the revenue and taxation year. Section 7 of the act provides:

"The board, on or before the first day of March and the first day of June, in each year, according to their best knowledge and judgment, shall ascertain and determine the true cash value of the property of each railroad company within this state."

At the date of the act the board of tax commissioners consisted of three members, but chapter 54, Session Laws 1917, created the office of state tax commissioner and gave him power and made it his duty to exercise all the powers and perform all the du-

ties theretofore vested in and required to be performed by the state board of tax commissioners. It therefore appears that if counsel's contention is correct that no assessment can be made by the tax commissioner until after the companies choose to send in their reports at the end of the time limited therefore by the statute, it would be almost if not quite impossible for the one commissioner to complete the assessments of the vast amount of such properties in this state until long after the time fixed by the statute for the making of such assessments. The reports which may be sent in by the companies as early as January 1 must be considered as directory provisions of the statute only, so far as the power of the commissioner to make the assessment is concerned. Section 7 of the act provides:

"Such hearing [before the commissioner] shall not impair or affect the right to a further hearing before the state board of equalization," which has power "on application or of its own motion [to] correct the valuation or assessment of the property of such company, in such manner as may in its judgment make the valuation thereof just and relatively equal with the valuation of the general property of the state."

There is no complaint here that the amount of the assessment was too high. The valuation of the property taken for assessment purposes was much less than the value as fixed thereafter by the private contract between the company and the city when it was purchased. That such proceedings antedating the assessment, particularly those proceedings which are to be performed by the property owner, are directory and not mandatory upon the public authorities, is well sustained by the cases. *Smith v. Newell*, 32 Wash. 369, 73 Pac. 369; *Coolidge v. Pierce County*, 28 Wash. 95, 68 Pac. 391; *County of Martin v. Drake*, 40 Minn. 137, 41 N. W. 942; *Torrey v. Milbury*, 21 Pick. (Mass.) 64; and 22 R. C. L. (Taxation) 349. Nor does the procedure or plan of administering the law that was adopted by the commissioner in making the assessment in this case in any way violate the Fourteenth Amendment to the federal Constitution or any guaranty contained in the state Constitution. The procedure in no way affected the substantial justice of the tax itself, nor did it vitiate or in any manner affect the assessment. *Coolidge v. Pierce County*, *supra*. The doctrine, and cases referred to, in *Chicago & N. W. R. Co. v. State*, *supra*, clearly applicable to the present case, meet all such contentions of the appellants.

Affirmed.

PARKER, O. J., and MACKINTOSH, TOLMAN, and MAIN, JJ., concur.

RAYMOND v. KING COUNTY et al.
(No. 16467.)(Supreme Court of Washington. Oct. 15,
1921.)

1. Taxation \S 573½ — Taxes on personal property lien on the specific chattel while in taxpayers hands and also a personal obligation.

Statutes relating to the assessment and collection of taxes on personal property contemplate that an assessment on personal property is not only a lien upon the specific chattel assessed, but is a personal obligation on the owner.

2. Taxation \S 511—Personal property tax creates a lien only on that property while in the possession of taxpayer assessed.

The general lien of a personal property tax under Rem. Code 1915, § 9235, providing that taxes assessed on personal property shall be a lien on all the property of the person assessed and unaffected by transfer of either real or personal property, does not follow the property when transferred to the vendee, the tax being enforceable against the other personal property of the seller under Sess. Laws 1915, c. 187.

En Banc.

Appeal from Superior Court, King County; Calvin S. Hall, Judge.

Action by C. B. W. Raymond against King County and others. Permanent injunction decreed, and defendants appeal. Affirmed.

Malcolm Douglas and Wm. Farmerlee, both of Seattle, for appellants.

C. M. Fouts and Alexander Bundy & Swale, all of Seattle, for respondent.

FULLERTON, J. For some years prior to the year 1920, and until October 6 of that year, the Page & Bolster Shingle Company was engaged, in King county, in the business of manufacturing lumber and shingles. On the specific date given, the company was, at the suit of certain of its creditors, adjudged insolvent and placed in the hands of a receiver. At the time of the appointment of the receiver the company owned and had in its possession with other property, some 312,000 feet of lumber, which had been manufactured by it in the earlier part of the year 1920. This lumber was sold by the receiver on December 20, 1920, under the order of the court, to the respondent, C. B. W. Raymond. In 1919 the Page & Bolster Shingle Company owned certain other personal property on which a tax was assessed for that year in the sum of \$120.20. The taxes were not paid, and after the sale of the lumber to the respondent the sheriff of King county under papers in distraint issued by the county treasurer, threatened to distraint and sell the lumber, or so much thereof as might be necessary to pay the

taxes with interest and costs. This action was thereupon begun by the respondent against the sheriff and the county treasurer to enjoin the threatened distraint. At the hearing a permanent injunction was entered, and the county officers appeal.

[1, 2] The statutes relating to the assessment and collection of taxes upon personal property are somewhat complicated, and to a certain extent confusing. While they perhaps contain no specific provision to that effect, they evidently contemplate that an assessment upon personal property is not only a lien upon the specific chattel assessed, but is a personal obligation of the owner of the chattel. With reference to the general lien of the tax the statute contains this further provision, namely (see Rem. Code, § 9235):

"The taxes assessed upon personal property shall be a lien upon all the real and personal property of the person assessed, from and after the date upon which such assessment is made, and no sale or transfer of either real or personal property shall in any way affect the lien of such taxes upon such property."

Invoking the language of this section, the appellants contend that a personal property tax, no matter when or upon what property assessed, becomes a lien upon all the personal property owned by persons charged with the tax, whenever or however acquired, and that the lien follows the property into whosoever hands it may subsequently fall.

It is our opinion that this is not the legislative meaning. To give the statute the construction contended for would be to say that a chattel by mere sales and deliveries could be charged with a constantly increasing burden. If, to illustrate, a person charged with a tax and owning a specific chattel should sell and deliver the chattel to another, the chattel would not only remain charged with the personal property tax of the seller, but would become immediately charged with the personal property tax of the purchaser; and a like result would follow from all subsequent sales until the chattel could be chargeable with the entire delinquency in the county. It would be to say, moreover, under the rule that a person destroying a chattel on which there is a specific lien becomes personally chargeable with the lien to the value of the property destroyed, that the patrons of an ordinary grocer could be held for the grocer's personal property tax to the extent of their purchases of groceries from him. Effects such as these would be intolerable to the business world. It would prevent traffic in personal property. No one, without the most careful research, could purchase from another a specific chattel with the assurance that he was acquiring an unincumbered title

thereto, or with the assurance, if he so used the chattel as to put it out of the reach of the tax collector, that he would not thereafter be called to account for the value of the chattel.

But we think the statutes themselves show that the contention made misconstrues the legislative intent. The statutes from the earliest time have contained provisions similar to the provision now in question declaring that the taxes assessed upon personal property shall be a lien upon all of the real and personal property of the person assessed; yet the statutes declaring the lien have uniformly provided that any levy upon personal property to enforce the lien shall be made upon the personal property of the person charged with the tax. See Code of 1881, §§ 2882, 2903; Hills' Code, §§ 1131, 1096; Code of 1896, §§ 3752, 3758, 3745; Ballingers' Code, §§ 1740, 1727; Pierce's Code (1912 Ed.) tit. 501, §§ 181, 215; Remington & Ballinger's Code, §§ 9223, 9235; Remington's Code, §§ 9223, 9223A, 9235; Pierce's Code (1919 Ed.) §§ 6979, 6957, 6958. As to the manner of collecting delinquent personal property taxes, the latest enactment of the Legislature is found in the Session Laws of 1915, at chapter 137. It is there provided that, in the event the treasurer is unable to collect such taxes in due course, he shall prepare papers in distraint, which shall contain a description of the personal property, the amount of the tax, the amount of the accrued interest at the rate of 15 per cent. per annum from March 15 of the year succeeding the levy, and the name of the owner or reputed owner, and shall file the same with the county sheriff, "who shall immediately without demand or notice, distrain sufficient goods and chattels belonging to the person charged with such taxes to pay the same. * * * Manifestly, we think, had it been intended that the levy could be made upon any property the person charged with the taxes at any time owned while so charged, it would have been so stated in express terms, and the specific provisions prescribing upon what property the levy should be made would not have been so framed as to exclude the idea.

In none of our adjudicated cases has the precise question been determined. The decisions most nearly in point are *Mills v. Thurston County*, 16 Wash. 378, 47 Pac. 759; *Klickitat Warehouse Co. v. Klickitat County*, 42 Wash. 299, 84 Pac. 860, and *Puyallup v. Lakin*, 45 Wash. 368, 88 Pac. 578, where we held that taxes levied upon specific chattels followed the chattels into the hands of purchasers purchasing from persons who were owners at the time the taxes were levied. The soundness of these decisions seems to have been questioned in the later case of

State v. Snohomish County, 71 Wash. 320, 128 Pac. 667. But, be this as it may, the principle of the cases is not applicable to the present situation. A purchaser can protect himself against taxes levied upon a specific chattel, but he cannot do so as against a general lien such as is here contended for.

The judgment will stand affirmed.

PARKER, C. J., and HOLCOMB, TOLMAN, MACKINTOSH, MITCHELL, BRIDGES, and MAIN, JJ., concur.

IN re GRAHAM'S ESTATE.

TAPPAN v. FORTMAN.

(S. F. 9779.)

(Supreme Court of California. Oct. 13, 1921.
Rehearing Denied Nov. 10, 1921.)

1. Executors and administrators \Leftrightarrow (1) —
Lawyer executor, though practicing lawyer,
may employ attorney.

An executor or administrator who is himself a practicing lawyer is entitled to employ and pay from the estate an attorney for the performance of the usual and ordinary legal services that are incident to a probate proceeding, under Code Civ. Proc. §§ 1616, 1618, 1619.

2. Executors and administrators \Leftrightarrow (1) —
No denial of allowance of attorney fees merely because executor is attorney.

Conceding that it is still within the discretion of the probate court to pass upon the necessity for the employment of an attorney in the administration of an estate the same as upon other matters of necessary expenditure, denial of such necessity cannot be made to rest upon the mere fact that the required services are in the line of the administrator's profession or business.

In Bank.

Appeal from Superior Court, Alameda County; E. C. Robinson, Judge.

In the matter of the estate of Margaret Graham, deceased. From an order denying an allowance in his final account, on objection of Anna Fortman, of fees to an attorney, R. B. Tappan, executor, appeals. Reversed.

See, also, 183 Pac. 952.

Nusbaumer & Bingaman, of Oakland, for appellant.

Allen G. Wright, of San Francisco, amicus curiae.

L. R. Weinmann, of Alameda, for respondent.

SLOANE, J. This is an appeal by R. B. Tappan, executor of the last will of Margaret Graham, deceased, from an order of court

denying an allowance in the final account of the executor of fees to a attorney employed by said executor in the administration of the estate of said decedent.

[1] The executor, Tappan, is himself a practicing lawyer, and it was the ruling of the probate court that his employment of an attorney for the usual and ordinary legal proceedings of the administration was not a necessary expense of the administration. An allowance of attorney's fees was made for certain extraordinary services rendered by the attorney employed in the course of the administration. So the only question presented is whether an executor or administrator, who is himself a practicing lawyer, is entitled to employ and pay from the estate an attorney for the performance of the usual and ordinary legal services that are incident to a probate proceeding.

The Code of Civil Procedure, as in force at the time this estate was in process of administration, contained the following provisions:

"Sec. 1616. Compensation of the executor and administrator. He shall be allowed all necessary expenses in the care, management, and settlement of the estate, and for his services such fees as provided in this chapter."

"Sec. 1618. When no compensation is provided by the will, or the executor renounces all claim thereto, he must be allowed commissions upon the amount of estate accounted for by him."

Then follows a graded scale of commissions varying with the valuation of the estate. Section 1619 provides that attorneys for executors and administrators shall be allowed out of the estate as fees "for conducting the ordinary probate proceedings the same amounts as are allowed by the last section as compensation for executors and administrators for their own services."

The reasonable necessity for the employment of an attorney to prepare legal papers and conduct the ordinary court proceedings by the average layman administrator is not disputed. Such employment is a matter of universal practice, the compensation is provided for by statute and made equal to that of the executor or administrator, and such allowance is not made an issue in this case further than to claim an exception where such executor or administrator is himself a lawyer and competent to perform the legal services required.

We may therefore confine ourselves to a consideration of the question whether a duty rests upon the executor who is a lawyer to render this professional legal service to the estate without additional compensation rather than to employ another attorney for such service.

Counsel in this case are disposed to agree that, if the executor does perform these legal services, he may not receive extra compensation therefor.

The issue presented here is whether the performance of such professional legal duties is part of the service designated by the Code when it provides that the executor or administrator shall receive "for his services such fees as are provided in this chapter." It is clear that the services incumbent upon the executor in the exercise of his duty to the estate are the same, irrespective of his general vocation in life. The "care, management and settlement" of the estate" referred to in section 1616, supra, may call for the services of a plumber, a carpenter, an auctioneer, a real estate agent, or an expert accountant. Must the administrator render these services if they happen to be in the line of his general occupation? Clearly not. He would be entitled to hire such work done and pay for it as part of the "necessary expense of the care, management, and settlement of the estate." If he did perform such services which were not in the line of his duty as administrator, he might not be permitted to receive compensation, but the reason would be one of public policy forbidding him to be his own employer.

In many of the states, and in California prior to 1873, attorney's fees have been approved under the general provision that the administrator "shall be allowed all necessary expenses in the care, management, and settlement of the estate," and, as already pointed out, under such general provision an attorney administrator would be no more called upon to give his professional services to the estate than would the plumber, carpenter, or accountant administrator to render services that might be required in his special line of business, when the care and management of the estate should call for such employment.

It is true that such services as just referred to are of a more exceptional and casual nature than that of handling the legal business of an administration, but that is an additional reason why the latter should not be gratuitously added to the responsibilities of the lawyer administrator, while all others are allowed to avail themselves of outside legal assistance.

The legal end of the probate of an estate has come to be recognized as a distinct branch of employment. Hence we have had various amendments to the Code recognizing and providing for such legal services. In 1873 there was added to the general provision hereinbefore quoted, providing for an allowance to the administrator of all necessary expenses," etc., the words "including reasonable fees paid to attorneys for conducting the necessary proceedings or suits in the probate or other courts." In 1905 the Legislature advanced the position of an attorney in probate matters, so far as relates to compensation, to an equality with the administrator, upon a commission basis

graduated according to the value of the estate, and in 1909 the law as it now stands was enacted, which gives the same compensation to the attorney for the ordinary legal services of a probate proceeding as are allowed to the administrator for the ordinary business administration of the estate.

We are bound to assume that the Legislature in its deliberations has determined that the services rendered by the administrator and by the attorney in such probate proceedings are of equal value, and that the compensation to each is a reasonable compensation for the service rendered. It certainly would be an unjust interpretation of the law which would require of the lawyer administrator twice the service for the same pay that is required of the merchant or mechanic or physician in the same position.

Although the employment of an attorney for the probate of an estate is not required by law, such employment is recognized by our legislation as the usual and customary practice, and it is doubtless conducive to system and accuracy in the administration of the probate law. The probate procedure in California may be considered by many as unduly intricate and expensive, but it cannot be disputed that it is effective in the settlement of estates and the transmission of property and titles in a way to protect the rights of creditors and of heirs and devisees.

The whole matter of the disposition of the estates of deceased persons is within the legislative control. Our Legislature has seen fit to recognize the services and compensation of the administrator, and the services and compensation of an attorney, as relating to distinct employments in probate administration.

There are, and have been to the knowledge of all legislators, hundreds of practicing lawyers serving as executors and administrators, but there has been no intimation in any law upon the subject that a different rule should apply to a lawyer in such position in the matter of employing legal assistance than to an administrator of any other business calling.

And in all of the innumerable instances in this and in other states where lawyer administrators have employed and paid attorneys there seems to be but one case in the courts where the right of such employment has been called in question.

There are decisions cited where, on grounds of public policy, it has been held that an administrator rendering legal services cannot receive additional compensation therefor. *Taylor v. Wright*, 93 Ind. 121; *Hough v. Harvey*, 71 Ill. 72; *Collier v. Munn*, 41 N. Y. 143; *Bushby v. Berkeley*, 153 App. Div. 742, 138 N. Y. Supp. 831; *Doss v. Stevens*, 13 Colo. App. 535, 59 Pac. 67.

Other courts have upheld allowances to the administrator for legal services rendered by him as an attorney in the interests of the estate. *Harris v. Martin*, 9 Ala. 895; *Morgan v. Nelson*, 43 Ala. 586; *In re Mabley's Estate*, 74 Mich. 143, 41 N. W. 835; *Chatfield v. Swing*, 6 Ohio Dec. 666; *Fulton v. Davidson*, 50 Tenn. 614.

The only decision which the diligence of the counsel in this action and of amicus curiae filing briefs in behalf of this matter has been able to find bearing upon the right of such administrator to employ an attorney is that of *Noble v. Whitten*, 38 Wash. 262, 80 Pac. 451. This decision was under a statute similar to the provisions of the California law prior to 1873, which merely allowed to the administrator "all necessary expenses in the care, management and settlement of the estate." It was there held that the administrator, who was a practicing lawyer was not under the necessity of employing additional legal assistance and was not entitled to an allowance therefor. It is said in the course of the opinion:

"In this case the record shows that the administrator was a lawyer. He had control of the estate as agent and attorney for the deceased during her lifetime. He was allowed a claim of \$200 for services and advice to Mrs. Whitten prior to her death. Mr. Whitten, the principal heir, desired to retain him as attorney to represent my interest and that of my children, if any, and continue to manage the property, so far at least as our interests are concerned; and, upon this request, Mr. Noble voluntarily offered to serve as administrator. Because of these facts, no doubt, Mr. Whitten consented to his appointment as administrator, and because of his ability and fitness to conduct the administration of the estate the court appointed him."

To what extent the court was influenced in the decision cited by the circumstances referred to as to the choice of this administrator with a view to his legal services does not appear. In the application of the limitation as a general rule, especially in view of the more specific recognition of the functions of an employed attorney under our Code, its authority is not controlling and its reasoning is not convincing.

[2] Conceding that it is still within the discretion of the probate court in this state to pass upon the necessity for the employment of an attorney in the administration of an estate, the same as upon other matters of necessary expenditure, we are satisfied that denial of such necessity cannot be made to rest upon the mere fact that the required services are in the line of the administrator's profession or business.

The order appealed from is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

PEOPLE v. LAUMAN. (Cr. 2349.)

(Supreme Court of California. Oct. 11, 1921.
Rehearing Denied Nov. 10, 1921.)

1. Criminal law §970(7)—Defects in indictment charging defendant with presenting false proofs held not ground for arrest of judgment.

Failure of indictment charging defendant with presenting false proofs in support of a claim upon an insurance policy, under Pen. Code, § 549, to allege that a claim was presented, and that the company whose existence was alleged issued the policy, held not ground for arrest of judgment after conviction under section 1185, as against contention that facts stated did not constitute a public offense in view of sections 959, 960, 1404, and Civ. Code, § 2586, where instructions supplied lacking elements and policies were received in evidence without objection, and such defects were apparently not discovered until after trial.

2. Criminal law §1144(15)—Jury presumed to have followed instructions.

The jury will be presumed to have followed instructions.

3. False pretenses §37—Indictment charging presenting false proofs need not allege that policy was in force at time proof of loss was presented.

Indictment charging defendant with presenting false proofs in support of a claim upon it in an insurance policy under Pen. Code, § 549, need not allege that the contract of insurance was in force at the time the proof of loss was presented.

In Bank.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Roy R. Lauman was found guilty of presenting false proofs in support of a claim upon a policy of insurance, and from an order granting a motion in arrest of judgment, the People appeal. Reversed and remanded, with directions.

See, also, 195 Pac. 50.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., Thomas A. Wood and Thomas Lee Woodwine, Dist. Attys., both of Los Angeles, and W. J. Clarke, Deputy Dist. Atty., for the People.

Chandler P. Ward, Samuel R. Blake, and Davis, Rush & MacDonald, all of Los Angeles, for respondent.

LAWLOR, J. This is an appeal by the people from an order granting a motion in arrest of judgment. Respondent was charged in each of three counts of an indictment with the crime of presenting false proofs in support of a claim upon a policy of insurance, as defined by section 549 of the Penal Code. He had taken out three policies of fire insurance, one each in the Springfield Fire & Marine Insurance Company, the Prov-

idence-Washington Insurance Company, and the Concordia Fire Insurance Company. The respondent was engaged in the cleaning and dyeing business in the city of Los Angeles, operating under the name of the Imperial Dye Works. The policies covered the building, stock in trade, and other goods connected with the business, and also articles left with respondent by his customers. Two fires occurred on the premises, the first on June 5, 1917, and the second on July 14, 1917. Respondent filed claims and proofs of loss with each of the three companies, and these are the proofs alleged to have been falsely made.

The indictment alleged the existence of the three insurance companies, the procuring of policies of insurance, not alleging they were procured in the above companies, the occurring of the fires, the presentation of the proofs of loss to the said companies, the falsity of the proofs, and respondent's knowledge thereof and intent to cheat and defraud the said companies. Each count charged the presentation of false proofs to one of the companies. A general demurrer was interposed to each count, and was disallowed. A trial of the three counts was had, and the jury returned a verdict of guilty on each count. Respondent interposed a motion for a new trial and a motion in arrest of judgment. The motion for a new trial was denied, no appeal being taken from the order. The motion in arrest of judgment was granted, and from the said order appellant takes this appeal.

A motion in arrest of judgment is defined in section 1185 of the Penal Code as:

An "application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty, or on a verdict against the defendant. * * * It may be founded on any of the defects in the indictment or information mentioned in section ten hundred and four, unless the objection has been waived by a failure to demur, and must be made and determined before the judgment is pronounced."

Section 1004 of the Penal Code, as far as it is pertinent here, provides that—

"The defendant may demur to the indictment * * * when it appears upon the face thereof either: * * * 2. That it does not substantially conform to the requirements of sections nine hundred and fifty, nine hundred and fifty-one, and nine hundred and fifty-two. * * * 4. That the facts stated do not constitute a public offense."

By section 950 of the Penal Code the indictment must contain:

"2. A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended."

Section 951 prescribes the form of the indictment, and section 952 requires that—

"It must be direct and certain, as it regards: * * * 2. The offense charged. 3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense."

Section 1012 provides in part:

"When the objections mentioned in section one thousand and four appear on the face of the indictment * * * they can only be taken by demurrer, except that the objection * * * that the facts stated do not constitute a public offense, may be taken * * * after the trial, in arrest of judgment."

The demurrer specifies two grounds—that neither the indictment nor any count thereof states facts sufficient to constitute a public offense, and that neither the indictment nor any count thereof substantially conforms to the requirements of sections 950, 951, and 952 of the Penal Code. The motion in arrest of judgment specifies all the grounds mentioned in said section 1004, but on appeal respondent only urges that no count of the indictment alleges facts sufficient to constitute a public offense.

We quote from respondent's opening brief:

"The indictment in this case, and each of the counts contained therein, is fatally defective in alleging merely that the defendant presented 'a false and fraudulent claim of loss by fire.' There is no allegation that a claim was presented upon a contract of insurance for the payment of a loss."

In his supplemental brief it is contended:

That "each count of the indictment wholly fails to allege that the contract of insurance which it is alleged Lauman obtained on a certain date was issued either by the company whose corporate existence is alleged or by the company to which it is alleged Lauman presented a proof of loss," and that "It is absolutely essential to the stating of a public offense under such section that the indictment charge not only that, at the time of the fire, but at the time of the making and presenting of the proof of loss, there was a valid contract of insurance, then in full force and effect. As stated before, there is no allegation that any contract of insurance or otherwise was existing * * * at the time of its execution or presentation."

The different counts of the indictment are all worded alike, except for the difference in the identity of the insurance companies, the items covered, and the terms of the policies. For brevity, we shall discuss the first count only. Considering the contention that there is no allegation that the proofs of loss were presented on contracts of insurance for the payment of a loss, and that there is no allegation that the companies whose existence was alleged issued the policies, it is true the indictment does not, in terms, allege these facts. Section 959 of the Penal Code provides that the indictment is sufficient if—

"the act or omission charged as the offense is clearly and distinctly set forth in ordinary and

concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended."

The indictment in this case did allege that the Springfield company was organized and doing an insurance business on July 3, 1917; that respondent procured a policy of insurance, and that, intending to cheat the said company, he presented false claims of proof of loss to it. This proof of loss, which is set out in the indictment, is as follows:

"Policy No. 424612, Agency at Los Angeles, Cal. Amount of policy, \$2,500.00. Expiration July 3, 1918. Sworn statement in proof of loss to the Springfield * * * Co. * * * By your policy as above, you insured Roy Lauman, trading as Imperial Dye Works, according to the terms and conditions printed therein."

And at the end of the proof:

"Total amount claimed of this company under above named policy, \$2,011.97."

[1] There are allegations, then, that the company was engaged in the insurance business at the time in question, and that a proof of loss was presented to it on a policy bearing a given number and issued to respondent, which proof of loss described the same character of property as that referred to in other portions of the indictment. It is incomprehensible to us how a person of common understanding could fail to be informed by the indictment that respondent was charged with anything different than presenting to the Springfield company a false claim of loss suffered by fire, upon a policy issued by it to him to cover property so falsely claimed to have been destroyed. The conclusion is irresistible that to a common understanding it would appear that the indictment was intended to charge that the Springfield company had issued a policy to respondent, and that the claim of loss based thereon was upon a contract of insurance for the payment of a loss, inasmuch as a "policy" is but the written evidence of such a contract. Section 2588, Civ. Code. Except for the failure to allege these facts specifically, the indictment was unobjectionable.

[2] The question is then presented whether these omissions resulted in prejudice to the respondent. Section 960 of the Penal Code provides:

"No indictment * * * is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits."

Section 1404 of the same Code declares:

"Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right."

Many facts and circumstances shown by the record preclude the idea that the defects of the pleading prejudiced or tended to prejudice respondent's right to be sufficiently informed of the charge against him. In the first place the court instructed the jury as follows:

"An intent to defraud is a material ingredient of the offense set forth in each of the three counts of the indictment, and you must not convict the defendant upon any of the said counts unless you believe beyond all reasonable doubt (1) that a contract of insurance existed between the defendant and the insurance company named in such count of the indictment; (2) that while such contract was in full force and effect that the defendant, in the county of Los Angeles, and within three years next preceding the filing of the indictment, presented or caused to be presented a false proof of claim to such company; (3) that the proof of loss so presented was willfully and intentionally false, and was presented with the intent on the part of the defendant to deceive and defraud said insurance company."

It is plain that the instruction itself supplied the elements which are claimed to be lacking in the indictment, and it will be presumed that the jury followed this instruction when it found respondent guilty on each of the three counts.

Moreover, the policies were received in evidence without objection, and it was stipulated that they were issued to respondent by the respective companies. It was shown that respondent had previously sued two of the companies on their policies, and in the complaints in those actions he alleged the policies were issued to him. These complaints were received in evidence. In addition to these facts the proofs of loss, as we have shown, were set out verbatim in the complaint. These proofs, verified by respondent, stated that the policies were issued by the respective companies to respondent, and that a certain amount was claimed under each of them.

Apparently the attorneys for respondent did not discover the defects in the indictment until after the trial, for before the trial one of the attorneys presented an affidavit for a subpoena duces tecum in which he averred:

"That he is one of the attorneys of record for the defendant herein, Roy R. Lauman. That the indictment charges the making of false proofs of loss as to two insurance policies, in Springfield Fire & Marine Insurance Company and the Concordia Fire Insurance Company, respectively. * * * That R. C. Heinsch is the agent of the Springfield Fire & Marine Insurance Company, and issued their policy No. 424612. That N. T. Horton was the agent of the Concordia Fire Insurance Company, and issued their policy No. 30804. * * *"

In *People v. Griesheimer*, 176 Cal. 44, 167 Pac. 521, the defendant was charged with the crime of obtaining money under false

pretenses. The appeal was taken from the judgment of conviction and the order denying defendant's motion for a new trial. He was charged with falsely representing himself to be an agent of the Fatherland Magazine, authorized to receive loans and subscriptions in its behalf, and with exhibiting a fictitious list of subscribers to induce persons to subscribe. In that capacity he was collecting money, and collected the sum of \$300 from the prosecuting witness. The court, in holding the information to be sufficient, said:

"The particular defect in this information, as urged by appellant, is that it does not show the causal connection between the false pretense and the parting with the property by the prosecuting witness, and therefore fails to state facts sufficient to constitute a public offense. We are of the opinion that, as against the defendant's general demurrer, the information should be held sufficient on appeal. While there is no direct allegation that the money was paid to the defendant as a subscription or loan to the Fatherland Magazine, a reader of the information could hardly draw from it any other inference than that the payment was made for such purpose. It may be conceded that a direct allegation to this effect would have been more in accord with technical requirements. But what was intended to be charged in this connection is perfectly plain from the language in fact used, and no person of common understanding could fail to understand that it was substantially charged, by necessary inference at least, that the money was paid because of the alleged false representations, and for the purpose suggested thereby."

The Attorney General cites section 4½, art. 6, of the Constitution in support of his argument that the defects in the indictment are not prejudicially erroneous. Respondent contends, on the other hand, that the provision does not apply to an appeal by the state from an order granting a motion in arrest of judgment. But, as we have reached the conclusion that the defects are fully covered by the statutes referred to, whose terms are in line with the constitutional provision, the question need not be considered.

[3] Respondent cites no authority, and we are aware of none, which supports his third contention, that the indictment is defective in not alleging that the contract of insurance was in force at the time the proof of loss was presented. This position is untenable. The act denounced by section 549 of the Penal Code is the presentation of false proofs in support of a claim on a contract of insurance for the payment of a loss. The statute does not provide that the contract must be operative at the time the claim of loss is made. The indictment does allege that the policies were in full force and effect at the time the fires occurred, and the court instructed the jury that it was necessary to a conviction that a false proof of loss be presented while the contract was in effect, and

within three years next preceding the filing of the indictment. It follows that the indictment is not defective in failing to allege that the contract was in full force and effect at the time the proof of loss was presented. To hold otherwise would be to lay down a rule that, where the loss occurs while the contract is in full force and effect, and the false proof of loss is not presented until after the period of coverage has expired, a case could not be made out under section 549 of the Penal Code. Such is not the law. Each count alleges that the policy was in full force and effect on a certain date, and gave the same date as the date of the fire. It was therefore unnecessary to allege that the policy was in full force and effect when the proof of loss was made, for as matter of law it remained operative for the presentation of proof of loss. It appears from the indictment that the proof of loss was filed in each case within two months from the date of the two fires.

It must be held that the indictment substantially alleged facts sufficient to constitute a public offense under section 549 of the Penal Code, and that respondent was not prejudiced by the defects of pleading complained of.

Order reversed, and cause remanded for further proceedings in contemplation of sections 1191 and 1202 of the Penal Code.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SLOANE, J.; LENNON, J.

GOLDSTEIN v. HEALY. (S. F. 9414.)

(Supreme Court of California. Oct. 10, 1921.
Rehearing Denied Nov. 7, 1921.)

1. Pleading \Leftrightarrow 214(1)—Demurrer admits only facts well pleaded.

A demurrer admits the truth of all facts well pleaded, but it does not confess any omitted circumstances, indispensable to the cause of action upon which the complaint is based, or essential to remedy an allegation specially challenged for uncertainty or ambiguity.

2. Pleading \Leftrightarrow 193(1)—Essentials of complaint stated.

A plaintiff is required, even as against a special demurrer, merely to allege the essential facts of his case with reasonable precision and with particularity sufficiently specific to acquaint the defendant with the nature, source, and extent of his cause of action.

3. Innkeepers \Leftrightarrow 8—"Guest" defined.

A "guest" of an inn or hotel is one who receives accommodations or entertainment therein usually for compensation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Guest.]

4. Innkeepers \Leftrightarrow 10—Required to exercise reasonable care toward invitees of guests.

A guest may, under such reasonable restrictions and regulations as the management of the hotel may impose, invite unobjectionable persons to visit him for lawful purposes and at proper times, and the hotel keeper is required to exercise reasonable care that such persons be not injured through defective condition of the premises.

5. Innkeepers \Leftrightarrow 10—Not liable for injuries caused by patent defects or structural insecurity.

Hotel keeper is not liable for injuries to persons invited to hotel by guests due to a patent defect or structural insecurity in the hotel premises or its equipment.

6. Innkeepers \Leftrightarrow 10—Complaint held to show that defect in premises was not patent.

In action against hotel keeper for injuries caused by defective railing to plaintiff while on premises at invitation of hotel keeper's guest, complaint alleging that the decayed condition of the railing was unknown to the plaintiff, held sufficient to show that the defect was not patent.

7. Innkeepers \Leftrightarrow 10—Plaintiff's failure to discover defective condition of premises a matter of defense.

In an action against a hotel keeper for injuries caused by defective railing to plaintiff while on premises at invitation of hotel keeper's guest, complaint was not required to allege that defective condition of railing could not have been discovered by plaintiff in the exercise of ordinary care; the failure to exercise such care being a matter of defense.

8. Innkeepers \Leftrightarrow 10—One on premises at invitation of guest not required to allege that he was rightfully there.

In action against hotel keeper for injuries caused by defective railing to plaintiff while on premises at invitation of hotel keeper's guest, plaintiff was not required to allege that he was lawfully and properly upon the premises; the fact that he was not properly upon the premises being a matter of defense.

9. Innkeepers \Leftrightarrow 10—Complaint, not naming guest at whose invitation plaintiff was on premises, held not uncertain.

In an action against a hotel keeper for injuries caused by defective railing around tent in possession of hotel keeper's guest, who had invited plaintiff thereon, plaintiff's failure to allege name of guest did not render complaint uncertain, where the particular tent was identified, and the hotel keeper's tents were occupied by but one guest, since the hotel keeper could have ascertained the name of the guest without such allegation.

10. Pleading \Leftrightarrow 12—Less particularity required of complaint where defendant has full information concerning facts.

Less particularity is required in allegations of a complaint where the facts stated are such that defendant from their nature and his relation to them has full information concerning them.

11. Innkeepers — 10—Complaint for injuries from defective premises held to show causal connection between negligence and injury.

In an action against hotel keeper for injuries caused by defective railing to plaintiff while on premises at invitation of hotel keeper's guest, complaint held sufficient as against contention that it did not show the causal connection between the negligence and the injury.

In Bank.

Appeal of Superior Court, Sonoma County; Emmett Seawell, Judge.

Action by Mervyn Goldstein, by his guardian, Ben Goldstein, against W. Healy. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

Hiram E. Casey and Casey & Lambert, all of Santa Rosa, and T. L. Breslauer, of San Francisco, for appellant.

J. R. Leppo, of Santa Rosa, for respondent.

SHURTLIFF, J. Plaintiff in his second amended complaint alleged:

That at the time of the commencement of the action he was a minor under the age of 21 years, and that Ben Goldstein was the duly appointed, qualified, and acting guardian of his person and estate; "that on or about the 5th day of July, 1919, the defendants (there being one fictitious defendant) * * * were conducting and maintaining at Monte Rio, in the county of Sonoma, state of California, a summer resort and hotel for the accommodation of the public. * * * That as a part of the said summer resort and hotel and as living quarters for its guests and their invitees the defendants maintained a tent set upon a wooden platform." That to prevent persons occupying, visiting, or being upon said platform from falling therefrom, and to protect persons who were thereon, the defendants erected, placed, and maintained on the outer edge thereof "a railing made of wood about three inches to four inches in diameter," which railing was "fastened upon the said platform about three or four feet above the floor of the said platform by means of timbers and braces." That said railing at all the times in the amended complaint mentioned "consisted of decomposed and rotten wood * * * negligently and carelessly maintained in said condition by the said defendants, all of which was unknown to the said plaintiff. * * * That on or about the 5th day of July, 1919, the plaintiff herein was present upon the said platform at the invitation and request of a guest of the said hotel and summer resort, to whom the tent on the said platform had been assigned by the said defendants as living quarters; and that while on said platform as aforesaid and while standing on said platform talking to the said guest of defendants and with his back to said railing around the said platform as hereinbefore described, and relying upon said railing as aforesaid as protection against falling over and off from the said platform, the said plaintiff rested his hands lightly upon the said railing as aforesaid, and thereupon and by reason of the said rottenness and decomposition of the said

wood of which the said railing consisted as aforesaid, and by reason of the carelessness and negligence of the defendants in so maintaining said railing, and not otherwise, the said railing gave way and broke, thereby precipitating and causing the plaintiff to fall off the said platform and to the ground below, a distance of about 20 feet and causing the plaintiff to strike upon his head and body."

It is further alleged that plaintiff, by reason of his alleged fall, sustained certain enumerated physical injuries, incurred numerous specified expenses, and lost one month's salary. The prayer of the complaint is for \$5,000 damages.

As we have said, there was one fictitious defendant who was never served, and for that reason, following the briefs, we will hereafter use the singular number.

The foregoing is a comprehensive statement of the allegations of the amended complaint which are material to this inquiry. To this complaint, defendant, Healy, demurred generally upon the ground that it failed to state a cause of action, and specially that it was ambiguous and uncertain, in that it was not alleged therein, and could not be ascertained therefrom, whether the decomposed and rotten condition of the railing "was apparent and patent, or concealed and latent"; "what caused said railing to give way and break"; "for what purpose was plaintiff present on said platform," or at whose invitation; what caused plaintiff to fall from the platform, or to fall upon or against the railing, or how "the giving way and breaking of the railing caused plaintiff to fall." The demurrer was sustained without leave to amend, and judgment entered in favor of defendant for costs. It is from this judgment that this appeal is prosecuted.

[1, 2] While it is well settled that a demurrer admits the truth of all facts that are well pleaded in the complaint, it does not, however, confess any omitted circumstance which is indispensable to the cause of action upon which it is based, or essential to remedy an allegation specially challenged for uncertainty or ambiguity. All that is required of a plaintiff, even as against a special demurrer, is that he set forth in his complaint the essential facts of his case with reasonable precision and with particularity sufficiently specific to acquaint the defendant of the nature, source, and extent of his cause of action.

A few general observations touching the relations of the parties and their corresponding duties and liabilities, as disclosed by the amended complaint, will conduce to a clearer understanding of the questions to be determined.

[3-5] A guest of an inn or hotel may be defined as one who receives accommodations or entertainment therein, usually for com-

pensation. *Pullman Palace Car Co. v. Lowe*, 28 Neb. 239, 44 N. W. 228, 6 L. R. A. 809, 26 Am. St. Rep. 325; *Manning v. Wells*, 28 Tenn. 746, 51 Am. Dec. 688; *Schouler's Bailments and Carriers* (3d Ed.) 282. While this definition seems simple of application, it is nevertheless not always easy to determine whether the person claiming such relation is in fact a guest within its meaning, but no such difficulty arises here, for it is clear from the complaint that plaintiff was not upon the hotel property of defendant in that capacity. The allegation of the complaint is that plaintiff was upon the platform, from which he fell, "at the invitation and request of a guest of the said hotel." Plaintiff makes no claim whatever in his pleading that he in any manner, as a guest, availed himself of the accommodations which the hotel afforded. He states he was at the defendant's inn in response to an invitation of a guest, who, we hold, in extending such invitation, was clearly acting within his rights, for, in the absence of a regulation or agreement to the contrary, a guest of a hotel may, as a matter of right, under such reasonable restrictions and regulations as the management may impose, invite unobjectionable persons to visit him at the inn for lawful purposes and at proper times. It is common knowledge that this right is universally accorded guests of hotels, and that it is a necessary public convenience. It is more than a privilege; it is, as we have said, a right which cannot be withheld except for good cause, as long as the relation of innkeeper and guest continues; it is one of the accommodations of the service which a hotel gives its patrons. To all such invitees, and such was the status of plaintiff, the innkeeper owes the duty of at all times maintaining his hotel premises in a reasonably safe condition, and of exercising reasonable care to protect them while in the hotel and in the part thereof open to the public, from personal injury through his negligence. But this duty does not obtain in cases where the injury to the invitee was due to a patent defect, or structural insecurity in the hotel premises or its equipment, so that, in the instant case, if the alleged "rotten and decomposed" condition of the railing was patent, the plaintiff cannot recover. As said by Hawley, District Judge, in *Ten Broeck v. Wells Fargo & Co. et al.* (C. C.) 47 Fed. 690, which was an action for damages for injuries received by a fall from steps leading to a platform connected with a hotel and not protected by a railing:

"In this case no presumption need be indulged in. The pleader has not only shown by his allegation that the injury was not received because 'anything gave way through the latent insecurity of the structure,' which was the ground upon which plaintiff might be entitled to recover, but has gone further, and affirmatively

shown 'that the accident arose from a patent defect,' for which, under the well-settled principles of the law, plaintiff is not entitled to recover."

[8-10] It is to the last-stated principle of law that defendant appeals in support of his contention that the complaint under review is uncertain and ambiguous, in that it cannot be ascertained therefrom whether the decomposed condition of the railing was "latent or patent." But we do not think the pleading is open to this criticism. Upon the contrary, in our opinion, the allegation that the decayed condition of the railing was "unknown" to plaintiff, which could not have been true had it been patent, is in effect a sufficient declaration that it was latent. If the defective condition of the railing was such that it would have been discovered by plaintiff in the exercise of ordinary care, the failure to exercise such care would be a defense which the plaintiff is not required to anticipate. It also sufficiently appears from the complaint that the plaintiff was upon the platform, from which he fell, at the invitation of the guest occupying the same, from which it follows *prima facie* that he was lawfully and properly there. If the reverse is true, it is likewise a matter of defense. Nor was it necessary for the plaintiff to state the name of the guest whom he was visiting; his omission to do so, under the peculiar facts of this case, does not render the complaint ambiguous or uncertain. It refers to but one tent as being upon the hotel premises, and describes it with sufficient particularity to render it easy of identification. Moreover, so far as the pleading discloses, but one person occupied such tent, and such occupant was the guest at whose request the plaintiff was upon the platform. This being the state of the pleadings, it was an easy matter for the defendant to ascertain the name of such guest who presumably registered and was assigned to the tent in question. Less particularity is required in the allegations of a complaint where, as here, the facts in it stated are such that the defendant, from their nature and his relation to them, has full information concerning them.

[11] Respondent makes the further claim that the complaint is insufficient in that it does not show the "causal connection between the negligence and the injury." With this contention we find ourselves unable to agree. In our opinion the following allegations amply comply with this elementary rule of pleading:

"That while on said platform * * * and while standing on said platform talking to the said guest of defendants and with his back to said railing * * * and relying upon said railing as aforesaid as protection against falling over and off from the said platform, the said plaintiff rested his hands lightly upon the said

railing as aforesaid, and thereupon and by reason of the said rottenness and decomposition of the said wood of which the said railing consisted as aforesaid, and by reason of the carelessness and negligence of the defendants in so maintaining said railing, and not otherwise, the said railing gave way and broke, thereby precipitating and causing the plaintiff to fall off the said platform and to the ground below."

The quoted allegations are sufficiently comprehensive, and adequately disclose the "causal connection between the injury and the negligence," which the law demands must be present to justify a recovery in cases similar to the one under consideration, and are hence good as against both the general and special demurrer.

None of the cases, to which counsel for respondent directs our attention as bearing upon this branch of the case, in any manner conflict with the views herein expressed. Each of them was in the main disposed of upon the facts which it presented, which facts were not in all respects analogous to the facts of the present one. *Smith v. Buttner*, 90 Cal. 99, 27 Pac. 29, contains language which, when read apart from the facts, seems to support defendant's contention. The complaint in that case declared that the plaintiffs were tenants in possession of, and occupying, a dwelling house, while it was being raised, and that the defendants, who were the lessors, had failed to provide any safe and proper means of entrance to, or egress from, the same, which, if true, would be patent to any one. The court there said:

"As we have seen, it is entirely consistent with the allegations of this complaint to suppose the injury occurred because defendant neglected to provide any mode of egress whatever. We are not at liberty to suppose anything gave way through the latent insecurity of the structure; for it is not so alleged."

It will be seen at a glance that this case is distinguishable from the one we are considering, for here it appears that the defendant had in fact constructed a railing around the platform, which railing, when plaintiff placed his hands upon it, gave way by reason of a defect which, as we have pointed out, the complaint alleges in effect was latent.

For the foregoing reasons we think the learned judge of the trial court erred in sustaining the defendant's demurrer.

The judgment is reversed, and the lower court directed to overrule the demurrer and permit the defendant to answer the complaint within such time as it may deem reasonable.

We concur: ANGELLOTTI, C. J.; SLOANE, J.; WILBUR, J.; LENNON, J.; LAWLOR, J.

PEOPLE v. CLARKE. (Cr. 752.)

(District Court of Appeal, Second District, Division 1, California. Feb. 21, 1921. Hearing Denied by Supreme Court April 19, 1921.)

Parent and child \S 17(2)—Father not criminally liable for failure to furnish necessities for child cared for by wife's parents.

A father is not criminally liable under Pen. Code, \S 270, for failure to provide clothing, food, and medical attention to a child, where the child was being supplied as far as was necessary by the wife's parents without demand on father for financial aid in the matter of support to whose house she had taken the child upon separating from her husband.

Appeal from Superior Court, San Diego County; T. L. Lewis, Judge.

George Dewey Clarke was convicted of failure to furnish necessities to a child, and appeals. Reversed in the District Court of Appeal, and hearing denied in Supreme Court.

Edward J. Kelly, of San Diego, for appellant.

U. S. Webb, Atty. Gen., and Arthur Keetch, Deputy Atty. Gen., for the People.

SHAW, J. On August 13, 1920, an information containing two counts was filed against defendant. By the first count he was charged with the crime specified in section 270 of the Penal Code, and by the second he was charged with the crime of non-support of his wife, as defined in section 270a, Penal Code.

At the close of plaintiff's evidence, defendant's motion for a dismissal of the accusation contained in the second count of the information was granted, and thereupon the trial of the case proceeded upon the charge contained in the first count of the information, the result of which was the conviction of defendant; and from the judgment pronounced thereon he prosecutes this appeal. Section 270 provides that—

"A parent of either a legitimate or illegitimate minor child who willfully omits, without lawful excuse, to furnish necessary food, clothing, shelter, or medical attendance for his child, is punishable by imprisonment in the state prison, or in the county jail, not exceeding two years, or by fine not exceeding one thousand dollars, or by both."

Of the several grounds for reversal urged by counsel for defendant, we deem it unnecessary to consider other than that of the sufficiency of the evidence to justify the verdict rendered by the jury.

On June 1, 1919, the defendant, then a young man of 21, was married to Ella Winn, who was of the age of 18. He was just out of the army, and his worldly goods consisted

of about \$150. In the latter part of August, 1919, prior to which time he had been engaged in odd jobs of work in San Diego, where they were married, he went to Oakland, where a few weeks thereafter his wife, at his request and with money sent by him, followed, and the two took up their abode with the husband's mother. The wife was then pregnant and expected the birth of a child the latter part of March. She appears to have been unhappy and dissatisfied with her environment, and so notified her parents in San Diego, who on October 20, 1919, went to Oakland, where, as a result of their persuasion and insistence defendant consented that his wife should return to the home of her parents in San Diego pending confinement, and at the same time they extended an invitation to him to accompany her, which defendant declined. It appears that about March 6th defendant received a letter from the district attorney of San Diego county, the contents of which, however, are not in evidence, but in response to which he sent his wife \$65. This money it appears, instead of being expended for clothing for the baby, born on February 27th, was applied in payment of a nurse who attended the wife during confinement. The mother, as contemplated when she left her husband in Oakland, and, after its birth, the child, made their home with her parents, who were well to do and able to and did provide her, as they insisted upon doing, with a home, food, and shelter; and although defendant, other than contributing the \$65 applied to the payment of her nurse and some small articles of clothing, supplied no money, the baby, as stated by the wife, had never been in want of necessities, but at all times had food, clothing, and medical attention when necessary, which were voluntarily provided by her father. The court properly instructed the jury that defendant's failure to make provision for the support of the child before its birth and before he knew of the birth of the child did not constitute a crime; hence the offense, if established, must be based upon defendant's neglect to supply the child with necessary food, clothing, shelter, and medical attendance during the first five months of its existence. The evidence touching this question is exceedingly meager. It cannot be said that, because defendant yielded to the persuasion of his wife's parents that she abide with them, such fact constituted neglect to furnish shelter; and, as to medical attendance, there is no evidence whatever that the child ever at any time required such attendance after its birth. As to food, the evidence is consistent with the fact that it was obtained from its mother, in accordance with nature. Prior to its birth, the child's maternal grandmother, at an expense of some \$25 or \$30, procured clothing upon her own account, charging defendant therewith, in

addition to which clothing, necessary articles of wearing apparel were given to the mother by her friends and relatives. Indeed, it cannot be said that, had the \$65 sent by defendant to his wife been applied to the uses of the child, it would not have been ample for its needs.

Conceding, however, that defendant neglected and failed to contribute any sum to meet the necessary requirements of the child, nevertheless it conclusively appears that it had everything in the way of shelter, clothing, food, and medical attention which it needed; and, conceding that these necessities were, as stated by the mother, furnished by her parents, and, in the absence of lawful excuse, not by the father, we are of the opinion that, whatever breach of legal or moral obligation arose from such omission, such neglect and failure does not constitute a criminal offense within the meaning of section 270, Penal Code.

The provisions of section 270, under which defendant was prosecuted, are substantially the same as those contained in section 270a, which make it a crime for a husband having sufficient ability so to do, to neglect to provide his wife with necessary food, clothing, and shelter. While section 270 makes the offense dependent upon want of lawful excuse, it has been held that want of financial ability to provide for a child is such lawful excuse. *People v. Forester*, 29 Cal. App. 460, 155 Pac. 1022. In *People v. Selby*, 26 Cal. App. 796, 148 Pac. 807, the defendant was charged with the offense designated in section 270a, and on an appeal the judgment pronounced upon his conviction was reversed for the reason, among others, that it was made to appear that his wife was received into the family of a relative and there cared for, and, moreover, had credit at a general merchandising store from which she was privileged to obtain goods on her own account. Quoting from the opinion, the court said:

"She did not, nor did any other witness, testify that, after the separation, she was at any time deprived of the necessities of life. The only proof upon that matter was that the defendant did not provide those necessities. While it was, of course, his duty to furnish her with such necessities, it was no crime for him not to do so if she was not actually in want of them, even though he might have abandoned her within the meaning of the statute."

In *State of Missouri v. Thornton*, reported in 232 Mo. 298, 134 S. W. 519, 32 L. R. A. (N. S.) 841, where the court had under consideration a charge preferred against a defendant under a statute similar to ours, it was held that one is not within the operation of a statute providing for the punishment of a father who neglects to furnish necessary food, clothing, and lodging to his infant child if the child is being supplied therewith as far as is necessary, by the wife's parents, to

whose house she had taken the child upon separating from her husband, the child's father.

It is the omission of the parent to furnish necessary food, clothing, etc., which is penalized, and such articles cannot be necessary to one fully supplied therewith by one other than the father who acts voluntarily and of his own accord in contributing the same. A necessary article is one which the party actually needs. The mere fact that the articles are necessary, however, is not enough. They must be such as the party without them actually needs. In the case at bar the child had food, shelter and clothing, and, while not provided by defendant, it was nevertheless not in need of that which it had.

While it is true that defendant was under obligation, both morally and legally, to furnish such necessities, rather than have the child dependent upon the grandparents therefor, nevertheless his omission so to do imposed no burden upon the state; nor was the welfare of the child, in which the state is interested, jeopardized or affected by such omission. In our opinion, the statute should not be construed as a law punishing a father for failure to perform his duty as such, but to secure to minor children, who in the future are to become citizens, the necessary food, clothing, and shelter, without which destitution would follow, and their lives and health be endangered, and thus protect the state from a burden which would otherwise devolve upon it. So long as they are properly cared for without intervention on the part of the state, it is not interested as to the source from whence the supplies come.

Under a similar statute, the Supreme Court of Georgia, in *Dalton v. State*, 118 Ga. 196, 44 S. E. 977, in reversing the judgment, said:

"The evidence adduced on the trial showed that the father was willing for the wife to leave him and return to her relatives. The child which she took with her was between four and five years of age, and was, of course, dependent. The evidence, however, does not disclose that the child was destitute at the time of the abandonment, or had even become destitute up to the time of the trial. So the case turns upon the question whether the father is guilty if he fails to provide for his child after the separation, even though the child may be abundantly supplied with all the necessities of life. While it is true that a father is under a moral and legal obligation to support his minor child, it is not also true that, if he fails to do his duty, he may be convicted under the above section of the Code, although the child is fully provided for by others. The father cannot be convicted unless it be shown that the child was not only dependent, but in a destitute condition. If it is not destitute, but is amply supplied with all necessities, the father cannot be convicted.

It is true he may have violated his moral and legal obligations in abandoning the child at all; but, as criminal statutes must be construed strictly, we are constrained to give this statute this interpretation."

A like question arose under an Ohio statute in *State v. Stouffer*, 65 Ohio St. 47, 60 N. E. 985, wherein, it appearing that the child was in the custody of its mother, who lived with her parents, and had a comfortable home, and necessary food and clothing, the court held that, while it was plainly the duty of the defendant to support the child, from which obligation he was not absolved by reason of the act of the grandparents in furnishing it with food and shelter, such obligation should be enforced in a civil action rather than by a criminal proceeding. As opposed to these and other like authorities, respondent cites *In re McMullen*, 19 Cal. App. 484, 126 Pac. 368, *People v. Schlott*, 162 Cal. 347, 122 Pac. 846, and *Hunter v. State*, 10 Okl. Cr. 119, 134 Pac. 1134, L. R. A. 1915A, 564, Ann. Cas. 1916A, 612, the latter case arising under an Oklahoma statute wherein, under the peculiar laws of that state, a father was held criminally liable, although his child was not in want, for the reason that its needs were met by another than himself. The reasoning upon which the decision in that case was reached is not convincing to us, and, since contrary to the weight of authority, should be disregarded. The question here involved was not considered in the other cases cited by respondent, and hence they do not apply to the facts in the instant case. The judgment is reversed.

We concur: CONREY, P. J.; JAMES, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the Second Appellate District, Division 1, is denied.

The case shown by the opinion is apparently simply one in which the mother and child, during the first five months of the child's life, upon the invitation and insistence of the parents of the wife, resided with them as their guests and were fully supported and cared for by such parents without any request or demand on the father for financial aid from him in the matter of the support of the child. Certain general statements in the opinion as to the proper construction of section 270, Penal Code, which may not be exactly correct as mere abstract statements of law, must be considered in the light of the facts of this case, and, so considered, do not require revision by this court.

All concur.

PEOPLE v. FLOWERS. (Cr. 764.)

(District Court of Appeal, Second District, Division 1. California. Sept. 14, 1921.)

1. False pretenses §31—Information held to show connection between false pretenses and effect.

An information alleging that defendant falsely and fraudulently represented that he owned a half interest in a printing plant and was lawfully entitled to sell and convey such interest, and prosecuting witness, believing the representations and pretenses as alleged, was deceived thereby and paid defendant a certain sum of money, etc., *held* not subject to the objection that it did not show "causal connection" between the alleged false pretenses and the effect attributed to them.

2. False pretenses §51—Fraudulent intent held for jury.

In a prosecution for obtaining property by false pretenses by selling an interest in a printing plant which defendant did not own, whether defendant sold the property fraudulently with intent to unlawfully deprive complainant of his property, *held* for the jury.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

J. M. Flowers was convicted of obtaining personal property by false pretenses, and appeals. Affirmed.

Cooper, Collings & Shreve and W. T. Helms, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

JAMES, J. The defendant was convicted under the charge of having obtained personal property of one Rinker by means of false representations and pretenses. He appeals from the judgment and from an order denying a motion for a new trial.

[1] It is first contended that the court was in error in overruling an objection to the introduction of evidence and in denying a motion in arrest of judgment. The point made in that behalf is that the information did not contain a statement of facts sufficient to constitute the public offense attempted to be charged. It is argued by counsel that no "causal connection" is shown between the alleged false pretenses and the effect attributed to them. In the information it was alleged that appellant represented and pretended that he was the owner of and possessed of the title to a certain printing plant; that he was lawfully entitled to sell and convey an interest therein; that Rinker, believing the representations and pretenses, as alleged, to be true, and relying upon the same, was deceived thereby, and paid to appellant the sum of \$130 in money, and delivered to him liberty bonds of the value of \$95 and an

automobile of the value of \$400. It was then alleged as follows:

"That in truth and in fact each and all of the said representations and pretenses, so made as aforesaid, by the said J. M. Flowers to the said Richard Rinker were then and there false, fraudulent, and untrue, as he, the said J. M. Flowers, then and there well knew. That in truth and in fact the said J. M. Flowers was not then and there, or at any time, or at all, the owner of, or possessed of the legal title to, or the owner of, or entitled to any interest whatsoever in and to that certain printing plant with the accessories thereof as hereinbefore described, as he, the said J. M. Flowers, then and there well knew."

The information also contained allegations that the representations and pretenses were willfully, fraudulently, and feloniously made with intent to defraud the said Rinker. It also contained an allegation that appellant executed a written bill of sale whereby he pretended to convey to said Rinker an undivided one-half interest in the said printing plant. It appears then that the information clearly charged representations to have been made by appellant that he was the owner of the printing plant; that by reason of said representations Rinker was induced to deliver to appellant the money and property in exchange for a one-half interest in the plant; and that the representations as to ownership made by appellant were false, and that he had no interest whatsoever in the printing plant. Where representations detailed in the words of an information do not in themselves furnish a logical cause or inducement for a complainant's act in parting with his money or property; where their force in that direction depends upon some extrinsic meaning or understanding which is not alleged—it may then be said that the "causal connection" between the pretenses employed and the resulting loss is not made to appear. The information presented in this case is not deficient in the respect suggested. It is plain enough in its charging part to enable a person of ordinary understanding to comprehend that the defendant, by pretending to be the owner of property, procured another to deliver to him money and merchandise in exchange for an interest therein. It is clearer in its statement of the facts constituting the alleged offense than was the information considered in the case of *People v. Griesheimer*, 176 Cal. 44, 167 Pac. 521, which the Supreme Court sustained as against the precise contention that is now advanced.

[2] Insufficiency of the evidence to sustain the verdict is urged as a second ground for error. We have examined carefully the statement of the evidence and are satisfied that it must be held sufficient. It is clearly shown that appellant was not the owner of the printing plant when he attempted to sell

(201 P.)

a one-half interest to the complainant; he had no title at all. He attempted to show that negotiations had been in progress looking toward the purchase by him of the property and attempted to show that he had in fact completed such a deal. The evidence fell short of establishing that fact and the most that can be said for appellant's side of the case is that the jury might have concluded, had it believed the testimony offered by the defendant, that, while he had not in fact obtained title to the printing plant, his assumption that he had completed the purchase of it furnished an excuse as relieving his acts and conduct from the charge that they were fraudulent and done with intent to unlawfully deprive complainant of his property. That question, however, was for the jury and was decided against the appellant, and with that decision upon the facts he must rest content.

In the concluding paragraph of appellant's brief it is asserted that there was error in the instructions, but there is no specification or argument to show wherein the charge as given by the court to the jury did not correctly declare the law. We find no error justifying the claim of appellant that a reversal should be ordered.

The judgment and order are affirmed.

We concur: CONREY, P. J.; SHAW, J.

PEOPLE ex rel. FOLTZ v. GIFFORD et al.
(Civ. 2334.)

(District Court of Appeal, Third District, California. Sept. 8, 1921.)

1. Nuisance §82—Dismissal of action under Redlight Abatement Act against occupant held not to affect proceeding against owner.

Under Redlight Abatement Act, occupant and owner of building alleged to be used for prostitution are not such joint tort-feasors as prevent court from dismissing action against occupant and proceeding against owner.

2. Judgment §559—Dismissal of action for misdemeanor not applicable to abatement of nuisance.

Pen. Code, § 1387, providing that dismissal of action for a misdemeanor is a bar to any other proceeding for the same offense, is not applicable to equitable action to abate a nuisance under Redlight Abatement Act.

3. Nuisance §84—Amendment of description permissible.

In action under Redlight Abatement Act to abate as a nuisance buildings used for prostitution, an amendment of the complaint by correcting erroneous description of property is permissible, as Code Civ. Proc. § 473, relating to amendments, is applicable.

4. Appeal and error §236(2)—No complaint of amendment where additional time to plead was not requested.

Defendants in action under Redlight Abatement Act to abate as a nuisance buildings used for prostitution cannot complain of amendment correcting description of property where they did not request additional time to plead or secure evidence.

5. Appeal and error §740(2) — Assignment that court failed to find material allegations of answer too general.

An assignment of error that court failed to find all material allegations of the answer is too general for consideration.

6. Appeal and error §931(1)—Failure to find on allegations of answer presumed correct.

On appeal on judgment roll alone it will be presumed that court's failure to find on allegations of answer was on ground that they were not supported by the evidence.

7. Constitutional law §42—Party not injured cannot claim denial of due process.

In action under Redlight Abatement Act to abate as a nuisance buildings used for prostitution, occupant cannot complain that she was denied due process of law because suit as to her was dismissed and court then proceeded to judgment against the owner and decreed that she was the owner of the furniture therein, and that it should be removed, as she had her day in court and could have defended and was not prejudiced thereby, but escaping costs.

8. Constitutional law §251 — Federal Const. U. S. Amend. 5, does not apply to states.

Const. U. S. Amend. 5, relating to due process of law, has no application to the several states.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by the People, on the relation of E. P. Foltz, against Olive E. Gifford and another. From judgment for relator, defendants appeal. Affirmed.

A. M. Armstrong, of Portola, for appellants.
Charles Light and H. C. Stanley, both of Stockton, for respondent.

BURNETT, J. The action was under the Redlight Abatement Act (Stats. 1913, p. 20), and resulted in a judgment of abatement as a nuisance of certain buildings used for prostitution in the city of Tracy in the county of San Joaquin. The appeal is here upon the judgment roll alone, and we can see no merit whatever in the position of appellants.

[1] It appears that after the evidence was heard the action was dismissed as to the occupant of the building, and it seems to be the claim of appellants that thereby the plaintiff lost the right to prosecute the cause any further; in other words, that the action must be prosecuted to judgment against both the owner and occupant, if prosecuted at all.

There are certain cases of joint tort-feasors where this principle would probably apply, but such is not the situation herein. In considering the question, it is well to remember that the principal purpose of the action is to abate and prevent a nuisance; it being a proceeding in rem, primarily against the property because it is maintained and used in violation of the law. The statute contemplates that the owner and occupant shall be made parties to the action to afford them an opportunity to meet the accusation and protect their property interests, but, when it has been shown that the building is used for such immoral purposes, the owner cannot resist the abatement of the nuisance simply because the court has seen fit to dismiss the action as to the occupant. It is manifest that he is not prejudiced in any manner by such dismissal, however erroneous it may be. The case is entirely different from those instances of joint personal liability where there may be the right of contribution. Besides, the record does not show upon what ground the action was dismissed nor upon whose motion. We may assume that it was done at the instance and according to the request of appellants. If so, they would not be heard to question a righteous judgment upon the ground that it was irregularly rendered by reason of an error committed at their own solicitation. For be it said that, according to the findings, the court committed error in dismissing the action against Jessie Green. As to her it may be said, in addition, that she has no ground for complaint, since her property was not sold, as might have been done under the evidence. It was ordered removed from the building, but this is a necessary incident to the judgment closing the building for a year, and the result was really more favorable to her than she had the right to expect.

[2] There is no room for the application of section 1387 of the Penal Code, providing that the dismissal of an action for a misdemeanor "is a bar to any other prosecution for the same offense," etc. That refers to criminal proceedings, while here we are dealing with an equitable action for the abatement of a nuisance. *McCarthy v. Gaston Ridge Mill, etc., Co.*, 144 Cal. 542, 78 Pac. 7. The civil action is entirely distinct from the criminal, and the prosecution of one does not prohibit the prosecution of the other. We may add that there is no evidence in the record that any criminal proceeding has been instituted against either of the defendants.

[3, 4] Equally without merit is the claim that the amendment to the complaint, allowed by the court after the cause was set for trial "set up an entirely new cause of action, leaving the court with no jurisdiction to proceed further in the summary proceeding." It seems that a mistake was made in the description of the property, it being desig-

nated in the original complaint as lots 9 and 10, whereas it was really lots 7, 8, and 9; and the court permitted the correction to be made. We can conceive of no reason why the court should not allow such amendment. In that respect this class of actions stands upon the same footing as other proceedings. The amendment was in furtherance of justice and was authorized by the Code and the decisions of the courts. Code Civ. Proc. § 473; *Carter v. Lothian*, 133 Cal. 451, 65 Pac. 962. Of course, the court did not lose jurisdiction of the cause by reason of said amendment, nor is there anything to show that appellants were at all prejudiced thereby. If they had desired additional time in which to plead or to secure further evidence in consequence of said amendment, they should have requested it. Manifestly, though, the amendment was of such nature as to require no continuance of the trial.

[5, 6] It is claimed that the court failed to find upon "material allegations of the answer." The specification is too indefinite to demand particular notice. However, we find no material allegation that did not receive attention in the findings. Moreover, if there be any such allegation, "it must be presumed, in the absence of a contrary showing in the record, that there was no evidence which would have sustained a finding" in their favor on such issue. *Coats v. Coats*, 160 Cal. 671, 118 Pac. 441, 36 L. R. A. (N. S.) 844.

[7, 8] The only other objection worthy of notice is that the court—

"after having already acquitted the occupant of the building, Jessie Green, of the charge of maintaining a nuisance then proceeded in the same action to find her guilty of the same charge and inflicted upon her the penalty of such unwarranted conviction, to wit, eviction from the accused building, confiscation of her lease, and removal of all her personal property therefrom, * * * contrary to the express mandates of amendments 5 and 6 of the Constitution of the United States of America."

This objection erroneously assumes that the court acquitted said Green of the charge of maintaining a nuisance. The fact is that the court found:

"That said Jessie Green is the owner of the furniture, fixtures, and musical instruments and other movable property situated in said building, and that the same are used in conducting, maintaining, aiding, and abetting said nuisance."

It is true, as already seen, that for some undisclosed reason the action as to her was dismissed, but this was after she had her day in court and the opportunity to defend the action. The dismissal was apparently an unwarranted favor granted to her and saved her the payment of costs of suit.

That said amendments have no application to the case is quite apparent. The only pro-

vision therein that could possibly be regarded as bearing upon the controversy is the one prohibiting the taking of one's property "without due process of law."

But she was afforded the benefit of every privilege that the law contemplates, and it was only after full hearing that the court concluded that said nuisance existed and was being maintained by the defendants.

Of course, there can be no question that the state has authority to provide for the abatement of nuisances, whether they exist by the fault of individuals or not. Cooley's Constitutional Limitations (7th Ed.) p. 849.

It may be added that our Supreme Court has held that the Sixth Amendment to the Constitution of the United States has no application to proceedings in our state courts. *People v. Nolan*, 144 Cal. 75, 77 Pac. 774.

We can see no merit in the claim of appellants, and the judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

MEYERS v. BRADFORD et al. (Civ. 2292.)

(District Court of Appeal, Third District, California. Sept. 6, 1921. Hearing Denied by Supreme Court Nov. 3, 1921.)

1. Municipal corporations \S 705(1) — Trial \S 194(15) — Instruction that driver should always have automobile under control and not assume that road was clear held proper.

In an action for damages to an automobile from collision on a city street, an instruction that it is the operator's duty to keep his motor vehicle always under control, so as to avoid the collision with others using the highway, and that he has no right to assume that the road is clear, but under all circumstances and at all times must be vigilant, and must anticipate and expect the presence of others, and that the fact that he did not know that any one was on the highway did not excuse conduct amounting to recklessness, had he so known, held proper and not to invade the jury's province.

2. Damages \S 39 — For loss of use of automobile recoverable.

Where defendant's negligence caused an automobile wreck, plaintiff could recover damages for the use of his machine while it was being repaired.

3. Damages \S 106 — For loss of use of automobile wrecked by defendant's negligence would be the cost of use of other machine whether one hired or not.

Under Civ. Code, \S 3333, the measure of plaintiff's damages for loss of the use of his automobile while being repaired, after injury from collision through defendant's negligence, would be the cost of hiring another machine for his use, whether he hired one or not.

4. Appeal and error \S 1068(4) — Defendant may not object to measure of damages in matter for which damages were not allowed.

In an action for damages to an automobile caused by defendant's negligence resulting in a collision, defendant may not complain as to measure of damages for plaintiff's loss of use of his machine, where the jury undoubtedly allowed nothing therefor.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by J. S. Meyers against Mrs. George B. Bradford and others. Judgment for plaintiff, and the defendants appeal. Affirmed.

Downey & Downey, of Sacramento, for appellants.

P. H. Johnson, of Sacramento, for respondent.

BURNETT, J. Plaintiff recovered judgment on a verdict in his favor for \$400 for damages to his automobile received through a collision with the car of appellants at the intersection of Twenty-Fourth and U streets in the city of Sacramento, and the appeal is from said judgment. It is not disputed that the evidence is sufficient to support the verdict and judgment in respect to the negligence of defendants, the want of contributory negligence on the part of plaintiff and the amount of damages awarded. Indeed, there seems to be no substantial conflict as to any of these elements involved in the case, and even the testimony of defendants showed them to be chargeable with actionable negligence.

[1] Two points, however, are made by appellants: First, that the court erred in instructing the jury that "it is part of the duty of the operator of a motor vehicle to keep his machine always under control so as to avoid collisions with pedestrians and other persons using the highway. He has no right to assume that the road is clear, but under all circumstances and at all times he must be vigilant and must anticipate and expect the presence of others. Accordingly, the fact that he did not know that any one was on the highway is no excuse for conduct which would have amounted to recklessness if he had known that another vehicle or person was on the highway." And, second, that the court was not warranted in authorizing a recovery for the value of the use of the machine while it was being repaired.

That said instruction demands the proper attitude of an operator in the situation referred to can hardly admit of doubt. It suggests a fundamental principle that must be observed in order to avoid illegal injury to another. The basis of the instruction is that in the enjoyment of a common right the participant must exercise constant care that

the correlative right of others may not be unnecessarily impaired or destroyed. The highways are, of course, established and maintained at public expense for the use and benefit, for lawful purposes, of all the citizens, and it cannot be claimed that the drivers of automobiles have any special right or privilege in the use or enjoyment thereof. The law indeed imposes upon them a degree of care commensurate with the peculiar hazard attending the operation of these modern vehicles.

If said instruction does not contain sound doctrine, then the converse of the propositions therein contained may be adopted as the right rule for the guidance of automobile drivers. The court would then declare the law to be that—

"It is *not* a part of the duty of an operator of a motor vehicle to keep his machine always under control, or that it is his duty to keep it under control only a *part* of the time; that he has the right to assume that the road is clear, and under no circumstances and at no time must he be vigilant or anticipate or expect the presence of others; and if he does not know that any one else is on the highway he is excusable for conduct that would amount to recklessness if he did know that another was using it."

The absurdity of such a rule is, of course, apparent. Even the undertakers, whose business would be greatly promoted thereby, would hesitate to indorse it. But it is due the learned counsel for appellants to say that their stricture is really confined to the last part of the instruction. It must be plain, however, that the driver is not excusable for reckless conduct because he does not know that another may be using the highway. From the very nature of the situation he is chargeable with knowledge and he must anticipate such contingency as arose in this case. It may be true, as suggested by appellants, that in out of the way places, or at late hours of the night, or in extremely stormy weather, the rule is not so strict, and it would not be so unreasonable for him to assume that the highway is more or less deserted. But the collision herein occurred before dark, in the heart of the residence district of the city, at the intersection of two highways in constant use, and the fact that it was raining emphasized the duty of the driver to be careful and vigilant. Citation of authorities is hardly needed for a proposition so obvious, but we may refer to these cases noted in respondent's brief: *Graham v. Hagmann*, 270 Ill. 252, 110 N. E. 337; *Thies v. Thomas* (Sup.) 77 N. Y. Supp. 276; *Birkett v. Knickerbocker Ice Co.*, 110 N. Y. 504, 18 N. E. 108; *Lauson v. Fond du Lac*, 141 Wis. 57, 123 N. W. 629, 25 L. R. A. (N. S.) 40, 135 Am. St. Rep. 30.

In giving the instruction the court did not invade the province of the jury. It

stated merely a recognized principle of law that was involved in the case, and it left to the jury the determination of the question of fact whether the conduct of appellants fell within the contemplation of such principle. Indeed, the instructions were full and accurate as to the doctrine of negligence, and they have escaped the criticism of appellants, save in the instance to which we have referred.

[2, 3] As to the other question, it is apparent that, by reason of the negligence of defendants, plaintiff was deprived of the use of his machine while it was being repaired. This is a thing of value, and it is difficult to understand why it should not be considered a part of the detriment suffered by plaintiff in consequence of the accident. The general rule applicable to the situation is found in section 3333 of the Civil Code as follows:

"For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

The only difficulty is in determining the financial measure of the use of the machine; in other words, how much money would compensate for the loss of its use during the time it was being repaired. If the plaintiff had hired another machine, what he paid for it, if the rental value, would furnish a practicable and reasonable measure of his loss. But he suffers an equal detriment if he chooses to do without a machine while his is being repaired, and there seems to be no sound reason why the rental value of such machines should not be taken in either case as a fair measure of his loss. Upon this subject the authorities are not altogether uniform, but we think the better view is with respondent.

In *Dettmar v. Burns Bros.*, 111 Misc. Rep. 189, 181 N. Y. Supp. 146, it was held:

"1. Damages for loss of use of an automobile may be allowed against one who negligently injures it, although the owner intended to use it only for pleasure, and not for rent or profit.

"2. Evidence of the rental value of an automobile is admissible upon the question of the compensation to be awarded the owner for being deprived of its use through another's negligence, although he did not intend to rent it or use it for profit.

"3. Evidence of rental value is admissible not as furnishing the exact measure of damages, but as one of the facts to be considered in ascertaining the extent of the injury."

Other cases to the same effect are *Perkins v. Brown*, 132 Tenn. 294, 117 S. W. 1158, L. R. A. 1915F, 723, Ann. Cas. 1917A, 124; *Cook v. Packard Motor Car Co.*, 88 Conn. 590, 92 Atl. 413, L. R. A. 1915C, 319; *Banta v.*

Stamford Motor Co., 89 Conn. 51, 92 Atl. 665; Universal Taxi Co. v. Blumenthal (Sup.) 143 N. Y. Supp. 1056. See, also, Sedgwick on Damages (9th Ed.) § 243b.

It is clear that this element is a part of the general damages suffered by plaintiff, and it is not subject to any special provision of the statute, as was the case in *Lynch v. McGhan*, 7 Cal. App. 132, 93 Pac. 1044. It is rather analogous to *Linforth v. S. F. G. & E. Co.*, 156 Cal. 58, 103 Pac. 320, 19 Ann. Cas. 1230, wherein a building was injured, and in discussing the elements of damage, the court said that the plaintiff was entitled to the cost of the repairs and that "compensation for the loss of the use of the property is in precise accord with section 3333 of the Civil Code."

[4] But if we were to concede that the trial court took an erroneous view of this feature of the case, it should be held that it was without prejudice, for the jury undoubtedly allowed plaintiff nothing for the loss of the use, since the evidence shows without conflict that the damage to the machine exceeded the sum of \$400. Under such circumstances we would presume that the general verdict was based upon those elements of damage that were unquestionably involved, rather than upon one of doubtful propriety.

We see no merit in the appeal and the judgment is affirmed.

We concur: FINCH, P. J.; HART, J.

Ex parte THOMPSON. (Cr. 1013.)

(District Court of Appeal, First District, Division 1, California. Sept. 7, 1921.)

Habeas corpus §54—Prisons §15—Petition for habeas corpus insufficient; credits for good behavior available only if accorded by board.

Under the Indeterminate Sentence Law, credits for good conduct are available to reduce a prisoner's time of confinement only if accorded by the state board of prison directors and not forfeited by them; hence a petition for habeas corpus by a prisoner, claiming to be held in custody after expiration of the time when, after allowance of credits earned, his term of imprisonment expired, was insufficient, where it did not appear therefrom that the board had accorded petitioner any credits or that they had not forfeited any which had been given.

Application by Fleet E. Thompson for writ of habeas corpus. Writ denied.

Fleet E. Thompson, in pro. per.

PER CURIAM. In the verified petition for a writ of habeas corpus, filed in this matter, it is alleged that the petitioner is unlawfully held in custody by the warden of the state prison at San Quentin, after the expiration of the time when, with the allowance of credits earned, his term of imprisonment expired. His allegation is that he has "earned" all the credits provided for by the rules regulating the government of prisoners at the prison, and that none have been forfeited.

The petitioner's contention is based upon an erroneous theory of the present law governing such matters. Formerly a prisoner in one of the state's penal institutions was entitled, as of right, to certain fixed credits earned by good behavior while under restraint. By the enactment of the indeterminate sentence law, which went into effect July 27, 1917 (Stats. 1917, p. 665), the Legislature did away with the plan theretofore in force by which these credits for good behavior were given. In *re Lee*, 177 Cal. 690, 695, 171 Pac. 958. Following the decision of the Supreme Court in the *Lee Case*, the state board of prison directors adopted a comprehensive system under which, as we understand it, the matter of the good behavior of a prisoner, and the recognition to be given to such conduct, becomes a matter of consideration and affirmative action by the board in each particular case.

The petitioner was received at the prison February 15, 1919. Thereafter, according to his petition, the board of prison directors fixed his term at three years from and after the date on which he was received by the warden, and provided there should be deducted from the time of his confinement the aggregate of all credits provided by the board, which the prisoner should have earned and not forfeited. He alleges he has earned certain credits which have not been forfeited. But under the decision in the *Lee Case*, and according to the rules and usage in vogue at the prison, as we understand them, the allegations are not sufficient. It is not made to appear that the board of prison directors, by any act on its part, has accorded the petitioner any credits for good conduct, or, if any have been given, but that they may have been declared forfeited by the board. In view of the fact that petitioner was released on parole, which was later revoked by the board, and the prisoner only recently returned to the prison, we may safely infer that he is a "parole violator," who has lost the good standing, if any, he may have previously attained.

The application for the writ is denied.

CLARKSON v. MOIR (two cases).
(Civ. 3685.)

(District Court of Appeal, Second District, Division 1, California. Aug. 8, 1921.)

1. Appeal and error §694(1)—Sufficiency of evidence not reviewable, where bill of exceptions does not specify insufficiencies.

Where the bill of exceptions contains no specifications of particulars, wherein the evidence is claimed to be insufficient to sustain the findings, its sufficiency cannot be considered on appeal from the judgment, and the rule extends to review of proceedings on motion for new trial, where the record is brought up by bill of exceptions.

2. Parties §95(3)—Error as to initial of party named is subject of amendment.

Where action was brought against Lydia F. Moir, when Lydia M. Moir was intended, the error is subject to correction by amendment.

3. Limitation of actions §121(2) —Amendment as to name of party relates back.

Where an amendment is filed correcting the name of defendant by changing an initial, the action should be regarded as having commenced against such party at the time the original complaint was filed.

4. Judgment §818(2)—Of foreign country as to liability of stockholders here binding without notice served in such country.

Proceedings in the Supreme Court of Ontario, Canada, finding a corporation insolvent and listing the amount for which stockholders residing here are liable, is binding and enforceable here, though notice of the proceedings was not served on them within the jurisdiction of that court; the only notice had being served here.

Appeal from Superior Court, Los Angeles County; Frederick W. Houser, Judge.

Action by Geoffrey Teignmouth Clarkson, as Liquidator of the Sovereign Bank of Canada, against Georgianna Esther Moir, and action by same plaintiff against Lydia M. Moir. Judgment for plaintiff, and defendants appeal. Presented on one bill of exceptions and record. Affirmed.

Williams & Williams, of Los Angeles, for appellants.

Donald Barker, of Los Angeles (Wm. H. Neblett, of Los Angeles, of counsel), for respondent.

CONREY, P. J. Separate actions were brought against appellants, and judgments rendered against each of them, from which judgments they have appealed. In accordance with stipulations of the parties, the appeals are presented on one bill of exceptions and record. Each of the defendants was held liable to pay to the plaintiff, as liquidator of the Sovereign Bank of Canada, an amount equal to the par value of the shares held

by her in that bank, a corporation which became insolvent. The recovery was based upon the insolvency of the corporation and resulting proceedings and judgment of the Supreme Court of Ontario, in the Dominion of Canada, as set forth in the amended complaint. The proceedings in the Supreme Court of Ontario were conducted under the "Winding-Up Act," and amendment thereto, of the Dominion of Canada. In the judgment rendered in those proceedings, each of the defendants were designated as contributory, and settled upon the list of contributories for a stated amount, and a call was thereby made for the full amount for which the contributory named was settled upon the list of contributories.

The present actions were commenced on the 26th day of January, 1918. The answers of the defendants, in addition to denials of some of the allegations in the complaints alleged that the bank became insolvent on or about the 18th day of January, 1908, and that the actions were barred by the provisions of section 359 of the Code of Civil Procedure. Under the provisions of that section, an action brought against a stockholder of a corporation to enforce a liability created by law must be brought within three years after the liability was created. In *Royal Trust Co. v. MacBean*, 168 Cal. 642, 144 Pac. 139, which was an action similar to those now under consideration, it was held that—

"The liability was created, at the latest, upon the beginning of the status of insolvency, and the three-year period of limitation began to run then."

[1] In the present actions, the court found that all of the allegations of the amended complaint are true; and that the bank did not become insolvent until 90 days after the 30th day of June, 1913. Appellants contend that the corporation, in fact, became insolvent at the time stated in their answers. We must decline to examine the evidence for the purpose of questioning the findings of fact. The bill of exceptions contains no specifications of particulars wherein the evidence is claimed to be insufficient to justify any of the findings. In the absence of such specifications, the question of the sufficiency of the evidence to sustain the findings cannot be considered on appeal from the judgment. This rule extends to the review of proceedings on motion for a new trial where the record is brought up by a bill of exceptions. *Mills v. Brady*, 196 Pac. 776; *Beeson v. Schloss* (Sup.) 192 Pac. 292; *Millar v. Millar* (Sup.) 175 Cal. 799, 167 Pac. 394, L. R. A. 1918B, 415, Ann. Cas. 1918E, 184.

[2, 3] On behalf of appellant, Lydia M. Moir, it is claimed that the action against her is barred for the additional reason that the action was originally commenced against

another party, and that this appellant was not made a party defendant until May, 1917; also that the court erred in permitting substitution of appellant in place of the original sole defendant in the action. For the reasons hereinabove stated, we can consider this point only to the extent that the facts appear in the judgment roll. As shown by the original complaint, the action was commenced against Lydia F. Moir. In the amended complaint, the defendant is named as Lydia M. Moir (sued herein as Lydia F. Moir). The second amended complaint begins thus:

"Comes now the plaintiff and by leave of court amends his complaint herein and for cause of action against the defendant, Lydia M. Moir (who was originally sued herein as Lydia F. Moir), alleges."

In her answer, appellant alleged that she has never been known as Lydia F. Moir, and that the person originally sued herein under that name is her mother. But the court found that the person sued and intended to be sued herein was and is the defendant, Lydia M. Moir; that there was no substitution of one defendant for another, but that by mistake and inadvertence the middle initial of the defendant was erroneously inserted in the original complaint and summons as "F" instead of "M," and that the complaint was amended accordingly when said mistake was discovered. We have no doubt that an error of this kind may be corrected, and that the action should be regarded as having been commenced against appellant at the time when the original complaint was filed. *Allison v. Thomas*, 72 Cal. 562, 14 Pac. 309, 1 Am. St. Rep. 89. In 15 Ann. Cas. 117, numerous cases are cited in support of the proposition that—

"The weight of authority seems to be that, in civil proceedings, a mistake made in the middle initial of a name by the insertion of an erroneous initial for the correct one is immaterial, and should be disregarded."

Appellants next suggest that the insolvency of the bank as early as 1911 is established by the finding of the court that certain circular letters to shareholders were sent out by the general manager of the bank as alleged in the answer of appellants. But the findings of the court that certain specified allegations of the answers are untrue included the alleged facts concerning the laws of Canada, upon which appellants relied. Since these findings must be accepted as establishing the facts of the case, the only law by which the question of insolvency of the bank may be tested consists of the statutory provisions contained in the complaint. It must therefore be accepted to be true, as found by the court, that the bank did not become insolvent until 90 days after the 30th day of June, 1913.

[4] Finally, it is claimed that the proceed-

ings, orders, and judgment in the insolvency matter in the Supreme Court of Ontario were without jurisdiction as against appellants because appellants were not served with notice of those proceedings at any place within the jurisdiction of that court. Appellants claim the benefit of the rule that jurisdiction to render a judgment personally enforceable against the defendant must be founded upon personal service of process within the state or country to which the jurisdiction of such court is confined. *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565. *Belcher v. Chambers*, 53 Cal. 635, and numerous other decisions. In the cases at bar the court found that it is true that, as to whatever notices, summons, processes or pleadings mentioned in the complaints as having been served upon the defendants, such services were made upon them while they were residents of and within the state of California, and not while they were residents of and actually within the Dominion of Canada.

The rule relied upon by appellants is not applicable to proceedings of the nature of those here in question. Such seems to be the effect of the decisions in which the subject has been considered. So far as we are advised, the question has not been determined by the courts of California. A leading case is *Howarth v. Lombard*, 175 Mass. 570, 56 N. E. 888, 49 L. R. A. 301. That was an action brought in a court of Massachusetts by the plaintiff as receiver of a bank in the state of Washington, to recover the amount of an assessment levied by the superior court of the state of Washington upon the defendant as a stockholder. Defendant had not been personally served with process in the state of Washington in the proceedings there in which the assessment was made. The principles governing the matter of jurisdiction in such cases were extensively discussed in the Massachusetts decision, and were applied to the particular case as follows:

"In the case at bar a receiver of the Traders' Bank has been appointed, the amount of its assets and liabilities has been judicially determined, the necessity for an assessment upon stockholders and the amount of the required assessment have been ascertained, an assessment upon all stockholders has been made, and the receiver who is to hold this fund in trust for creditors has been directed to collect it. We see no injustice to the defendant in holding him here to the performance of the obligation which he voluntarily assumed in another state.

"The question arises how far these proceedings in the court of Washington are binding on the defendant. The stockholders must be assumed to have understood the statute from the first as it has been construed by the court. They must be presumed to have agreed that on the insolvency of the corporation a receiver might be appointed by the court, and the affairs of the corporation administered, and the amount of its assets and liabilities determined, and the deficiency ascertained under the order of the

court, and an assessment to meet this deficiency made ratably upon all who were then stockholders. This is the only proper way of accomplishing the object of the statute, and the statute, as construed by the local courts, means this as plainly as if every part were expressed. Under the statute the stockholders impliedly agreed that, if their subscriptions were in part unpaid when they were needed for creditors, they would pay the balance to the corporation or its legal representative, and that if more was needed they would also pay their proper share, up to the amount of their subscriptions, to the trustee of this additional fund, for the benefit of creditors. The determination of the questions involved is a part of the proceedings of the court in the administration of the affairs of a local insolvent corporation. The court of Washington, acting under its general authority in such administration, is the only tribunal which has jurisdiction to determine the amounts due creditors, and to collect and apply the assets of the corporation. The undertaking of the stockholders relates directly to the payment of amounts so to be ascertained. The ascertainment is like a common case of a judgment against a corporation, which is binding on stockholders. The members of such corporations, as well as the corporations themselves, are within the jurisdiction of the local court so far as is necessary for the determination of the rights and liabilities of the corporation and its members among themselves. In reference to this kind of liability, such decisions and orders are binding on stockholders who are not before the court otherwise than by virtue of their membership in the corporation. [Citing cases.] That such adjudications are binding upon absent stockholders in reference to assessments for unpaid subscriptions has often been expressly decided."

The same subject was considered in *Bernheimer v. Converse*, 206 U. S. 516, 27 Sup. Ct. 755, 51 L. Ed. 1163. That was an action originating in the circuit court of the United States for the southern district of New York, wherein the receiver of a corporation of the state of Minnesota sought to recover upon the alleged stockholder's liability under the Constitution and laws of the state of Minnesota. The action was based upon an order made at the instance of the receiver in the Minnesota court having jurisdiction of the receivership. This order fixed the amount of assessment declared to be necessary against each and every share of the capital stock, and authorized the receiver to prosecute actions or proceedings against the persons liable in any court having jurisdiction in the state of Minnesota or elsewhere. Notices of hearing of the receiver's petition had been published, mailed, and served, as required by order of the court, but had not been personally served upon the stockholders, who were defendants in the action brought by the receiver in the federal court. The matter having been brought before the Supreme Court of the United States on writ of error, that court sustained the judgment of the cir-

cuit court, and upheld the validity of the proceedings declaring the assessment. Referring to the proceeding in the action wherein the assessment was made, the court said:

"The proceeding has for its purpose the liquidation of the affairs of the corporation, the collection and application of its assets and other liabilities which may be administered for the benefit of creditors. In such case it has been frequently held that the representation which a stockholder has by virtue of his membership in the corporation is all that he is entitled to. It was so held in a well-considered case in Massachusetts. *Howarth v. Lombard*, 175 Mass. 570, 49 L. R. A. 301, 56 N. E. 888. And it has been held in cases in this court that when an assessment is necessary to be made upon unpaid stock subscriptions for the benefit of creditors, the court may make the assessment without the presence or personal service of stockholders. *Hawkins v. Glenn*, 131 U. S. 319, 33 L. Ed. 184, 9 Sup. Ct. Rep. 739; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 336, 40 L. Ed. 966, 990, 16 Sup. Ct. Rep. 810."

In *Converse v. Hamilton*, 224 U. S. 243, 32 Sup. Ct. 415, 56 L. Ed. 749, Ann. Cas. 1918D, 1292, referring to proceedings under the laws of the state of Minnesota wherein a court there, at the instance of the receiver, had levied an assessment against stockholders who were not made parties to the sequestration suit, and were not notified otherwise than by publication or by mail of the applications for the orders levying the assessments, the Supreme Court of the United States said:

"The constitutional validity of chapter 272 has been sustained by the Supreme Court of the state, as also by this court; and this because: (1) The statute is but a reasonable regulation of the mode and means of enforcing the double liability assumed by those who become stockholders in a Minnesota corporation; (2) while the order levying the assessment is made conclusive, as against all stockholders, of all matters relating to the amount and propriety of the assessment and the necessity therefor, one against whom it is sought to be enforced is not precluded from showing that he is not a stockholder, or is not the holder of as many shares as is alleged, or has a claim against the corporation which in law or equity he is entitled to set off against the assessment, or has any other defense personal to himself; and (3) while the order is made conclusive as against a stockholder, even although he may not have been a party to the suit in which it was made and may not have been notified that an assessment was contemplated, this is not a tenable objection, for the order is not in the nature of a personal judgment against the stockholder, and as to him is amply sustained by the presence in that suit of the corporation, considering his relation to it and his contractual obligation in respect of its debts."

In *Johnson v. Libby*, 111 Me. 204, 88 Atl. 647, Ann. Cas. 1916C, 681, it was likewise held that—

"When, in proceedings for the liquidation of the affairs of a corporation, and for the payment of its debts and engagements, an assessment is necessary to be made upon unpaid stock subscriptions and upon the additional liability which its shareholders have assumed by becoming members of the corporation as shareholders, the court may make such assessment in proceedings therefor against the corporation without the presence of, or personal service upon, the individual shareholders. In such proceedings the representation which a shareholder has by virtue of his membership in the corporation is all that he is entitled to."

In the cases at bar, no attempt was made by either of the defendants to show that she was not a stockholder, or that she was not the holder of the alleged number of shares, or that she had any claim against the corporation which in law or equity she was entitled to set off against the assessment, or that there was any other defense personal to herself. Appellants therefore are not in a position to claim that they were denied any of the rights to which they might have been entitled under the most favorable construction of the law as stated in the foregoing decisions.

The judgments are affirmed.

We concur: SHAW, J.; JAMES, J.

BACON v. TRADERS' OIL CORPORATION. (Civ. 3673; L. A. 6417.)

(District Court of Appeal, First District, Division 1, California. April 4, 1921. Hearing Denied by Supreme Court June 3, 1921.)

1. Corporations §123(12)—Holder of note waived rights under pledge of corporate stock by bringing action in attachment.

Holder of note secured by a pledge of corporate stock waived and abandoned his rights under the pledge by bringing action against the pledgor and others on the note and procuring an attachment to be levied on the shares of stock pledged to him, under Civ. Code, § 324.

2. Corporations §114 — Stock transferable without delivery of certificate; "personal property."

While shares of corporate stock are "personal property" under Civ. Code, § 324, a certificate of stock is merely written evidence of the ownership thereof, and hence, where stock was pledged as security for a note, the certificate being indorsed, a transfer by the debtor of the stock to a third person by a separate instrument was effectual to convey title in the shares of stock to the third person, no transfer of the stock having been made on the books of the corporation to the pledgee, notwithstanding section 3440.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Personal Property.]

3. Corporations §122—Purchaser of stock at execution sale held not to acquire title.

Where certificate of shares of corporate stock was indorsed as security for a note, but no transfer was made on the books of the corporation, and thereafter debtor transferred the stock by a separate instrument to a third person, and such transfer was noted on the books of the corporation, and the pledgee of the stock brought action on the note and attached the shares of stock as belonging to the debtor, and purchased the same at an execution sale with knowledge of the conveyance of the stock to the third person, he acquired no title to the stock, under Civ. Code, §§ 324, 3440.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Frank P. Bacon against the Traders' Oil Corporation. Judgment for defendant, and plaintiff appeals. Affirmed in District Court of Appeal, and hearing denied in Supreme Court.

A. L. Abrahams and P. B. D'Orr, both of Los Angeles, for appellant.

Adams, Adams & Blinford, of Los Angeles, for respondent.

WASTE, P. J. The plaintiff, claiming to be the owner of 300 shares of preferred capital stock of the Traders' Oil Corporation, defendant in this action, made demand for a transfer of the shares to himself on the books of the company, and that the corporation issue to him a new certificate therefor. The demand was refused, whereupon the plaintiff brought this action for the recovery of damages, alleging the wrongful conversion of the stock by the defendant to its own use. Judgment was entered for the defendant, and plaintiff appeals.

The facts are few and are practically agreed upon. Harry Jackins, together with other parties, whose connection with the matter is not material here, indorsed the promissory note of the Leasehold Company, a corporation, which note was delivered to the appellant. Subsequently Jackins became the owner of 300 shares of the preferred capital stock of the Traders' Oil Corporation, his ownership being represented by certificate No. 249. Thereafter Jackins and M. V. McQuigg, for value, executed and delivered to appellant their promissory note for \$18,500. As collateral security for its payment Jackins indorsed and delivered to appellant the certificate for the 300 shares of the stock of the defendant so owned by him. Appellant did not have this transaction noted on the books of the corporation. A few days later, by a separate instrument in writing, and consideration of McQuigg assuming Jackins' liability on the promissory note for \$18,500, and other consideration, Jackins transferred to McQuigg all his right, title and interest in and to said stock certificate No. 249, and directed the corporation to transfer the stock

to McQuigg, waiving and relinquishing all interest that he had in the stock, and all dividends arising thereunder. Immediately after the execution and delivery of this agreement to McQuigg, Jackins and McQuigg together went to the office of the Traders' Oil Corporation, and orally informed the assistant secretary of the corporation that the ownership of the shares of stock had been transferred to McQuigg. The latter thereupon requested that the proper entries be made on the stock ledger of the corporation, showing the change of ownership of the stock. This request was complied with. An indorsement was entered on the page of the stock ledger containing Jackins' account, which clearly indicated that the shares of stock in question had become the property of McQuigg, and that the dividends thereon were thereafter to be paid to him.

A short time after this transfer, the note of the Leasehold Company not being paid, appellant brought suit thereon, making Jackins and his coindorsers on the note parties defendant with the corporation. He procured an attachment to be issued, which was served upon the respondent, and under which the sheriff attached all stock, or shares, or interest in any stock or shares in the Traders' Oil Corporation belonging to Jackins. Appellant obtained a judgment against the Leasehold Company, Jackins, and others. Execution was duly issued and levied upon the stock of the Traders' Oil Corporation claimed to belong to Jackins. At the execution sale which followed the appellant bid the sum of \$1,500 for this stock, and received a sheriff's certificate of sale therefor. This he presented to the Traders' Oil Corporation, with a demand that it issue to him a new certificate representing the shares of stock so purchased, and make the proper entry upon its books, showing the transfer. He did not surrender, nor offer to surrender for cancellation, certificate No. 249, which had theretofore been delivered to him. Upon refusal by respondent to comply with the demand appellant brought this action.

It was admitted in the court below that the value of the stock was \$16,500; that presentation of the original certificate, No. 249, with the sheriff's certificate, was unnecessary, and would have been futile in so far as influencing respondent to issue the stock to appellant. It was also stipulated that at the time of the execution sale the appellant had notice of McQuigg's claim that the stock had been sold and transferred to him.

[1] Appellant is not here claiming any rights under the provisions of section 324 of the Civil Code, relating to the transfer of shares of stock in corporations. He admits that when he brought his action against Jackins and the others on the promissory note of the Leasehold Company, and procured the attachment to be levied on the shares of stock which Jackins had pledged to him, he

waived and abandoned his rights under the pledge. This was undoubtedly true. *Latta v. Tutton*, 122 Cal. 279, 283, 54 Pac. 844, 68 Am. St. Rep. 30; *Clafin Co. v. Bretzfelder*, 69 Ark. 271, 279, 62 S. W. 905. He bases his attack on the judgment upon other grounds. At the time of the sale and transfer of the stock by Jackins to McQuigg, the certificate for the stock was, and remained, in the possession of appellant. Consequently it was not delivered by Jackins to McQuigg, or surrendered by the latter to the Traders' Oil Corporation for cancellation and reissue. Placing his reliance therefor upon the provisions of section 3440 of the Civil Code, relating to the transfer of personal property other than a thing in action, appellant contends that the sale from Jackins to McQuigg was void as to him, a creditor of Jackins, for the reason that it was not, he claims, accompanied by an immediate delivery and followed by the actual and continued change of possession of the stock transferred.

[2] We do not believe there is merit in this contention. While the shares of stock in the Traders' Oil Corporation, acquired and owned by Jackins, were personal property under section 324 of the Civil Code, the certificate of stock was merely written evidence of the ownership thereof. 14 Corp. Jur. p. 478, par. 698; *Craig v. Hesperia Land & Water Co.*, 113 Cal. 7, 12, 45 Pac. 10, 35 L. R. A. 306, 54 Am. St. Rep. 316; *Williams v. Ashurst, etc., Co.*, 144 Cal. 619, 625, 78 Pac. 28. Consequently, while the section of the Code, supra, provides that shares of stock of a corporation may be transferred by indorsement and the delivery of the certificate, but that such transfer is not valid except as to the parties thereto until entered upon the books of the corporation, we find nothing in the section declaring that a transfer without such indorsement and delivery of the certificate, may not be made. In fact, the accepted doctrine appears to be otherwise. Thompson in his work on Corporations (2d Ed.) vol. 4, par. 4326, lays down the rule that the correct method of transferring the full legal title of corporation stock is by an assignment, *either by a separate instrument* (Italics ours), or by an indorsement on the certificate to the purchaser, duly signed by the holder of such certificate and by the actual registration of the transfer on the books of the corporation, when this is required either by statute or charter or by a valid by-law.

"It may be said in a general way," says this author, "that any assignment, by delivery or otherwise, which is finally entered and transferred on the books of the corporation, according to its rules, is a transfer of the legal title. The very purpose of the transfer on the books is to pass the legal title to the transferee."

We think the rule thus laid down is in entire accord with the provision of section 324 of the Civil Code. The execution and delivery

of the separate instrument by Jackins to McQuigg in the instant case was as effectual as an assignment of the certificate as if that document itself had been actually indorsed and delivered.

[3] Plaintiff was but a purchaser at an execution sale. While one who purchases at execution sale shares of stock of a corporation, standing on the books in the name of the judgment debtor, is entitled to have the certificate of such shares released to him as such purchaser, if at the time of the purchase he acts in good faith, and without notice that the outstanding certificate has been assigned, and that the ownership of the stock has passed to some other person (*Security Com. & Savings Bank, etc., v. Imperial Water Co.* [Sup.] 192 Pac. 22), that rule has no application here. In the instant case appellant admits that he had notice at the time of the execution sale of the fact that the stock had been transferred by Jackins to McQuigg by a sale which we hold to be valid. He therefore acquired no title to the stock. *Blake-man v. Puget Sound Iron Co.*, 72 Cal. 321, 13 Pac. 872.

The judgment is affirmed.

We concur: KERRIGAN, J.; RICHARDS, J.

Opinion of Supreme Court in Bank denying Hearing.

PER CURIAM. The application for a hearing in this court after decision by the District Court of Appeal of the First Appellate District, Division One, is denied.

We would say, however, that we do not understand the opinion of the District Court of Appeal as holding that section 3440, Civil Code, does not apply to a transfer of stock whose ownership is evidenced by stock certificates. We understand the opinion as going upon the fact that the transfer had been made on the books of the corporation, and thereby the requirements of section 3440, Civil Code, had been complied with.

All concur.

ALBERTSON v. MacFARLANE. (Civ. 3593.)

(District Court of Appeal, First District, Division 2, California, Aug. 20, 1921. Hearing Denied by Supreme Court Oct. 18, 1921.)

1. Estoppel §68(3)—Defense in former action held an election to treat deed as mortgage.

Where defendant in action to quiet title set up a defense that a deed given to plaintiff was intended as a mortgage, such election to treat the conveyance as a mortgage precluded him from later attempting to treat the deed as a trust deed and to proceed in another action to enforce the trust.

2. Judgment §744—Matter determined in former suit not again considered.

Where defendant in suit to quiet title set up defense that deed to plaintiff was intended as a mortgage, and the judgment was in favor of plaintiff, defendant could not in a later action claim that the deed was intended as a mortgage.

Appeal from Superior Court, Alameda County; J. O. Moncur, Judge.

Action by Rasmus H. Albertson against M. MacFarlane. Judgment for defendant, and plaintiff appeals. Affirmed in the District Court of Appeal and hearing denied in Supreme Court.

Sawyer & Sawyer, of San Francisco, for appellant.

H. L. Breed, of Oakland, for respondent.

STURTEVANT, J. On December 31, 1917, the plaintiff filed a complaint in the trial court, asking that the trial court adjudge him to be the owner of, and that the defendant was holding, a certain piece of property in Alameda county as trustee for the plaintiff. The defendant filed an answer in which he denied the allegations stated in the complaint, and as a second defense he pleaded a certain judgment in bar, and he also filed an amendment to his answer in which he set forth the statute of limitations. A trial was had, in which all the issues so made by the pleadings were fully tried out. In other words, the judgment of the trial court did not turn solely on the statute of limitations, nor solely on the plea of a judgment in bar, but rested on all of the issues. The judgment of the trial court was in favor of the defendant. The plaintiff has appealed, and has appeared in person during a part of the proceedings, and latterly Sawyer & Sawyer, attorneys at law, did, as a matter of charity, prepare and present to this court a brief on behalf of the appellant. The appellant's brief makes four separate points: (1) That appellant is the owner of the land; (2) that the deed to MacFarlane is a mortgage; (3) that it has never been foreclosed; and (4) that the prior judgment was made and entered against the appellant at a time when he was actually insane and actually an inmate of a state hospital, and therefore is not a bar. The respondent, in reply, makes three separate points: (1) That all the material allegations in the complaint were tried out by the trial court, that the evidence perchance may be said to be conflicting, but that all of the allegations of plaintiff's complaint were found against the plaintiff, and that such findings are conclusive on this court; (2) that the question of title to the lands in dispute was tried out in a former action between the same parties, and that the judgment in the former case is a bar; and (3) that the plaintiff's cause of

action, if any he has, is barred by the statute of limitations. Among other things, the court found that on, and long prior to, the 6th day of February, 1913, plaintiff was the owner in fee of the lands described in plaintiff's complaint; that on February 6, 1913; plaintiff sold said lands to the defendant, who has ever since been in possession thereof, claiming to own the same; that the deed of conveyance was absolute in form, and was not intended to be a mortgage, nor to be a conveyance in trust; that prior to the commencement of this action, the plaintiff never demanded of defendant an accounting, nor did he ever tender to the defendant \$1,240, together with interest thereon from the 6th day of February, 1913; that on the 6th day of February, 1913, and at the time of the trial, the property in dispute was of the value of \$1,500, and no more; that subsequent to the execution of the deed dated February 6, 1913, the defendant gave to the plaintiff an option to purchase said property on, or before, the 6th day of April, 1913, and the plaintiff never exercised said option; that on May 27, 1913, plaintiff made a deed, absolute in form, conveying said lands to John W. Striker, and thereafter John W. Striker made a quit claim deed to this defendant; that plaintiff's action herein is barred by a certain judgment rendered on the 17th day of December, 1913, by the superior court of Alameda county, in an action therein pending wherein this defendant, M. MacFarlane, was the plaintiff, and this plaintiff, Albertson, was the defendant, wherein the title of this defendant, M. MacFarlane, was quieted, and this plaintiff, Albertson, and all persons claiming under him subsequent to the 29th day of August, 1913, were forever barred and enjoined from claiming any right, title, interest, or estate, of, in, or to, said real property, or any part thereof, or lien thereon, adverse to this defendant; that said judgment was duly given and made in the superior court of Alameda county, and was entered on the 19th day of December, 1913; that plaintiff's action herein is barred by the provisions of subdivision 1 of section 337, and the provisions of subdivision 1 of section 339, and by the provisions of section 343 of the Code of Civil Procedure of the state of California.

[1] The plaintiff's complaint hints at fraud. The hint is predicated upon what purports to be a secret oral agreement that the deed from the plaintiff to the defendant was intended to be a conveyance in trust. On conflicting evidence the court found against the plaintiff. The finding was in accordance with the great weight of the evidence. If any fraud was committed, the plaintiff was advised of the defendant's contentions as early as August 29, 1913, the date of the filing of the complaint in the first action. The claimed fraud was a matter which could have

been and should have been litigated in that action. True it is that in that case this plaintiff claimed that his deed to this defendant was intended as a mortgage. He was bound to elect which theory to advance. In making the election to proceed upon the mortgage theory he precluded himself from the right to claim thereafter that the deed was intended to be a trust deed. The two theories are inconsistent. The election in 1913 to treat the conveyance as a mortgage precluded this plaintiff from later attempting to treat a bargain and sale deed as a trust deed. *Parke, etc., Co. v. White River L. Co.*, 101 Cal. 37, 40-41, 35 Pac. 442.

[2] As we have stated above, in his brief, as distinguished from his pleadings, the plaintiff now claims that his deed to the defendant was intended as a mortgage, and that the mortgage has never been foreclosed. But, that theory was expressly advanced in the prior action, and was expressly determined adversely to the contention of this plaintiff. As to this last contention the prior judgment has become a bar, and the courts are not at liberty to again consider the question.

Something is said in the briefs regarding the fact that during a part of the time that the first action was pending this plaintiff was being confined pursuant to a judgment of lunacy. No claim is made that summons was not duly served. No facts are shown which indicate that the incarceration for insanity prevented a full presentation of the plaintiff's case in the first action; and, even though such facts existed, they would not be a proper subject for consideration under the pleadings in this case.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. In denying the application for hearing in this court after decision by the district court of appeal of the first appellate district, division two, we wish to state that we are not prepared to approve what is said with relation to the matter of the alleged insanity of the plaintiff at the time the former action was instituted, pending and decided. This matter, however, was material only on the issue of bar by former judgment. The finding on this issue is not essential to the judgment here in view of the findings on the other issues which sufficiently support the judgment in favor of defendant, regardless of the finding on the issue of former judgment.

The application for a hearing in this court is denied.

All concur except SHAW, J., absent,

RAMSEY v. CALIFORNIA PACKING CORPORATION et al. (Civ. 2269; Saa. 3087.)

(District Court of Appeal, Third District, California. Feb. 23, 1921. Opinion of Supreme Court in Bank, Denying Hearing, April 19, 1921.)

1. Appeal and error § 659(3)—Original complaint made part of record on appeal.

Where answer denied certain allegations of complaint on information and belief by specific reference to the numbered lines and pages of the original complaint, but not to the complaint, as to the paging and the numbering of the lines thereof, as printed in the transcript on appeal, a suggestion of diminution of record, with the object of bringing before the appellate court, the original complaint, should be allowed.

2. Chattel mortgages § 136 — Removal of crop with consent of mortgagee not tortious, and lien is lost.

If mortgaged crops are removed with the consent of the mortgagee, they are not wrongfully or tortiously removed, and the lien of the mortgage on removal ceases by operation of law, under Civ. Code, § 2972.

3. Acknowledgment § 20(2), 53 — Chattel mortgages § 150(1)—Execution of chattel mortgage before joint beneficiary not notice to third persons when recorded.

Every instrument required to be recorded, with the exception of those belonging to the class mentioned in Civ. Code, §§ 1159, 1160, 1202, 1203, cannot be recorded, unless execution is acknowledged by the person executing it, and an acknowledgment taken before a grantee or one standing in the position of a beneficiary under a conveyance or other instrument is void, and does not entitle an instrument to be recorded, and a chattel mortgage executed before a notary public, who was a partner and joint beneficiary in the notes and mortgage, while in full force and binding between the parties, did not impart any notice to third persons of the mortgagee's right under it, though recorded.

4. Chattel mortgages § 229(3) — Mortgagee must rebut presumption that he consented to removal of crops.

In an action by mortgagee against purchaser of mortgaged tomatoes, where it appeared in evidence that the tomatoes had been removed from the premises before the purchase, the burden was on the plaintiff to rebut the presumption that the lien had been extinguished by showing that the tomatoes were removed without his knowledge and consent, and that it was therefore a tortious removal.

5. Chattel mortgages § 229(3) — Mortgagee, suing purchaser of crop, must show knowledge of tortious removal from premises.

In action by mortgagee of crop of tomatoes against third person, who had purchased the same after they had been tortiously removed from the premises by the mortgagors, burden was on the plaintiff to show that the purchaser had knowledge of the wrongful removal of the crop from the premises.

6. Chattel mortgages § 136—Permitting mortgagors to remove crop and sell same substitution of personal obligation.

An agreement of mortgagee, allowing mortgagors to sell mortgaged crops and turn over the proceeds to mortgagee, amounted in practical effect to a substitution of the personal obligation of the mortgagors for the security of the mortgage.

7. Pleading § 355—Refusal to strike out denials in answer on information and belief proper.

In an action by mortgagee of crop against third persons, purchasing the same from mortgagors, court properly refused to strike out from answer denials on information and belief relating to allegations of complaint, which referred to execution of notes, mortgage, good faith thereof, acknowledgment and recordation of the mortgage, and that no part of the note was paid; the mortgage not being recorded as required by law, in that it was executed before a joint beneficiary of the note and mortgage.

8. Appeal and error § 1047(3)—Striking lease from evidence in action on chattel mortgage held not prejudicial.

In action by mortgagee against purchasers of mortgaged crop, tried on the theory that mortgagors were owners of the crop and tortiously removed the same, it was not prejudicial error, if error at all, to strike from the evidence a lease of the land from mortgagee to mortgagors, wherein it was provided that title to crop should remain in mortgagee; it being immaterial whether or not mortgagors were tenants of the plaintiff.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by W. C. Ramsey against the California Packing Corporation and others. From a judgment of nonsuit, plaintiff appeals. Affirmed in the District Court of Appeal, and hearing denied in Supreme Court.

A. H. Carpenter, of Stockton, for appellant.

R. C. Minor and Nutter, Hancock & Rutherford, all of Stockton, and Pillsbury, Madison & Sutro, of San Francisco, for respondents.

HART, J. This is an appeal by plaintiff from a judgment of nonsuit granted at the end of plaintiff's case on the motion of the defendants California Packing Corporation and E. Powers, who interposed their respective answers to the complaint. The defendants Kim and Hahn did not file an answer or answers to the complaint. The appeal is supported by a bill of exceptions. The facts, in summary, may be stated as follows:

Plaintiff was the owner in fee of 320 acres of ranch property which he leased to the defendants Kim and Hahn on the 1st day of November, 1917, for the term of one year

wherein, plaintiff asserts in his brief, there was a stipulation that "the title to the crops shall remain in the party of the first part [plaintiff] until the entire rental is paid and the work performed." The complaint alleges on the 18th day of March, 1918, the same defendant lessees gave to the plaintiff two promissory notes, one for \$3,000, and the other for \$2,000, and, to secure the payment thereof, at the same time gave to said plaintiff and owner of said real property a crop or chattel mortgage on all crops of sugar beets, tomatoes, beans, Egyptian corn and similar products "being, standing, and growing" on the land described in the mortgage at that time, namely, March 18, 1918, when the chattel mortgage was signed. The note for the smaller amount was subsequently paid in full by the makers, who, also, before this suit, paid \$500 on the other note. At the close of the harvest season of 1918, the answering defendants, California Packing Corporation and E. Powers, purchased and received possession from the said mortgagors (Kim and Hahn) of all the said crops of Egyptian corn and tomatoes and applied the same to their own use. Shortly after such sale and delivery of said crops by Kim and Hahn, the plaintiff demanded the aforesaid crops from said purchasers, or enough of the proceeds thereof to satisfy his mortgage claim. The said answering defendants refused to return the crops so sold and delivered as aforesaid, or to pay or satisfy said mortgage note. This action is for damages in the sum of \$2,622.50; the said damages being equal to the balance due on said note, for the tortious removal of the mortgaged chattels from the land described in the mortgage and the wrongful conversion of said property. The case was tried by the court without a jury.

The court, upon the close of the plaintiff's case, and on motion of counsel for the answering defendants, struck from the record the lease whereby the premises described in the mortgage were demised to Kim and Hahn. Immediately following the making of that order, the motion of the defendants California Packing Corporation and Powers for a nonsuit was granted upon the following grounds and reasons:

"First, that the crop or crops, the value of which plaintiff is suing for, were not crops included in the mortgage; second, because the mortgage itself is invalid, as the execution of the instrument was before a person who was one-half interested in the proceeds of these crops; third, the general principle of law, of course, is that cited in the section, that the crops when severed—the old law was when severed from the soil—the crop mortgage became extinguished, and later the statute went one step further and stated they had to be removed from the premises; in other words, so long as the crops are on the premises, of course, the mortgage still exists, but, when removed, the

mortgage becomes extinguished—here are the exceptions, and the plaintiff must show we are in the excepted class—that the goods were moved tortiously, and that there was some act or thing done by the defendant himself that caused that removal; fourth, the law says there must be some testimony of diligence on the part of the mortgagee of a crop mortgage. He cannot sit by, and wait for a season to pass, and allow those crops to leave the lands, or to be taken therefrom, and then afterwards, when an innocent purchaser buys the property, go to the man for the crops, or go to the man for the money."

[1] Before taking up for consideration the points involving the merits of this controversy, it is proper that we should first dispose of the suggestion of a diminution of the record on appeal made and filed by the respondent California Packing Corporation. The answer of said respondent denied certain allegations of the complaint on information and belief by specific reference to the numbered lines and pages of the complaint as they were numbered in the original draft of that pleading. Counsel for the plaintiff moved in the court below that so much of the answer as denied the allegations thus referred to "on information and belief" be stricken out, on the ground that the matters as to which, by its denials, the Packing Corporation disclaimed knowledge were presumptively within its knowledge, and should therefore have been directly denied. Typical of the allegations thus denied were those relative to the execution of the mortgage and the promissory notes by the nonanswering defendants, Kim and Hahn. It appears, however, that the denials of the answer to said allegations of the complaint on information and belief, while so conforming to the original complaint as it was numbered by page and lines as that no possible misunderstanding could arise as to the particular allegations of the complaint to which such denials were addressed do not conform to the complaint, as to the paging and the numbering of the lines thereof, as it is printed in the transcript on appeal. The object, therefore, of the suggestion of the diminution of the record was to bring before this court the original complaint, so that this court would be afforded enlightenment upon the point urged by the appellant that the court below erred in refusing to grant his motion to strike from the Packing Corporation's answer the denials referred to. We think the suggestion should be allowed, and it is therefore the order that the record certified to this court on the suggestion be and the same is incorporated into the record as a part thereof. Whether the court erred in refusing to strike from the said answer the denials referred to will be considered herein later on.

Upon the merits, we first remark that the

ground of the nonsuit first above stated, to wit, that "the crop or crops, the value of which plaintiff is suing for, were not crops included in the mortgage," is, to the mind of the writer of this opinion, not only very technical but of doubtful validity. The argument supporting that position is, in effect, that the language of the mortgage describing the property to which it was intended the lien should attach, being in the present tense, or having reference to crops then (at the time of the execution of the mortgage) growing and standing on the land, and that the crops, the value of which the plaintiff is suing for, not having been planted, and not "being or growing or standing" on said land, until several months after the mortgage was executed, the crops involved herein are not and could not be held to be affected by the mortgage lien.

The judgment, however, must be affirmed for other reasons, as presently we will show, and therefore, while it is not necessary and we will not attempt to construe the mortgage for the purpose of ascertaining its just scope and effect, we will nevertheless suggest that it is very doubtful (at least in the mind of the writer) whether the language of the mortgage referred to, although in the present tense, is required to be so construed as to compel the conclusion that the mortgage does not include, nor was intended by the parties to cover, any crops of the kind specifically mentioned in the instrument (beans, tomatoes, corn, etc.) whenever seasonably produced upon the land within the year during which the notes and mortgage were to run (year 1918), it being shown, and, indeed, a matter of common knowledge, that at the date of the execution of the notes and mortgage it was not the season of the year to plant and grow such crops. That the mortgage was intended and is sufficiently definite to include the crops involved herein would certainly be not only the just, but the equitable construction of the mortgage, and the view that a court of equity would be strongly inclined to take in such a case before it would deny to the mortgagee the only security he in good faith believed his mortgage afforded him for the payment of a just and honest debt, in the event that the case reached that forum by proceedings in foreclosure, as thus it could properly be taken there (Civ. Code, § 2967; Code Civ. Proc., §§ 726-729), the remedy by foreclosure being of equitable cognizance, albeit the right to make and to take a chattel mortgage to secure an indebtedness is purely of statutory origin. But as stated, it is not necessary to decide the question here, and it is to be understood that the suggestions we offer are wholly gratuitous and do not involve a definite, or, indeed, any construction of the scope and meaning or in-

tent of the mortgage in the particular mentioned. We will, however, in considering the remaining questions, assume that the mortgage is not susceptible to the construction to which the respondents subject it.

[2] The other three grounds and the reasons upon which the nonsuit was presumptively granted practically involve the same ultimate propositions, viz.: Whether the crops were tortiously removed from the freehold and sold, and, even if so, whether the respondents were parties to those tortious and unlawful acts. Obviously, if the crops were removed by and with the consent of the plaintiff, then they were not wrongfully or tortiously removed, and in that case the lien of the mortgage ceased upon such removal by operation of law. This proposition follows from the terms of section 2972 of the Civil Code, which reads as follows:

"The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of mortgagor."

It is in order first to inquire whether, assuming for the purposes only of such inquiry that Kim and Hahn wrongfully removed the crops from the land, the answering defendants knew, before or at the time they purchased the crop, that such removal was tortious, and the first step to that end is to ascertain whether they had either actual knowledge or legal notice of the existence of the mortgage at the times designated. As to actual knowledge, it is to be said that there is no evidence showing, or even remotely tending to show, that they had any such knowledge of the mortgage, and if, therefore, they are to be charged with any wrong in the transaction culminating in the sale of the tomatoes and corn to them, they can only thus be bound because there must be imputed to them the notice of the mortgage constructively imparted to them by reason of the recordation of said mortgage as required by law.

[3] The contention of the respondents is, and so the court below expressly held in its decision of the motion for the nonsuit, that the mortgage was not legally recorded, and, consequently, did not impart constructive notice of its existence to third parties, for the reason, so it is asserted, that the evidence shows that T. F. Emerson, the notary public before whom the instrument was acknowledged, was a partner and joint beneficiary with the plaintiff in the notes and mortgage securing the same at the time of and subsequent to the execution of those instruments.

The law is, as is well understood, that every instrument required to be recorded, with the exception of those belonging to the class mentioned in sections 1159, 1160, 1202, and

1203 of the Civil Code, cannot be recorded unless its execution is acknowledged by the person executing it, "or if executed by a corporation, by its president or secretary, or other person executing the same on behalf of the corporation," etc. Civ. Code, § 1161. But it is the settled law in this state, as well as in other jurisdictions, "that an acknowledgment taken before a grantee, or one standing in the position of a beneficiary under a conveyance, or other written instrument, is void, and does not entitle an instrument to be recorded." *Greve v. Echo Oil Company*, 8 Cal. App. 275, 284, 96 Pac. 904; *Merced Bank v. Rosenthal*, 99 Cal. 39, 31 Pac. 849, 33 Pac. 732; *Lee v. Murphy*, 119 Cal. 364-370, 51 Pac. 549, 955; *Murray v. Tulare Inv. Co.*, 120 Cal. 311, 49 Pac. 563, 52 Pac. 586; *Henrici v. Land Co.*, 177 Cal. 442, 446, 170 Pac. 1135. While, as between the parties to a mortgage so acknowledged, the mortgage is in full force and binding efficacy, the record of the instrument does not impart any notice to third persons of the mortgagee's right under it. *Lee v. Murphy*, supra, 119 Cal. 370, 51 Pac. 955, and cases there cited.

The evidence in this case shows, without conflict, that at the time of the execution of the notes and mortgage, and in fact at all times, Emerson was not only a partner of the plaintiff in the real estate business in the city of Stockton, but was interested as a partner of and beneficiary with plaintiff in the notes and mortgage in question here. The plaintiff, testifying on his cross-examination, stated that—

"T. F. Emerson, the notary public who took the affidavit of W. T. Kim and C. H. Hahn to the crop mortgage pleaded in the complaint, and who also took the acknowledgment of W. T. Kim and C. H. Hahn to the crop mortgage, is the owner of a half interest in the land described in the complaint; that he and Emerson were partners in business; that Emerson owned one-half interest in all the crops that were growing on the premises on the day the mortgage in question was executed; that Emerson's interest in the said crop was similar to his (plaintiff's)—that is, each of them had a like interest in the crops."

Emerson, while denying that he had any interest in the land described in the mortgage, did not deny owning an interest in the crops grown thereon and the notes and mortgage. From his testimony generally, however, the inference appears to be justified, if not irresistible, that he was interested in the crops to the extent of the mortgage lien thereon. It was Emerson who personally prosecuted efforts to secure the payment of the note secured by the mortgage after the tomatoes and corn had become ready for harvesting. He testified that he saw said crops while they were growing, that he saw them after they had been harvested, and that he kept in such touch with the situation as to

know that portions of said crops had been severed from the land and sold to the two answering defendants. He talked with Kim and Hahn about the crops, and told them that they (plaintiff and himself) desired to secure payment of the note from the sale of said crops; that after he found out that the crop of tomatoes had been sold to the defendant Packing Company he—

"talked with Mr. Kim about it, and he was to make some payment upon the note for rent—this mortgage note; and I had been after him on that right along, because we wanted to get it fixed up. I asked him how soon he could pay something, and he said that he could pay just as soon as they remitted to him—the cannery company."

He further testified that, after considerable effort to obtain an interview with Mr. Davis, the local manager at Stockton of the Packing Corporation, after the latter had purchased the tomatoes and before paying for them, he met him (Davis) in the month of October, 1918, when—

"I told him that Mr. Kim owed us some money, and we had been after Mr. Kim for it, and he (Kim) said that Mr. Davis, or the company, was to pay the money. I said [to Davis]: 'How soon will that be?' He said they would all be in in a little bit and it would be fixed, if possible—they were always glad to fix up anything of that kind, and didn't want any trouble about the matter. I said we are anxious about it, just as much as you are. * * * Mr. Davis said to me: 'I will take the matter up with the company. I will get in correspondence with them, and you will hear from them later.' I did say that we wanted our money for our goods."

And this was the trend of all of Emerson's testimony, and from it, as stated, it is clearly to be inferred that he was a partner of and joint beneficiary with the plaintiff in the notes and the mortgage in controversy. In view of the fact that there was not a direct or even inferential denial by Emerson of the positive statement of plaintiff that he (Emerson) was interested in the note and mortgage equally with plaintiff, and of the further fact that Emerson at all times in his testimony in effect referred to the indebtedness evidenced by the note described in the mortgage as being due to him and plaintiff jointly, and there being no testimony upon that proposition, other than that of plaintiff and Emerson, there is, it is manifest, clear justification for our statement, above made, that the evidence without conflict, appears to show that plaintiff and Emerson were and are partners and joint beneficiaries in the note and mortgage described in the complaint. Indeed, it seems to us that no other conclusion can follow from the testimony introduced by the plaintiff. It, of course, results that the mortgage was and is, as to third parties, illegal and void. And it is to be noted that there is a marked distinction be-

tween the case where there are several grantees or mortgagees, each taking or having a separate and defined interest in the grant or mortgage, and the case we have here. In the former it has been held that the deed or mortgage should be treated as if made separately to each of such grantees or mortgagees, and that therefore the acknowledgment should be held good to all of them except the party taking it. *Murray v. Tulare Inv. Co.*, 120 Cal. 311, 314, 49 Pac. 563, 52 Pac. 586.

In the present case, as will be observed, the evidence shows that the mortgage was, in fact, though not eo nomine, to the plaintiff and the party taking the acknowledgment as copartners—in point of fact, joint mortgagees. There was no "separate and defined interest" in either of the two parties constituting the partnership for and in behalf of which the acknowledgment was taken. It follows that the mortgage, being void in its effect upon third parties because of the defective acknowledgment, or in fact, for the reason that in law there was no acknowledgment at all of the execution thereof which would entitle it to be recorded, imparted no notice of its existence to the answering defendants herein by the mere act of its having been recorded. In other words, the act of placing the mortgage of record was without legal force or effect so far as the respondents were concerned, and did not, as to them, operate as constructive notice of its existence. Nor was there any evidence showing that respondents had knowledge of any facts sufficient to put them on inquiry which, if followed up with reasonable diligence, would have discovered to them the existence of the mortgage.

Obviously, if the answering defendants had no actual knowledge or any notice of the existence of the mortgage at the time they purchased the crops in question, they were innocent purchasers, and cannot be bound by the acts of Kim and Hahn in removing the crops from the freehold, even if such removal was tortious and unlawful.

But, aside from the above considerations, it is very plain that the nonsuit was properly granted for the reason that the evidence clearly shows that the understanding between the parties was that Kim and Hahn were to remove and sell the crops and with the proceeds pay their mortgage indebtedness to plaintiff and Emerson. From the testimony of Emerson, some of which is referred to in connection with the above consideration of the question of the validity of the acknowledgment of the mortgage, it is clear that he knew, before the removal of the crop, that Kim and Hahn intended to remove and sell the same. Emerson admitted that he knew that certain portions of the crop had been removed from the premises and sold, and that the mortgagors intended to remove and sell the remainder; yet neither the

plaintiff nor his partner took any steps to prevent such removal and sale. But there was, evidently, according to Emerson's uncontradicted testimony, no intention on the part of plaintiff and Emerson to object to such removal and sale—that, indeed, the removal and sale of the crops by the mortgagors they sanctioned—for, having been asked by counsel for the Packing Corporation the following question:

"It was your understanding, was it not, throughout this transaction, from Kim, that he should sell the tomatoes?"

—he replied:

"Yes, sir, and pay the rent to us; that he should have the power to sell them and deliver them to whomsoever he chose."

He further testified, referring to a conversation he had with Kim at the premises on which the crops were grown, on the 25th day of October, 1918:

"Yes; I had been talking with Kim at that time, and then right along after. Kim said (addressing Emerson): 'You will get all your money, because Egyptian corn is good. * * * There will be plenty of money, with the tomatoes and the Egyptian corn, to pay for rent.' * * * He assured me that just as quick as the crops were cut off and sold we would get the money. That was satisfactory to me."

The plaintiff did not contradict that testimony, nor, as stated, is there any testimony in the record contradictory thereto. Indeed, the plaintiff himself testified:

"I am familiar with farming in this location, and I know when tomatoes generally ripen and are ready for delivery at Manteca (near which place are situated the premises on which the crops involved herein were grown); they commence to ripen along in September and October; I knew they were ripening in those months, but I did not know that they had been sold; I did not know what Kim was doing with them, or where they were being delivered; I judged that they were, but I could not have told to whom they were delivered or to whom they were sold."

Every act and movement of Emerson in the transaction seems to corroborate the foregoing testimony. Emerson, as between himself and Ramsey, appeared to be the most active in looking after their interests in the crops and in securing, after the maturity of the crops, a satisfaction of the mortgage debt, and furthermore, after the sale of the tomatoes to the Packing Corporation, it does not appear that he complained to Kim and Hahn for removing and selling the crops. He did not tell them that they had done wrong in doing so, but by his general conduct of quiescence as to such removal and sale, very clearly appeared to have regarded their acts as within the power and the rights of Kim and Hahn. His only concern about the matter then seemed to be as to the pay-

ment by the Packing Corporation for the tomatoes; his purpose being to obtain such payment direct to him and the plaintiff, instead of to the mortgagors. Certainly, if the understanding was not such as Emerson positively testified that it was, to wit, that Kim and Hahn were vested with full power to remove the crops from the premises and sell the same, and thereupon pay the money to plaintiff and Emerson in extinguishment of the mortgage, the latter were, according to their own testimony, culpably negligent in the matter of the preservation of the integrity of their security. As to the tomatoes, they knew, as everybody knows, that that vegetable is of the perishable kind, requiring immediate preservation very soon after being harvested. Emerson said he visited the premises very often, and, of course, he knew from that fact, if not from his general acquaintance with the seasonal characteristics or peculiarities of the tomato—that is, the time for planting the same and the time when, in the ordinary course of nature, it has so developed as to require that it be harvested—when the time for harvesting was reached, and still, as before declared, he and the plaintiff themselves made no move looking to the disposal of any of the crops. It would thus seem that there was no other course left to Kim and Hahn, if anything was to be realized from said crops, but to dispose of them themselves.

[4-8] Even if it were necessary to concede here that there was no other showing of an abandonment of the mortgage security by the plaintiff and Emerson, but the circumstances to which we last above refer, it is very clear that the judgment of nonsuit would have to stand; for, at the time of the purchase of the tomatoes by the Packing Corporation and the corn by Powers, the lien of the mortgage had *prima facie* been extinguished by the removal of those crops from the land on which they were grown (*Horgan v. Zanetta*, 107 Cal. 27, 30, 31, 40 Pac. 22; *Gates v. Tom Quong*, 3 Cal. App. 443, 446, 85 Pac. 662), and it rested upon the mortgagee, if he would still enjoy the benefit of his mortgage security, to rebut that presumption by showing that the crops were removed without his knowledge and consent, and that it was therefore a tortious removal; and, as before declared, even if it had been shown that the mortgagors had wrongfully removed the crops and sold the same to a third party, it would still be necessary, to bind the latter in an action for damages for such wrongful removal or for the conversion of the crops, further to show that such removal was tortiously effected with his knowledge or by connivance on his part with those wrongfully removing the crop to effect such removal. There is not only no such showing here, but, to the contrary, as has been stated, even without regard to the positive testimony that Kim was authorized by plaintiff and

Emerson to remove and sell the crops, the circumstances of the whole transaction, as shown by the testimony of both plaintiff and Emerson, very clearly strengthen and sustain the presumption that the crops were removed from the premises and sold by Kim under a specific understanding and agreement with the plaintiff and Emerson that he was thus to dispose of the crops upon their maturity. This agreement (allowing the mortgagors to sell the mortgaged crops and turn over the proceeds of sale to plaintiff and Emerson) amounted in practical effect to a substitution of the personal obligation of the mortgagors for the security of the mortgage. *Minneapolis Thresh. Machine Co. v. Calhoun*, 37 S. D. 542, 159 N. W. 127.

The authorities cited by the appellant have to do with cases in which the evidence clearly disclosed a tortious removal of the mortgaged crop, and, of course, are not in point here.

The other assignments to which attention will be given involve objections to the action of the court in refusing to strike from the answers certain denials contained therein and heretofore referred to, and in striking from the record the lease, previously received in evidence whereby the premises on which the crops in question were grown were demised to Kim and Hahn by plaintiff.

[7] 1. As stated above when considering the matter of the suggestion of the diminution of the record, the particular denials of the answer to which the motion to strike out was addressed were upon information and belief, and related to those allegations of the complaint which referred to the execution of the notes, the execution of the mortgage, the good faith thereof, the acknowledgment and recordation of the mortgage, that no part of the promissory note described in the mortgage has been paid, except a certain specific amount, and other like averments.

The disallowance of the motion to strike out the denials referred to was proper. The matters in the complaint to which said denials were addressed involved private transactions between private individuals, and it is not the law that such matters are presumed to be within the knowledge of third persons, unless the same are required by law to be made a public record, or are of such common notoriety that all persons must know of them. As to the mortgage, which, of course, cannot be binding upon third persons unless it is recorded as required by law, we have already shown that, in law, it was not recorded, and therefore the answering defendants were not to be charged with constructive notice thereof.

[8] 2. The lease, which was received in evidence and subsequently stricken from the record, was, as seen, from the plaintiff to Kim and Hahn, and demised to the latter, for a certain specified consideration, the

premises upon which the crops in question were grown. That lease, however, had been modified or changed in vital particulars, and was, consequently, not the lease under which Kim and Hahn were holding the property at the time that the said crops were removed from the premises and sold. But, waiving a consideration of that proposition, we cannot perceive wherein the order of the court striking the lease from the record, even if in any view erroneous, can be held prejudicial. The only purpose the lease could have served as evidence in the case would be to show that Kim and Hahn held possession of the land thereunder as tenants of the plaintiff. If it was important under the issues that this fact should be known, the reply is that the answering defendants conceded at the trial that the land was held by Kim and Hahn under a lease from plaintiff. But it seems to us that whether Kim and Hahn held possession of the land as tenants of the plaintiff, or held such possession as tenants of some other person, or themselves were the owners of the land, is wholly without significance here, if, as is conceded by all parties hereto to be true, and which is the theory upon which the complaint was framed and the issues were joined and tried, they owned the crops which are referred to in the mortgage. The question whether the mortgagors of the crops held possession of the land could have no bearing on the case, unless their ownership of the crops and right to mortgage them was made an issue, and no such question was raised in the case either by the pleadings or the proof. Therefore, as we have shown, the only questions in the case were whether Kim and Hahn, having mortgaged the crops to plaintiff, tortiously removed the same from the land on which they were grown and sold them to the answering defendants, and, if so, whether the latter purchased the said crops with knowledge before and at the time of the purchase that the crops were under mortgage and had been removed and sold wrongfully, or without the knowledge and consent of the mortgagees.

The cases mentioned by appellant as in support of his position that the ruling striking out the lease from the record was error and prejudicial to his rights promulgate very sound and wholesome rules, but, while applicable in proper cases, have no application to the instant case upon the theory upon which its issues were framed and tried.

The judgment is affirmed.

We concur: PREWITT, Presiding Justice pro tem.; BURNETT, J.

Opinion of Supreme Court in Bank
Denying Hearing.

PER CURIAM. The application for a hearing in this court after decision by the Dis-

trict Court of Appeal or the Third Appellate District is denied, without reference to or intimation of view on our part relative to the correctness of the discussion in the opinion on the question of the proper construction of the chattel mortgage as covering the personal property here involved, and the question of the validity of the notary's acknowledgment in the matter of such chattel mortgage. The opinion shows that the non-suit was properly granted in that the removal and sale of crops here involved was not tortious, and also that the trial court did not err in denying motion to strike out certain denials of the answer, or in striking out the lease theretofore received in evidence.

ELLIS et al. v. NEW MEXICO CONST. CO. et al. (No. 2603.)

(Supreme Court of New Mexico. July 21, 1921. On Motion for Rehearing, Oct. 25, 1921.)

(Syllabus by the Court.)

1. Municipal corporations \S 290—Statute on opening and improving streets held repealed by implication.

Section 3662, Code 1915, being chapter 39 of the Laws of 1884, was repealed by implication by chapter 42 of the Laws of 1903.

2. Municipal corporations \S 290—Procedure under either of two street improvement laws is valid.

There are in New Mexico two distinct and independent laws upon the subject of paving in municipalities, and procedure followed by a municipality under either of them is valid; these laws being the Provisional Order Law of 1903 (sections 3665 to 3671, inclusive, Code 1915), and the Petition Law, being sections 3672 to 3683, inclusive, Code 1915.

3. Municipal corporations \S 290, 408(1)—Where charter is silent on paving streets and levying assessments general law governs.

Where a municipality adopts a charter pursuant to chapter 86 of the Session Laws of 1917, and such charter is silent on the subject of paving city streets and levying special assessment therefor, the state law on municipalities governs.

4. Municipal corporations \S 294(2)—Character and extent of paving rests with governing body.

The purpose of the notice required under the provisional order law (chapter 152, Laws 1919) is to afford the property owner opportunity to urge objection as to paving or the extent or character of paving, and the cost thereof; but this is a right merely to be heard, and the doing of the work, the character and the extent thereof, rest entirely in the discretion of the governing body of the municipality.

5. Evidence \Leftrightarrow 83(2)—Municipal corporations \Leftrightarrow 323(2)—In absence of fraud, collusion, or showing of injury to property, owner's complaint that advertisement excluded all but successful bidder will not be considered.

In the absence of a charge of fraud or collusion between the city and the successful bidder, or of a showing of injury to the abutting property owner because of the acceptance of the bid, complaint as to the terms set forth in the advertisement for bids, in that they operate to exclude all but the successful bidder, will not be considered by the court; it being presumed that the city performed its duty and accepted the lowest bid; the manner of performing such duty not being subject to inquiry by the court.

(Additional Syllabus by Editorial Staff.)

6. Municipal corporations \Leftrightarrow 406(1)—City's authority to assess abutting property for street improvements is not implied from power to improve, but from express statute.

A municipal corporation's authority to pave streets does not imply power to burden owners of abutting property with the expense thereof by special assessment, but such power is derived from express statutory enactment, which must be carefully followed.

7. Municipal corporations \Leftrightarrow 444—Burdening property abutting street with cost of assessment is not dependent upon petition, but conforms to statute.

Burdening owners of property abutting street with a special paving assessment, as a matter of constitutional right assertable by such owners, need not be preceded by a petition of a majority or any number of them, nor by opportunity for effectual objection; conformity to the statute being sufficient.

8. Municipal corporations \Leftrightarrow 469(1)—Assessment upon front-foot rule under statute held valid.

Laws 1919, c. 152, § 8, permits assessment for street paving to be made upon the front-foot rule, and where so done in conformity to statute, it is valid and not subject to the objection that it is assessed in excess of benefits.

9. Statutes \Leftrightarrow 159—"Repealed by Implication" where intent is manifest that later inconsistent statute supersedes former.

A statute is repealed by implication where the legislative intent is manifest that the later statute should supersede the former, as where the Legislature enacts a new and comprehensive body of law which is so inconsistent with and repugnant to the former law on the same subject as to be irreconcilable with it, and especially where the later act expressly notices the former in such a way as to indicate an intention to abrogate.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Repeal by Implication.]

Appeal from District Court, Bernalillo County; Bratton, Judge.

Suit by George E. Ellis and others against the New Mexico Construction Company and

City of Albuquerque to enjoin road construction work and to remove cloud on title arising from special assessment lien. Judgment dismissing the complaint, and plaintiffs appeal. Affirmed.

George C. Taylor, of Albuquerque, for appellants.

W. A. Keleher and Reid, Hervey & Iden, all of Albuquerque, for appellees.

RYAN, District Judge. The city of Albuquerque, a municipal corporation, reorganized pursuant to chapter 86, Laws 1917, entered into a contract on the 2d of October, 1920, with the defendant herein, the New Mexico Construction Company, for the construction of about 12 blocks of bitulithic pavement on Tijeras road in said city. Thereafter the defendant construction company proceeding with such work, the plaintiffs, owners of property abutting on Tijeras road, filed suit in equity to enjoin the work and to remove the cloud on title arising from the special assessment lien.

The invalidity of the proceedings on the part of the city effectuating in the contract as made out in the complaint of the plaintiffs, lies in this: (1) The owners of property abutting the street to be paved, against whom the expense of paving by way of special assessment was assessed, did not, nor did a majority or any number of them, petition the municipal government for such improvement, such petition being a necessary prerequisite and jurisdictional to the validity of subsequent proceedings; (2) the city of Albuquerque having adopted a charter as provided by chapter 86, Laws 1917, and the charter being silent as to paving streets and levying assessments therefor against the owners of abutting property, there is absent any authority under and pursuant to which such work could be done and cost assessed; (3) that no legal notice was given the abutting property owners, and such hearing provided for upon the notice actually given furnished merely opportunity for objection, the objection being ineffectual against the contrary decision of the municipal government; (4) that the contract was let to the defendant construction company without an opportunity for the submission of bids, and upon such terms that none but the successful bidder, the New Mexico Construction Company, could have proposed and performed.

There are other grounds urged in the complaint going to the invalidity of the proceedings, but such grounds are not impressive enough to deserve consideration here.

To the plaintiff's complaint both defendants joined in interposing a demurrer which the trial court sustained, and, the plaintiffs refusing to plead further, final judgment was entered dismissing the complaint.

[8, 7] The first point raised, that is the

absence of a petition on the part of abutting property owners of the street to be paved, is exhibited more clearly by stating and deciding two preliminary propositions with which it is involved: First. A municipal corporation, though empowered, as under our laws, with authority to pave streets, has not by reason thereof implied power to burden the owners of property abutting the street to be paved, with the expense of such improvement by special assessment, but the power so to do is derived from express statutory enactment which must be carefully followed. *Town of Albuquerque v. Charles Zeiger*, 5 N. M. 674, 27 Pac. 315; *Town of Roswell v. Dominice*, 9 N. M. 624, 58 Pac. 342. Second. The burdening of the owners of property abutting the street to be paved with a special assessment to defray the cost, as a matter of constitutional right assertable by such owners, need not be preceded by a petition of a majority or any number of such owners, nor by opportunity for effectual objection, but conformity to the statute on the subject is sufficient. 2 *Page and Jones, Taxation by Assessment*, 1347; *City of Perry v. Davis & Younger*, 18 Okl. 427, 90 Pac. 885; *Spalding v. City and County of Denver*, 33 Colo. 172, 80 Pac. 128; *Parsons v. District of Columbia*, 170 U. S. 45, 18 Sup. Ct. 521, 42 L. Ed. 943.

[1, 2] We proceed to ascertain, therefore, whether the allegations in the complaint of the plaintiffs, admitted to be true by the demurrer, that the contract for construction of pavement was entered into without being preceded by the petition referred to, was fatal to the validity of the special assessment, in that the statute controlling required such petition. Plaintiffs' complaint assails the proceedings taken as offending against this essential by three allegations, each of which goes to the failure on the part of the city to follow the requirement of specific statutes on the subject; that is: First. That the proceedings omitted to conform to section 3662, Code 1915:

"No street or highway shall be opened, straightened, or widened, nor shall any other improvement be made which will require proceedings to condemn private property, without the concurrence in the ordinance or resolution directing the same, of two-thirds of the whole number of the members elected to the council or board of trustees, and the concurrence of a like majority shall be required to direct any improvement or repair of a street or highway, the cost of which is to be assessed upon the owners, unless two-thirds of the owners to be charged therefor shall petition in writing for the same."

Second. That the proceedings omitted to conform to the provisions of chapter 157, Laws 1919:

"Whenever the owners of more than one-half of the front feet of property abutting upon any highway, or portion thereof, proposed to be

improved in any city, exclusive of any property owned by the United States, or by the state, shall petition in writing, the governing body thereof, to order the improvement of such highway, or part thereof, within a district described in such petition or petitions, the governing body of such city shall have the power to order such improvement and select the material and methods therefor, and contract for the construction of such improvements in the name of the city, and to provide for the payment of the cost thereof out of any available funds of the city, or as otherwise provided by law; provided, that whenever any proposed improvement herein contemplated shall be on a highway or portion thereof, upon which abuts property belonging to any county, school district or city, the respective boards or bodies having control of such county, school district or city property, may cause a petition to be signed for such improvement."

Third. That the proceedings omitted to conform to the provisions of section 3672, Code 1915:

"Every incorporated city shall have power, upon presentation of a petition or petitions in writing, and subject to the limitations hereinafter provided in the following eleven sections, to improve any street, avenue, alley, highway, public place or square, or any portion thereof within its limits, by filling, grading, raising, paving or repaving the same in a permanent manner, or by the construction or reconstruction of sidewalks, curbs and gutters, or by widening, narrowing or straightening the same, and to construct the necessary appurtenances thereto, including sewers and drains."

Section 3662, Code 1915, is the statutory enactment of the territorial Legislature of 1884. As a statutory provision it exhausted the law in force in the territory on the authority vested in municipalities to pave streets and defray the cost by special assessment. This law is entirely inhibitive and negative in character, laying down a prerequisite jurisdictional to subsequent acts, but affording no positive detailed procedure to be followed in the event the condition demanded were met. It, in effect, by omitting to charter the manner by which paving might be legally done, prevents paving in municipalities by special assessment. In 1891 (chapter 43, Laws 1891) the territorial Legislature, apparently mindful of the frailty of the 1884 law, enacted new legislation competent, at least, to the object in view. Section 3 of this act reiterates the inhibition contained in the Law of 1884 referred to by specifically pointing out that the procedure in paving streets must conform to such act.

"That the levying of assessments provided for by the two preceding sections shall be under a general ordinance prescribing the manner thereof and upon petition of owners of at least one-half of the property frontage of the block fronting on the improvements to be made, and be subject to the provisions of section 1635 of the Compiled Laws of New Mexico 1884; and said assessments when levied shall create a

lien upon such adjoining property, to be collected under the provisions of subsection 75 of section 1622 and section 1660 of said Compiled Laws." Section 3, chapter 43, Laws 1891.

This was the law in force until 1903 when chapter 42, Laws 1903, was enacted. This latter act specifically repeals section 3 of the Laws of 1891, and furnishes a thorough, adequate, and complete method of procedure in the matter of paving streets in municipal corporations and by its completeness robbed of efficacy the other provisions of the Law of 1891, section 3 being repealed specifically, and by express provision repealed all acts and parts of acts in conflict therewith. This law, it is noted, was carried into the Code of 1915 as sections 3665 to 3671, inclusive. The Law of 1903, above, contains no provision similar to that of the 1884 Law (section 3662, Code 1915) and makes no mention whatsoever of a petition on the part of abutting property owners. On the contrary this act and the inhibitive law of 1884 are repugnant and irreconcilable as is evident from a comparison of both acts.

"That whenever the city council of any city, whether incorporated under general or special laws, or the board of trustees of any town or village in the state of New Mexico shall be of the opinion that the interests of said city require that any street or alley, or any part thereof, within the limits of said city, be graded, graveled, paved, macadamized or in any manner improved, such city council or board of trustees shall make a provisional order to the effect that such street or alley or part thereof shall be so graded, graveled, paved, macadamized or improved, and shall order the city engineer, or some other competent engineer, to cross-section said street or alley or part thereof and to make an estimate of the total cost thereof, and an estimate of the number of cubic yards of material necessary to be used in the grading thereof, or to be excavated therefrom." Section 3665, Code 1915.

Sections 3666 and 3667, following, provide that upon the filing of the report of the engineer a hearing shall be had after notice, at which hearing any one interested may be heard as to the propriety of the improvement contemplated, the cost and manner of payment. Section 3668 provides:

"After such hearing, said city council or board of trustees shall determine as to the advisability of so grading, graveled, macadamizing or otherwise improving such streets or alleys or parts thereof and shall determine the kind and character of such improvements so to be made, and shall proceed to advertise for bids for the doing of the work therefor, and shall enter into a contract for the doing of such work and the furnishing of all necessary materials to the lowest bidder."

[8] The act of 1903 by reason of the fact that it occupies completely all the matter on the topic of paving in municipalities and the levying of special assessments to pay the

expenses thereof, dealt with in prior legislation, that it expressly repeals section 3 of chapter 43, Laws 1891, in which was incorporated the law of 1884, that it is repugnant to and irreconcilable with the law of 1884, manifests a clear intent on the part of the Legislature to supersede and therefore to repeal that law. A statute is repealed by implication, though such repeal is not favored, where the legislative intent is manifest that the latter statute should supersede the former, and such intent is manifest where the Legislature enacts a new and comprehensive body of law which is so inconsistent with and repugnant to the former law on the same subject as to be irreconcilable with it, and especially does this result follow where the latter act expressly notices the former in such a way as to indicate an intention to abrogate. 6 Am. & Eng. Ency. of Law. 720; *Baca v. County Commissioners*, 10 N. M. 438, 62 Pac. 979; *U. S. v. Clafin*, 97 U. S. 546, 24 L. Ed. 1082; *Howard v. Hulbert*, 68 Kan. 793, 66 Pac. 1041, 88 Am. St. Rep. 267; *Gymnastic Assoc. of South Side Milwaukee v. City of Milwaukee*, 129 Wis. 429, 109 N. W. 109. The latter act (chapter 42, Laws 1903, sections 3665 to 3671, Code 1915) covering the entire subject, embracing all the law pertinent thereto and furnishing a new and comprehensive system of procedure, makes it clear that the Legislature intended to supersede prior acts relating to the same subject, and this result is to be derived even in the absence of repugnancy and inconsistency. *Harold v. State*, 16 Tex. App. 157; *State ex rel. v. B. P. O. El.*, 69 Miss. 895, 18 South. 255; *In re Hawes*, 22 R. I. 312, 47 Atl. 705.

We have then to consider as determinative of the validity of the proceedings complained of the law of 1903 (sections 3665 to 3671, Code 1915) and the law of 1913 (chapter 22, Laws 1913), which comprises sections 3672 to 3683, inclusive, Code 1915, and as each act was amended in certain particulars by the law of 1919, the former by chapter 152, and the latter by chapter 157 of such laws. An examination and analysis of these two laws, the first generally termed the provisional order law, the latter the petition law, display that each is complete in itself, and sets forth each step in the procedure to be followed by the municipality. But the former places in the discretion and judgment of the municipal government the decision as to paving streets, such decision being final; the latter imposes as a condition jurisdictional to valid proceedings the petition of at least 51 per cent. of the owners of the front feet of property abutting upon the street to be paved.

The contention of appellant that section 3662 is to be read into the former law as a prerequisite affecting the provisional order law of 1903 failing, in that such section is

repealed by the latter act, it is yet urged that the petition law, that of 1913, as the last expression of the legislative will, is controlling, and, being repugnant to the former, supersedes it. That this contention is untenable is forced upon us by the fact of the inclusion in the 1913 act of this saving clause.

"No other existing law with reference to the construction or maintenance of the improvements contemplated in the sections numbered in the preceding section, shall be repealed, but the said laws shall remain in force to be applied by the governing body of any city, in its discretion, according to the provisions of said laws and without reference to said sections." Section 3683, Code 1915.

There can be no repeal by implication where the act expressly provides that prior acts shall continue in force. 25 R. C. L. 931; 36 Cyc. 1077. It being clear, therefore, that it was the legislative intent that the 1913 act was not designed as a substitute for or to supersede the 1903 act, and that each act is complete in itself, but radically different to the extent that one leaves the decision as to paving and assessing the expense thereof by special assessment entirely with the governing body of the municipality, but the other permits nothing effective to be done without the petition of more than one-half of the abutting property owners, it follows that the acts are cumulative. 25 R. C. L. 174. We hold that the city of Albuquerque having, as the record before us shows, followed the procedure relative to paving under the provisional order law (sections 3605 to 3671, Code 1915) thus proceeding in conformity with law, the allegations of plaintiffs' complaint attacking the proceedings actually taken by the city on the ground that they are violative of one or more of the provisions of the petition law (sections 3672 to 3683) were demurrable.

[3] The demurrer admits further the allegations of the complaint that the special charter adopted by the city of Albuquerque under the provisions of chapter 86, Laws 1917, omits authorization to the city commissioners to pave city streets and meet the cost by special assessment and to enforce the liens created therefor by foreclosure. We have examined the cases cited in appellant's brief. The principle announced by all of them is established by mere statement. Where the Constitution of the state grants to municipalities power of self-government under a charter which is adopted, the charter is the measure of authority, and the municipality possesses the power to enact ordinances affecting persons and property within its corporate limits only to the extent that the charter expressly confers it, or necessarily implies such power from what is expressed or essential to the exercise of the power granted; but this rule does not apply to the instant case, for the reason that

Albuquerque has not adopted its charter under a grant of power conferred by the fundamental law. The Legislature only has acted. The state law on municipal corporations controls.

"Any municipal corporation now existing and by election accepting the provisions of this act shall retain its present boundaries, excepting as they may be altered under the provisions of the laws of New Mexico, and shall retain and possess all powers granted under the Municipal Corporations Act and such other powers as are not inconsistent with the statutes and Constitution of the state of New Mexico." Section 4, art. 1, chapter 121, Laws 1919.

[8] The next specific attack made by appellants in their complaint against the procedure followed by appellees is that the assessments made against them were in excess of benefits. Section 3, chapter 152, Laws 1919, amending the 1903 paving law (section 5, chapter 42) carried forward into the Code as section 3669, permits the assessment to be made upon the front-foot rule, and it is such method of assessment that appellants complain of, as stated above. The method followed by the city conforms to the statute, and is therefore valid. That it is a constitutional method of assessment this court has already decided. *Roswell v. Bateman*, 20 N. M. 77, 146 Pac. 950, L. R. A. 1917D, 365, Ann. Cas. 1918D, 426.

[4] The objection urged that no notice was given as required by section 3, chapter 40, Laws 1915, which amended section 3679 of the Code (part of the petition law) we have already disposed of; lack of adherence to the terms of the petition law is immaterial. The purpose of the notice in the provisional order law is to afford opportunity to discuss as already pointed out, and any objection at the hearing by one interested against the advisability of paving, or the extent or character of paving is unavailing against the decision of the city to the contrary. Notice and hearing within constitutional demands are had upon the filing of suit to foreclose the lien. *Roswell v. Bateman*, supra. Hence, by statutory provision, the extent or character of paving, as proposed in the provisional order, which forms the basis of the notice required, may be deviated from. In fact, were the order not clearly tentative, discussion upon it would be futile. It is after such provisional order is made and after hearing and discussion thereon that final decision is made by the city, which decision forecloses objection. Section 3668, Code 1915, supra.

[5] We see no merit in the remaining point as alleged in the complaint and argued in appellants' brief, to the effect that the advertisement for bids contained such terms that only the defendant construction company could have proposed to do the work and could have performed. There is no allegation of fraud or collusion, or of injury

to the plaintiffs or any property owner interested, or of other substantive facts which would go to negative the presumption that the city performed the duty imposed upon it by statute by letting "the contract for the doing of such work and the furnishing of all necessary materials to the lowest bidder." The allegations of the complaint admitted to be true are not necessarily inconsistent with the actual performance of the duty imposed. The action of the trial court in dismissing the complaint was proper, and its judgment will be affirmed; and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

On Motion for Rehearing.

RYAN, District Judge. In their motion for rehearing, plaintiffs urge that the court, in the original opinion filed herein, omitted to take into consideration the contention made by them that the provisional order law of the act of 1903 (sections 3665-3671, inclusive, Code of 1915) was repealed by implication by the act of the territorial Legislature of 1909, chapter 31, Laws of 1909. This position is so clearly untenable that it was not deemed deserving of comment in the opinion. The act of 1903 above referred to has to do with the authorization to a city council to order local improvements and assess the cost thereof upon abutting property. Chapter 31, Laws of 1909, has to do with the creation of improvement districts by incorporated cities; the organization of boards of improvements for the districts so created, and the direction and control of such improvements by such boards; the creation of boards for the assessment of benefits in each district; and the collection of the assessments. The opinion filed herein states upon what conditions subsequent legislation will be held to repeal prior legislation by implication. None of the tests therein set forth are here present to imply the repeal of the act of 1903 by the 1909 act.

The remaining contentions upon which a rehearing is urged were treated in the opinion proper.

For these reasons, the motion for rehearing will be denied; and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

MARTIN et ux. v. VINCENT, Superintendent of Industrial Training School.

(Supreme Court of Idaho. Oct. 28, 1921.)

1. Habeas corpus §76—A state officer making return in parents' proceeding for custody of child must justify detention.

In a habeas corpus proceeding, instituted by parents to recover the custody of their minor

child, it is incumbent upon one detaining the body of the child in his return to the writ to show facts sufficient to justify his detention under the law. The fact that the person making the return is an officer of the state and superintendent of one of its institutions does not relieve him from assuming the burden.

2. Habeas corpus §76—Superintendent of Industrial Training School in return to parents' proceeding must justify child's detention.

Where a child has been committed by the probate court to the Idaho Industrial Training School, and its parents sue out a writ of habeas corpus for the purpose of recovering the custody of the child, subdivision 2 of C. S. § 9280 applies, and the superintendent of the institution must in his return to the writ state the authority and cause of such imprisonment or restraint. The return must be sufficient to justify the child's detention as against the claims of the parents.

3. Infants §19—Proceeding to regain custody of child in Training School not collateral attack on commitment.

A habeas corpus proceeding instituted by parents seeking to regain the custody of their child committed by a probate court to the Idaho Industrial Training School is not a collateral attack upon the commitment.

Appeal from District Court, Kootenai County; W. F. McNaughton, Judge.

Petition by A. M. Martin and wife against W. D. Vincent, Superintendent of the Industrial Training School, for writ of habeas corpus to obtain custody of Dean Martin, a minor child. Writ denied, and plaintiffs appeal. Writ directed to issue, and minor returned to parents' custody.

J. F. Ailshie, Roy Agee, and J. F. Ailshie, Jr., all of Cœur d'Alene, for appellants.

Roy L. Black, Atty. Gen., and James L. Boone, Asst. Atty. Gen., for respondent.

RICE, C. J. Appellants filed a petition in this court, setting forth that respondent wrongfully detained their minor son, Dean Martin, in the Idaho Industrial Training School and unlawfully deprived them of his custody. This court issued the writ, and ordered that it be made returnable before the district court of the Eighth judicial district at Cœur d'Alene.

The material issues in that court are the following: Respondent in his return alleged that he detained the body of Dean Martin as superintendent of the Idaho Industrial Training School, and not otherwise, under and by virtue of an order of commitment duly made and entered by M. G. Whitney, acting in his official capacity as judge of the probate court of Kootenai county. The appellants demurred to the return on the ground that it did not state facts sufficient to warrant respondent in retaining the custody and control of the body of Dean Mar-

tin as against the appellants. The demurrer was overruled. In their answer appellants denied that the order of commitment made by the probate judge had any force or effect as against themselves as justifying the detention of the body of Dean Martin by respondent. They further answered that they were respectively the father and mother of Dean Martin, a minor of the age of 15 years, and that he had always lived and resided with them and had been under their care, custody, and parental control at all times prior to the date of his commitment; that no guardian for him had ever been appointed by an order of any court; that on or about the 26th day of February, 1921, the probation officer of Kootenai county wrongfully and unlawfully arrested Dean Martin, and thereupon took him before the probate court, which court made a pretended order committing him to the Industrial Training School; that the order was not binding upon the appellants, and had no validity or effect whatsoever as against them, or either of them, as parents and natural guardians of said minor. A hearing was had upon the issues thus framed. The district court filed its findings of fact and conclusions of law and denied the writ. An appeal was taken to this court."

After argument upon appeal, this court directed the writ to issue, and that the minor be returned to the custody of his parents.

[1] The demurrer to the return should have been sustained.

In the cases of *In re Sharp*, 15 Idaho, 120, 96 Pac. 563, 18 L. R. A. (N. S.) 886, and *Allen v. Williams*, 31 Idaho, 309, 171 Pac. 493, it was held that the parents are in no way bound by the action of a probate judge in committing a juvenile delinquent to the Idaho Industrial Training School. It was pointed out in those cases that the parents are entitled to their day in court, and that to hold a commitment of a minor child by the probate judge to be binding upon the parents, without their having been provided an opportunity to be heard, would render the juvenile delinquent law unconstitutional.

The right of a parent to the custody, control, and society of his child is one of the highest known to the law. The family is a unit of society and is so recognized by the state. The parents of children are recognized as their natural guardians, and the presumption is that they are fit and proper persons to exercise that trust. It is incumbent upon him who seeks to invade the home and remove a child from its protection, and from the custody of its natural guardians to show facts sufficient to justify his action under the law. Parents are not required in the first instance to take upon themselves the burden of proving their fitness to have the care of their children, or that they are properly exercising their parental control. The

fact that the one seeking to justify the detention of a child is an officer of the state and superintendent of one of its training schools in no way relieves him from the burden of showing facts which justify his action, in a case where parents are claiming their right to the child. Before the state will take a child from its parents and commit it to one of its institutions, it takes upon itself the burden of showing the existence of facts and conditions to justify its intervention. The commitment is not a justification where parents are seeking to have their rights determined. The judgment of a probate court declaring a child a juvenile delinquent is not in any sense an adjudication or an estoppel against them.

[2] Counsel for respondent contend that the return of respondent is in strict compliance with the law. C. S. § 9280, on which they rely, is in part as follows:

"The person upon whom the writ is served must state in his return, plainly and unequivocally:

"1. Whether he has or has not the party in his custody, or under his power or restraint.

"2. If he has the party in his custody or power, or under his restraint, he must state the authority and cause of such imprisonment or restraint.

"3. If the party is detained by virtue of any writ, warrant or other written authority, a copy thereof must be annexed to the return, and the original produced and exhibited to the court or judge on the hearing of such return. * * *

In a case such as this, where application for the writ is made by the parents of a minor child committed merely as a juvenile delinquent, subdivision 2 of the section is applicable, and the return must state the authority and cause of such imprisonment or restraint. This is true because parents are new parties, and the person making the return must justify his detention as against their claims.

Counsel for respondent also call attention to C. S. § 8711, which is as follows:

"In pleading a judgment or other determination of a court, officer or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction."

As applied to cases of this nature, we think this statute provides that in the answer to the writ the parents of the child may traverse the statement in the return that the officer detains the body of the child under the authority of an order of commitment duly made. If such an issue be raised, then of course the defendant must show the jurisdictional facts in the proceeding which resulted in the commitment.

[3] Counsel for respondent also contend

that the commitment of Dean Martin cannot be attacked collaterally in a proceeding of this nature. Upon this question we express no opinion. The case at bar is not a collateral attack upon the commitment. It presents new issues. If it be true, as suggested by counsel, that in considering the new issues it will become necessary to try anew in a different tribunal the same matters considered by the probate court in the proceeding which resulted in the commitment, the conclusive answer is that the parents are entitled to have these questions tried anew. Due process of law requires that they be accorded their day in court, with opportunity afforded to present their case and defend their rights.

The court found, among other things, that the appellants were honorable and law-abiding citizens and able to take care of and provide for Dean Martin, who is their youngest child. Under this state of the record the district court should have issued the writ.

It is true that the court also found that Dean Martin was an incorrigible boy, and an habitual truant from school. This finding was not responsive to any issue tendered by the return, and we do not feel called upon to examine the evidence critically to determine whether it supports the finding. In justice to Dean Martin, however, it should be stated that there is much evidence in the record to the effect that he is a fine, manly boy. There is no evidence in the record that he is growing up in immorality and crime, and that he knowingly associates with immoral persons. It also appears that at the time he was arrested and committed his parents had made arrangements to enter him in the Lyon School at Spokane, and also that they are willing to make arrangements to place the boy under the care of a competent instructor, so that he may acquire an education sufficient to comply with the laws of this state.

For the reasons set forth above, this court entered its order directing the return of Dean Martin to the custody of his parents.

BUDGE, MCCARTHY, DUNN, and LEE, JJ., concur.

STATE v. SNOOK. (No. 3405.)

(Supreme Court of Idaho. Oct. 25, 1921.)

1. Criminal law §1090(5)—Error in overruling demurrer to complaint and denying motion to quash can be presented only by settled bill of exceptions.

Alleged errors of trial court in overruling demurrer to criminal complaint and in denying motion to quash complaint can be presented to this court only by bill or bills of exception properly settled and incorporated in the record.

2. Criminal law §1090(19)—Rulings on demurrer and motion to quash complaint are not included in reporter's transcript and not substitute for bill of exceptions.

Rulings of the district court on demurrer to criminal complaint and motion, to quash such complaint are not a part of the trial and are therefore not included in the reporter's transcript.

3. Indictment and Information §3 — Misdemeanors triable in probate and justice courts may be commenced in district court by filing complaint.

Prosecution of misdemeanors triable in the probate and justice courts may be commenced in the district court by filing a criminal complaint.

Appeal from District Court, Lemhi County; F. J. Cowen, Judge.

Charles W. Snook was convicted of running sheep on a cattle range, and he appeals. Affirmed.

E. W. Whitcomb, of Blackfoot, and L. E. Glennon, of Salmon, for appellant.

Roy L. Black, Atty. Gen., for the State.

DUNN, J. Appellant was tried and convicted on a charge of violating C. S. § 8333, which makes it a misdemeanor for one to herd, graze, and pasture sheep upon a cattle range, and he has appealed from the judgment.

Appellant assigns the following errors:

(1) The court erred in not sustaining defendant's demurrer to the information herein.

(2) The court erred in not sustaining defendant's motion to quash the information herein.

(3) The verdict of the jury is contrary to law, in that the evidence is insufficient to sustain the verdict.

(4) The judgment of the court is contrary to law, in that the evidence is insufficient to sustain the judgment.

[1] It is the contention of appellant that all of the foregoing errors are properly presented to this court by the reporter's transcript of the proceedings on the trial, but the respondent objects to the consideration of the first and second alleged errors on the ground that no exception was taken by the appellant at the time of the court's orders overruling the demurrer and denying his motion to quash the information, and that such exceptions, if so taken, could be presented to this court only by bills of exception properly settled and incorporated in the record. This contention of the respondent must be sustained, for this court has so held in a long line of decisions, the most recent of which are *State v. Maguire*, 31 Idaho, 24, 169 Pac. 175; *State v. Subisarretta*, 33 Idaho, 473, 195 Pac. 625; *State v. Ford*, 33 Idaho, 689, 197 Pac. 558; *State v. White*, 33

Idaho, 697, 197 Pac. 824; State v. Colvard, 33 Idaho, 702, 197 Pac. 826.

The other two errors assigned alleging the insufficiency of the evidence to sustain the verdict and judgment are too general to comply with the requirements of C. S. § 9068, which reads as follows:

"Sec. 9068. *Appeal by Defendant.*—An appeal may be taken by the defendant.

"(1) From a final judgment of conviction.

"(2) From an order denying a motion for a new trial.

"(3) From any order made after judgment, affecting the substantial rights of the party.

"Upon an appeal from a final judgment of conviction, if a reporter's transcript of the evidence appears in the record, the ground that the verdict is contrary to the evidence may be considered and determined to the same extent as on an appeal from an order denying a new trial, providing, a specification of the particulars in which the evidence is insufficient to sustain the verdict is made in appellant's brief filed with the Supreme Court."

See State v. Maguire, 31 Idaho, 24, 169 Pac. 175; State v. Jones, 28 Idaho, 428, 154 Pac. 378.

Notwithstanding the inadequacy of the last two assignments of error, we have examined the transcript of the testimony taken on the trial and find that there is substantial evidence to sustain the verdict and judgment.

[3] This action was commenced in the district court of Lemhi County by the filing of a criminal complaint by James T. Spencer and Frank Sharkey charging the appellant with the crime above stated. Appellant contends that the district court is without jurisdiction to entertain such prosecution unless it be brought by indictment, citing article 5, § 13, of the state Constitution, as follows:

"Sec. 13. *Power of Legislature Respecting Courts.*—The Legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a co-ordinate department of the government; but the Legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this Constitution."

And also C. S. § 8768, as follows:

"Sec. 8768. *Mode of Prosecution.*—All public offenses triable in the district court must be prosecuted by indictment, or information, except as provided in the next section."

The next section relates to removal from office of certain officers.

Appellant takes the position that without some legislative action expressly authorizing the filing of a criminal complaint in the district court in any case which would be tri-

able in the probate or justice court, no prosecution can be commenced in the district court except by indictment. This contention of appellant is refuted by the decision of this court in the case of Fox v. Flynn, 27 Idaho, 580, 150 Pac. 44, where the procedure followed in the case at bar was expressly approved.

[2] Appellant strongly urges upon this court his view that since the adoption in criminal cases of the practice of using the reporter's transcript of the proceedings on the trial in lieu of a bill of exceptions, such transcript should be held to include all of the proceedings from the time of the filing of an information or complaint. This position is untenable for the reason that the reporter's transcript covers only such matters as occur during the trial of a criminal action, and the trial cannot by any proper construction of the statute be held to include those law questions raised by demurrers and motions to quash which are disposed of before the trial begins. The law with regard to reviewing the action of the trial court in such matters is the same as it was before it authorized the use of the reporter's transcript as a bill of exceptions. See C. S. § 9008 and 9010; State v. Maguire, 31 Idaho, 24, 169 Pac. 175.

In accordance with the foregoing views, the judgment of the trial court must be and is hereby affirmed.

RICE, C. J., and BUDGE, McCARTHY, and LEE, JJ., concur.

NORRIS v. HIBLER. (No. 10167.)

(Supreme Court of Oklahoma. Oct. 18, 1921.)

(Syllabus by the Court.)

Appeal and error. § 1001(1)—Verdict supported by evidence not disturbed.

In a civil action, triable to the jury, where there is competent evidence reasonably tending to support the verdict of the jury, and no prejudicial errors of law are shown in the instructions of the court, or its ruling on law questions presented during the trial, the verdict and finding of the jury will not be disturbed on appeal.

Appeal from County Court, Tulsa County; H. L. Standeven, Judge.

Action in replevin by Dave Hibler against E. C. Norris. Verdict and judgment for plaintiff, and defendant appeals. Judgment affirmed, and judgment here rendered against sureties on the supersedeas bond.

Jno. F. Kerrigan and Ivel M. Boyd, both of Tulsa, for plaintiff in error.

J. B. Allen and Ed. S. Butterfield, both of Oklahoma City, and Leon S. Hirsh, of Tulsa, for defendant in error.

JOHNSON, J. On September 27, 1917, Dave Hibler filed an action in replevin against the defendant, E. C. Norris, in the county court of Tulsa county, to recover a team of mules, wagon, and harness of the alleged aggregate value of \$417.50, and to recover damages for the wrongful withholding of the same by the defendant of \$5.50 per day for each and every day that the defendant had retained possession of said property. The case was thereafter tried to a jury, on March 27, 1918, and the plaintiff was awarded a verdict and judgment for the possession of the property or the value thereof fixed at \$355, and for the further sum of \$400 damages, to reverse which the defendant has regularly commenced this proceeding in error.

For convenience the parties will be referred to as plaintiff and defendant, respectively, as they appeared in the trial court.

The defendant's specifications of error are:

"(1) The court erred in admitting testimony as to the value per day of a driver, wagon, team and harness.

"(2) The court erred in giving to the jury instructions hereinbefore set out.

"(3) The court erred in refusing instructions to the jury, requested by defendant, hereinbefore set out.

"(4) The court erred in overruling defendant's motion for a new trial."

The errors complained of by the defendant and argued by his counsel in their brief are that the court erred in admitting testimony on the question of the measure of the plaintiff's damages and in giving certain instructions to the jury and in refusing certain requested instructions of the defendant. While the court's rulings upon the admission of evidence were, in some respects, inaccurate, we have carefully examined the entire record and find there is no merit in these contentions; that the court instructed the jury upon issues involved in the pleadings and made by the evidence in the trial, with substantial accuracy, and properly refused the requested instructions of the defendant.

The evidence amply supports the verdict of the jury in the amount thereof, and the cause comes within the provisions of section 6005, R. L. 1910, which provides:

"No judgment shall be set aside or new trial granted by any appellate court of this state in any case, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or as to error in any matter of pleading or procedure, unless, in the opinion of the court to which application is made, after an examination of the

entire record, it appears that the error complained of has probably resulted in a miscarriage of justice, or constitutes a substantial violation of a constitutional or statutory right."

There being no reversible error in the record, the judgment of the trial court is affirmed.

It further appearing from the record that prior to the filing of the appeal in this cause in this court, and as a part of the regular procedure on appeal, the plaintiff, E. C. Norris, as principal, with William B. Mohr and Fred Norris, as sureties, duly executed a supersedeas bond in this cause payable to the plaintiff, Dave Hibler, in the sum of \$1,600, conditioned as required by law, and duly approved by the clerk of the trial court, a duly certified copy of which bond has been filed in this court, and has been called to the attention of the court by brief of plaintiff filed herein in compliance with the rules of the court.

It is therefore further ordered and adjudged that the plaintiff, Dave Hibler, have judgment in his favor against the said defendant, E. C. Norris as principal, and the said William B. Mohr and Fred Norris as sureties on said supersedeas bond in the sum of ——— dollars, and all costs incurred herein as per journal entry.

HARRISON, O. J., and KANE, PITCHFORD, ELTING, and KENAMER, JJ., concur.

KKK MEDICINE CO. v. HARRINGTON et al.
(No. 10116.)

(Supreme Court of Oklahoma. Oct. 18, 1921.)

(Syllabus by the Court.)

1. Appeal and error ⇨977(3) — Order for new trial will be reversed only on a clear showing of manifest error and abuse of discretion.

The judge who presides at the trial of a case, hears the testimony as it falls from the lips of the witnesses, observes their demeanor on the stand, and has full knowledge of all the proceedings had and done during the progress of the trial, is in a better position to know whether or not substantial justice has been done than any other person can be. Where such judge on presentation of a motion for a new trial sustains such motion, it will require a clear showing of manifest error and abuse of discretion before an appellate court would be justified in reversing such ruling of the trial court.

2. Appeal and error ⇨933(1)—New trial ⇨6—Motion is addressed to court's discretion, and every presumption favors ruling.

A motion for new trial is addressed to the sound, legal discretion of the trial court, and,

where the trial judge who presided at the trial of the case sustains such motion, every presumption will be indulged that such ruling is correct.

3. Guaranty ¶53(1) — Altering obligation without consent releases guarantor.

Where the creditor changes or alters the original obligation of the principal without the consent of the guarantor, such act on the part of the creditor exonerates the guarantor.

(Additional Syllabus by Editorial Staff.)

4. Guaranty ¶53(1)—Where plaintiff's agent had selected selling territory before the guaranty was signed, guarantors will be presumed unwilling for him to select other territory.

In an action against plaintiff's agent and his guarantors, where the agent had selected his sale territory before the guarantors signed the contract, the presumption cannot be indulged that they were willing for him to select thereafter other territory in which to sell plaintiff's goods, and it was necessarily a change in the contract.

5. Guaranty ¶23—Written guaranty contract could be altered only in writing or by executed oral agreement.

In view of Rev. Laws 1910, § 968, relating to alteration of a written contract, a guaranty contract in writing could only be altered by a contract in writing or an executed oral agreement.

Appeal from Superior Court, Pottawatomie County.

Action by the KKK Medicine Company against C. W. Harrington, as principal, and J. Krouch, F. S. Douglas, and A. C. Neel, as guarantors, to recover on an account against C. W. Harrington. Judgment for the plaintiff against F. S. Douglas. Motion for new trial sustained. Plaintiff appeals. Affirmed.

Swan C. Burnette, of Pawhuska, for plaintiff in error.

Wyatt & Waldrep, of Shawnee, for defendants in error.

MILLER, J. This action was commenced in the superior court of Pottawatomie county by the KKK Medicine Company, as plaintiff, against C. W. Harrington, F. S. Douglas, J. Krouch, and A. C. Neel, defendants, to recover on an account due from C. W. Harrington to the plaintiff for goods purchased of the plaintiff under a certain contract; the other defendants being charged as guarantors for the faithful performance of the contract. The case was tried to the jury which resulted in a verdict in favor of the plaintiff and against defendant F. S. Douglas, his coguarantors being exonerated by the verdict of the jury. F. S. Douglas filed a motion for a new trial which was by the court sustained. The plaintiff excepted and appeals to this court to reverse the decision of the lower court granting a new trial. The parties will

be referred to as they appeared in the lower court.

The facts disclosed by the pleadings and evidence are: That C. W. Harrington made a contract with the plaintiff by which he was to purchase medicine of them at wholesale prices and sell them in a specified territory to be selected by him. He selected as this territory Lincoln county, Okl., which was specified on the contract. After the contract was signed by Harrington, he procured the signatures of his codefendants as guarantors for the faithful performance of the contract. The terms of the guaranty were set forth in a separate clause or agreement attached to the contract.

The contract was executed on the 28th day of August, 1911. It provided that it should not be in force and effect until approved by the company, by its president at its office at Keokuk, Iowa. It was approved on the 13th day of September, 1911, by the KKK Medicine Company, by George Hassall, its president, at Keokuk, Iowa.

On the 20th day of September, 1911, C. W. Harrington wrote a letter to the plaintiff company stating that he wanted his territory changed to Seminole county instead of Lincoln county. Pursuant to this request and on the 22d day of September, 1911, George Hassall as president of the plaintiff company struck out the word "Lincoln" and inserted the word "Seminole" on said contract. He thereupon sent a letter by registered mail to each of the guarantors on the contract, advising them he had made this change. He afterwards received the registry return cards, showing the delivery of the three registered letters. Some of the defendants said their name was signed to the registry return card by some one else and that they did not deceive the letters, but defendant Douglas admitted his signature on the registry return card, but said he had no recollection about the letter.

The plaintiff in its petition alleged that it made the change in the contract striking out the word "Lincoln" and inserting the word "Seminole" as above stated, but further averred that this was not a material change in the contract and that the guarantors consented to it, because they did not object upon being notified by registered mail as above stated.

But one assignment of error is made in the petition in error, which is as follows:

"That said court erred in sustaining the motion of defendant in error F. S. Douglas for a new trial."

[1, 2] A motion for a new trial is addressed to the sound discretion of the trial court. It has been repeatedly held by the courts that the judge who presided at the trial of the case, observed the witnesses upon the stand,

and had full knowledge of all proceedings had and done in court during the progress of the trial, was in better position to pass upon a motion for a new trial than any other person could possibly be; that where the judge who had tried the case granted a new trial there would have to be a clear showing of an abuse of discretion before it would be disturbed by the appellate court.

In the case of *Missouri, K. & T. Ry. Co. v. James*, 61 Okl. 1, 159 Pac. 1109, this court said:

"Trial courts are vested with a very large and extended discretion in the granting of new trials, and new trials ought to be granted whenever, in the opinion of the trial court, the party asking for a new trial has not probably had a reasonably fair trial, and has not, in all probability, obtained or received substantial justice, although it might be difficult, in many instances, for the trial court or the parties to state the grounds for such new trial upon paper so plainly that the Supreme Court could understand them as well as the trial court and the parties themselves understood them." *Crouch v. Crouch*, 59 Okl. 181, 158 Pac. 573; *St. Paul Fire & Marine Insurance Co. v. Peck*, 59 Okl. 195, 158 Pac. 595; *Vickers v. Phillip Carey Co.*, 49 Okl. 231, 151 Pac. 1023, L. R. A. 1916C, 1155; section 12, p. 226, 20 R. C. L.

[3] We do not think the court committed error in granting the new trial. It is well settled that contracts of guaranty may not be altered so as to change the liability of the guarantors. Section 1043 of Revised Laws of 1910 provides:

"A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended."

In *Hughes v. Board of Com'rs of Oklahoma County*, 50 Okl. 410, 150 Pac. 1029, the opinion states:

"It is contended that the passage of the fee and salary act increased the obligation of the bond, thus altering the contract, without the consent of the surety company, and that this discharged it from liability. On this point we find a very learned and exhaustive discussion in the case of *People v. Vilas*, 36 N. Y. 459, 93 Am. Dec. 520, from which we quote the following: 'As between private parties, the law is that any alteration in the obligation or contract in respect of which a person has become surety without the consent of the latter extinguishes his obligation and discharges him (*Burge on Surety*, 214; *Theobald on Principal and Surety*, § 132; *Witcher v. Hall*, 5 Barn. & C. 269); and this result follows irrespective of the inquiry whether the alteration could work any injury to the surety or not (*Bangs v. Strong*, 4 N. Y. 815). The reason upon which this rule is founded is that the surety has never made the contract upon which it is sought to charge him. His answer is, if it is sought to charge him upon the altered contract,

that he never made any such bargain; and if upon the original contract, that such contract no longer exists, having been legally terminated by the altered or substituted contract made by the parties. In either contingency the answer furnishes a complete defense.'"

In *Commonwealth National Bank of Dallas, Tex., v. Baughman*, 27 Okl. 175, 111 Pac. 332, Mr. Justice Hayes, speaking for the court, says:

"A material alteration of a note by the payee or holder without the consent of the maker avoids it against the maker, even in the hands of a bona fide holder, without notice of such alteration. *Overton v. Matthews et al.*, 35 Ark. 146, 37 Am. Rep. 9; *Horn v. Newton City Bank*, 32 Kan. 518, 4 Pac. 1022; 2 *Daniel on Negotiable Instruments*, pars. 1373, 1376. Whether an alteration is material does not depend upon whether it increases or reduces the maker's liability. The test is whether the instrument, after the alteration, expresses the same contract; whether it will have the same operation and effect after the alteration as before. If the change enlarges or lessens the liability, it is material, and vitiates the contract. 3 *Am. & Eng. Encyc. of Law & Prac.* p. 401. *New York Life Insurance Co. v. Martindale*, 75 Kan. 142, 88 Pac. 559, 21 L. R. A. (N. S.) 1045, 121 Am. St. Rep. 862, 12 Am. & Eng. Ann. Cas. 677, is in point. In that case the note sued upon, when executed, contained a clause providing for interest at blank rate per annum from maturity. Subsequent to its execution words were inserted so as to make the note bear interest at the rate of 5 per cent. per annum from maturity. Under the statute, in the absence of any provision in the note relative to interest, it would have drawn after maturity interest at the rate of 6 per cent. per annum. By the added words, the contract was made to draw a lower rate of interest after maturity than it would have drawn under that statute. It was held that the alteration vitiated the note. See, also, *Moore v. Hutchinson et al.*, 69 Mo. 429; *Whitmer v. Frye*, 10 Mo. 348; 2 *Daniel on Negotiable Instruments*, par. 1835."

In *Farmers' & Merchants' Bank v. Scoggins*, 41 Okl. 719, 139 Pac. 959, it is held:

"A promissory note executed January 2, 1909, containing the following clause: 'And in case of legal proceedings on this note I agree to pay 10 per cent. additional as attorney's fees'—was nonnegotiable, and if after the execution of the note, and without the consent of the maker, such clause is eliminated by running a pen through the same, such elimination made the note negotiable, and such change was a material alteration which rendered the note void as against the maker, even in the hands of a bona fide holder for value."

[4] It is urged by plaintiff in error that under the contract C. W. Harrington had a right to select his territory and by this letter he selected Seminole county instead of Lincoln county. C. W. Harrington had already selected his territory before the contract of guaranty was signed by the guarantors. This selection was a part of the con-

tract. If he had not yet selected his territory before the contract of guaranty was signed, then we might indulge the presumption that the guarantors were willing for him to select whatever territory he wanted. But having selected his territory and specified his selection in the contract, a change of the territory was necessarily a change in the terms of the contract. The plaintiff in error recognized this to be a change in the contract to such an extent that it was necessary to send notice to the guarantors that it had changed the contract, but plaintiff in error says because the guarantors did not object they consented to the change.

[5] Section 988 of the Revised Laws of 1910 reads:

"A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

The contract of guaranty was in writing, and under the statute it could only be altered by a contract in writing or an executed oral agreement. When the plaintiff altered the original obligation of the principal and sent a registered letter to the defendant, notifying him that it had altered the principal contract, and the defendant ignored the letter, his silence did not constitute a contract in writing.

Under the facts stated in plaintiff's petition and the provisions of the statute above quoted, the trial court did not commit error in sustaining the motion for a new trial.

The judgment of the trial court granting a new trial is therefore affirmed.

HARRISON, C. J., and KANE, JOHNSON, ELTING, and KENNAMER, JJ., concur.

STOCKMAN et al. v. LOESER et al.
(No. 99970.)

(Supreme Court of Oklahoma. Oct. 18, 1921.)

(Syllabus by the Court.)

1. Pleading §417—Pleader waives error in sustaining motion or demurrer by amending.

When a motion or demurrer is sustained to a pleading, and the pleader thereafter obtains leave of court to amend and does file amended pleadings, he thereby waives the error, if any has been committed, in sustaining such motion or demurrer. In order to take advantage of a ruling sustaining a motion or demurrer, the party must stand upon his pleading so held to be defective or deficient, and not amend.

2. Appeal and error §1078(1,6)—Causes for new trial and assignments not presented or argued in brief treated as abandoned.

The rule that causes assigned for a new trial in the motion for a new trial, and as-

signments of error in the petition in error, which are not presented or argued in the brief of the plaintiff in error, will be treated as abandoned and will not be considered by this court, has long since become the settled law and practice in this jurisdiction.

3. Quietling title §44(3)—Where answer and cross-petition to quiet title are denied generally and supported by uncontradicted evidence, judgment should be for defendants.

When the answer and cross-petition of the defendants contain sufficient facts to constitute a complete defense to plaintiffs' causes of action set out in her petition and defendants allege they are the owners of the property in controversy and ask to have their title quieted, and the allegation contained in the defendants' answer and cross-petition are only controverted by a general denial, and the uncontradicted evidence supports the allegations in defendants' answer and cross-petition, it is the duty of the trial court to render judgment for defendants as prayed for by them.

4. Pleading §372—Issues presented by pleadings abandoned, or to which motions and demurrers have been sustained or shall have been stricken, are not properly before the court.

The only issues presented for a court to try are those raised by the pleadings on file when the case is tried. Issues raised by pleadings that have been voluntarily abandoned by the pleader or to which motions or demurrers have been sustained, or by pleadings that have been stricken from the files, are dead issues and not properly before the court on the trial of the case unless presented in some subsequent pleading so as to make them a live issue.

Appeal from District Court, Alfalfa County; James B. Cullison, Judge.

Action by Friederike Stockman against Otto Loeser and five other defendants to recover possession of an undivided interest in real estate and for rents and profits and for partition. Judgment decreeing Otto, Fred, Godfrey, and Wilhelm Loeser to be the owners of the property and denying their codefendants, Minnie Christensen and Frank Loeser, and the plaintiff any of the relief prayed for, and plaintiff Friederike Stockman and defendants Minnie Christensen and Frank Loeser appeal. Affirmed.

C. H. Mauntel and J. P. Grove, both of Alva, for plaintiffs in error.

Titus & Talbot, of Cherokee, for defendants in error.

MILLER, J. This action was commenced in the district court of Alfalfa county by Friederike Stockman, as plaintiff, against Minnie Christensen, Wilhelm Loeser, Frank Loeser, Fred Loeser, Otto Loeser, and Godfrey Loeser, for the purpose of partitioning the northeast quarter of section 15, in township 28 north of range 10, W. 1. M., in Alfalfa

county, Okl. The original petition was afterwards amended, answers filed by different defendants, and replies filed by the plaintiff. There were numerous amended answers and replies filed, demurrers and motions sustained, and the case was tried to the court without a jury, which trial resulted in a judgment decreeing Otto Loeser, Fred Loeser, Godfrey Loeser, and Wilhelm Loeser to be the owners of the land in controversy and quieting the title in them as against the plaintiff and her codefendants Frank Loeser and Minnie Christensen. The plaintiffs and the defendants Frank Loeser and Minnie Christensen filed their separate motions for a new trial, all of which were overruled by the court. They perfected this appeal and have united as plaintiffs in error in this court.

The facts upon which this lawsuit is based and the errors complained of in this appeal are as follows:

The land in controversy was formerly owned by Carl Loeser (otherwise known as Charles Loeser) and was occupied as the homestead of the said Carl Loeser and Marie Loeser, his wife, who were the father and mother, respectively, of all the parties to this action. Frank Loeser some time prior to the 14th day of March, 1910, brought an action in the district court of Alfalfa county against Carl Loeser to recover damages for malicious prosecution. On the 14th day of March, 1910, Carl Loeser and his wife, Marie Loeser, executed a deed of general warranty conveying said land to Otto Loeser. Thereafter and on the 31st day of March, 1910, Otto Loeser executed a deed of general warranty conveying said land to one Gottlieb Dautel. These deeds were duly recorded in the office of the recorder of deeds within a day or two after the execution thereof. On May 4, 1910, Gottlieb Dautel executed a deed of general warranty conveying said land to Otto, Fred, Godfrey, and Wilhelm Loeser. This deed was not filed for record until the 18th day of April, 1912. On November 22, 1912, Frank Loeser filed an action in the district court of Alfalfa county in which he sought to subject the land in controversy in this action to the payment of a certain judgment in the sum of \$2,000, which he had obtained in the district court of Alfalfa county against his father, Carl Loeser, in the action for damages based upon malicious prosecution. Otto Loeser, Fred Loeser, Godfrey Loeser, and Wilhelm Loeser were made parties defendant with their father. During the pendency of the action and before final judgment, Carl Loeser died, and the action was revived in the name of the administrator of his estate and proceeded to final judgment. Marie Loeser died some time before the death of her husband, Carl Loeser. On the trial of the case instituted by Frank Loeser to subject the land in controversy to the payment of his judgment, the court sustained a demurrer to his evidence.

He took an appeal to this court from the ruling of the district court of Alfalfa county, which appeal he thereafter dismissed. On September 10, 1915, Friederike Stockman commenced this action, and in her petition she asked for partition of the land and alleged that she was the owner of a one-seventh interest therein, that defendants Fred Loeser, Otto Loeser, Godfrey Loeser, and Wilhelm Loeser were in adverse possession of the property. The four defendants in error filed motions and demurrers to the petition. When these were presented to the court, plaintiff obtained leave of court to amend her petition and thereafter filed an amended petition which included a cause of action asking for the possession of the property. Defendants in error filed an answer to this amended petition alleging that they were the owners of the property and based their title and ownership upon the deed of Carl Loeser and Marie Loeser, to Otto Loeser, from Otto Loeser to Gottlieb Dautel, and the deed from Gottlieb Dautel to these four defendants in error. They also pleaded the judgment in the former action, wherein the deed executed by Carl Loeser and Marie Loeser was attacked in the suit of Frank Loeser, and alleged that Carl Loeser in his lifetime defended against said action and asserted the validity of said deed and that its validity was upheld by the judgment of the court.

To this answer of defendants in error the plaintiff filed a lengthy reply. In her reply the plaintiff asked for the cancellation of each of the deeds above referred to, alleging that at the time of the execution of the deeds by Carl Loeser and Marie Loeser they were each very old, feeble, and infirm; that there existed a conspiracy on the part of the defendants in error to obtain the title to said land and by fraud they induced the said Carl Loeser to convey the said land to them. The four defendants claiming ownership of the land under the deeds filed a motion to strike from plaintiff's reply all of the allegations that the deed from Carl Loeser was procured by fraud. This motion was by the court overruled.

The defendants Frank Loeser and Minnie Christensen each filed a separate answer and cross-petition, in which they adopted the allegations of the plaintiff's petition and her reply and asked that the prayer of plaintiff's petition be granted. To these separate pleadings, the reply of plaintiff, the answer and cross-petition of defendants Frank Loeser and Minnie Christensen, the four defendants in error filed separate demurrers. On presentation, the demurrers were sustained by the court. That part of the journal entry sustaining said demurrers reads as follows:

"And thereafter and on the 8th day of June, 1916, and during said March, 1916, term of said court, and the court being in session, and all parties appearing as before, said cause

comes on for further hearing before the court upon the demurrer of the defendants Fred Loeser, Godfrey Loeser, Wilhelm Loeser, and Otto Loeser to plaintiff's reply, and to the answer and cross-petitions of the defendants Minnie Christensen and Frank Loeser. And said counsel duly present said demurrers, and the court having heard the argument of said counsel and being fully advised in the premises finds that said demurrers, as applied to the pleadings filed in this action, should be and the same are thereupon sustained, to which ruling of the court said plaintiff and said defendants Minnie Christensen and Frank Loeser except, and asks that they be granted additional time to file amended replies to the answer of the defendants Fred Loeser, Godfrey Loeser, Wilhelm Loeser, and Otto Loeser, which request is granted by the court, and they are granted 10 days from this date to file such amended reply, or replies."

Thereafter on June 19, 1916, the plaintiff filed an amended reply, and on the same day defendants Frank Loeser and Minnie Christensen joined in an amended answer and cross-petition in which they adopt and reassert the allegations of their original answer and cross-petition and adopt the allegations contained in the amended reply of the plaintiff. The defendants in error filed demurrers to the amended reply and the amended answer and cross-petition, which demurrers were sustained by the court as shown by the following journal entry:

"Now, on this 25th day of July, 1916, the same being a day of the regular March, 1916, term of this court, the above-entitled cause came on for hearing before the court upon the demurrer to plaintiff's amended reply, and also the demurrer to cross-petitions of the defendants Minnie Christensen and Frank Loeser, said demurrers filed by her attorney C. H. Mauntel; the defendants Minnie Christensen and Frank Loeser appearing by their attorney J. P. Grove, and the other defendants appearing by their attorneys Titus & Talbot. And said counsel duly present said demurrers to the court, and the court having heard the argument and statements of said counsel, and being fully advised in the premises, sustains said demurrers, to which ruling of the court said plaintiff and cross-petitioners except.

"Thereupon said plaintiff and said cross-petitioners ask that they be granted leave to file amended reply, and amended cross-petitions, which request is granted by the court, and the defendants Otto Loeser, Godfrey Loeser, Wilhelm Loeser, and Fred Loeser thereupon ask leave to file an amended answer to plaintiff's amended petition now on file in this action, which request is also granted by the court, said amended answer to be filed within ten days from this date, and said amended cross-petitions and reply to be filed within ten days thereafter."

On July 31, 1916, the four defendants in error filed their amended answer which contained only a general and special denial.

On August 12, 1916, Minnie Christensen

filed a separate amended answer. On the same day Frank Loeser filed his separate amended answer in which he adopts and assumes as his amended answer the amended answer of the defendant Minnie Christensen.

The defendants in error, on August 21, 1916, by a written motion filed in said cause, moved the court to strike these amended answers from the files on the ground that they alleged substantially the same facts as those contained in their former pleadings to which the court had sustained a demurrer. This motion was sustained by the court on March 5, 1917.

On August 30, 1917, the defendants in error obtained leave of court and filed an amended answer and counterclaim which is as follows:

"Come now Otto Loeser, Fred Loeser, Godfrey Loeser, and Wilhelm Loeser, defendants in above-entitled cause, and file this their amended answer, and counterclaim to plaintiff's amended petition now on file herein, leave of court first had and obtained, and say:

"They deny all and singular the material averments of said amended petition save such as are hereinafter expressly admitted.

"They admit that plaintiff and the various defendants are all of the children of said Carl Loeser; that the land described in said petition, to wit, the northeast quarter of section 15, township 28 north of range 10, W. I. M., Alfalfa county, Okl., was proved up by said Carl Loeser, and that he received a patent therefor from the United States; and that the said Carl Loeser departed this life at about the time stated by plaintiff, to wit, in January, 1914, and that he died intestate.

"These defendants further answering allege and say that plaintiff is not entitled to further prosecute this action for the reason that plaintiff is now and ever since the filing of this action has been a resident and citizen of the German Empire, and that since the 6th day of April, 1917, by an act of the Congress of the United States a state of war is declared to and does now exist between the United States and the German Empire.

"Counterclaim.

"These defendants for affirmative relief and by way of counterclaim allege and say:

"That they are the owners of the legal and equitable title in and to the lands aforesaid; that they procured title thereto through mesne conveyances from the said Carl, or Charles, Loeser, and his wife, Marie Loeser, who resided on and held said land as their homestead from the date they obtained the same from the United States till the date of their conveyance as hereinafter described.

"That on the 14th day of March, 1910, the said Carl Loeser and his wife, Marie Loeser, who were at the time residing on said land as their homestead, for a good and valuable consideration sold, and by deed of general warranty conveyed, the same to Otto Loeser, one of these defendants; that said deed was duly acknowledged and delivered by said grantors and on the 14th day of March, 1910, at 9:20 o'clock a. m. was duly filed for record and recorded in the office of the register of deeds of

said county, in Book 8, at page 579. That on the 31st day of March, 1910, the said Otto Loeser for a good and valuable consideration sold and by deed of general warranty conveyed said land to one Gottlieb Dautel. That said deed was duly acknowledged and delivered by the said grantor and on the 1st day of April, 1910, was filed for record in the office of the register of deeds of said county at 11:30 o'clock a. m. and duly recorded in Book 7 of Deeds, at page 114. That on the 4th day of May, 1910, the said Gottlieb Dautel for a good and valuable consideration sold and by deed of general warranty conveyed said land to these answering defendants, to wit: Otto Loeser, Fred Loeser, Godfrey Loeser, and Wilhelm Loeser. That said deed was duly acknowledged and delivered by the said grantor, and on the 18th day of April, 1912, was filed for record and recorded in the office of the register of deeds of said county at 5:00 o'clock p. m. and duly recorded in Book 14 of Deeds, at page 41, of the records of said office. That at the time and by virtue of said conveyances these answering defendants became, ever since have been, and now are the owners of the legal and equitable title in and to said real estate and every part thereof. That during all of said times these answering defendants have been and are now in the peaceable possession of said real estate and every part thereof and have enjoyed and received the rents, issues, and profits thereof that such possession has been and is open, notorious, hostile, and adverse to the rights and claims of all other persons including the plaintiff and said codefendants, Minnie Christensen and Frank Loeser.

"These defendants further allege that the plaintiff and the said defendants Minnie Christensen and Frank Loeser have or claim to have some right, title, interest, claim, or estate in and to said real estate or some part thereof, the exact nature of which these defendants are unable to state, except that the said plaintiff and said defendants Minnie Christensen and Frank Loeser claim to own shares of said real estate as heirs at law of said Carl Loeser, deceased. But these defendants say that such claim or claims are without right and are void as against the right, title, and estate of these defendants, but constitute a cloud upon the right and title of these defendants; and these defendants further say that they are entitled to have such cloud and claim canceled and removed from the title of these defendants, and to a decree of this court that the title and estate of these defendants is superior to the right, title, interest, claim, and estate of said plaintiff and said codefendants Minnie Christensen and Frank Loeser, and to a further decree that said plaintiff and said codefendants have no right, title, interest, estate, or claim in or to said property or any part thereof.

"Wherefore these defendants pray the court that plaintiff take nothing by her petition, and that the title of these defendants, to wit, Otto Loeser, Fred Loeser, Godfrey Loeser, and Wilhelm Loeser, be quieted and declared perfect in them, and that the said plaintiff and said codefendants, Minnie Christensen and Frank Loeser, be decreed to have no right, title, interest, estate, or claim in or to said proper-

ty or any part thereof, and that they be enjoined from asserting or setting up any such right, title, interest, claim, or estate; that these defendants recover their costs herein expended and have all other and further relief to which they may be entitled."

On November 27, 1917, Minnie Christensen obtained leave of court and filed a reply to the amended answer and counterclaim filed by the four defendants in error on August 30, 1917. On the same day Frank Loeser obtained leave of court and filed his separate reply to the amended answer and counterclaim of defendants in error. In his reply he again adopted the answer and counterclaim of defendant Minnie Christensen.

The defendants in error claim the replies so filed were carbon copies of the answer and cross-petition which had been stricken by the last previous order of the court. By comparing the pleadings we find they are identical, with the exception of a slight change in the form of the wording in the first paragraph and the last part of the prayer. The changes so made do not affect either the substance, the material allegations or the issues attempted to be raised. The defendants in error filed a motion to strike these pleadings from the files on the ground that said pleadings were identical with the ones that had been previously held insufficient and stricken by the order of the court. The plaintiff had not filed an amended reply since the court had sustained the last demurrer to her amended reply.

On December 11, 1917, the case was called for trial with the pleadings in this condition. The plaintiff by her attorney asked and was granted leave to file a reply to the answer and cross-petition of defendants in error. This reply consisted of a general denial of the allegations contained in the answer and cross-petition and alleged that the plaintiff was a resident of the German Empire and a citizen of the German Empire and she was then living within the borders of the German Empire, and that she is classed as an "alien enemy," and is not able, by reason of a state of war existing between the government of the United States and the government of the German Empire, to prosecute this action.

Thereupon the following proceedings were had and done by said court:

"By the Court:

"At this time, this cause comes on for hearing on the motion of the defendants Otto Loeser, Fred Loeser, Godfrey Loeser, and Wilhelm Loeser to strike the reply of the defendants Frank Loeser and Minnie Christensen from the record:

"The court after having examined the record in said cause and having heard counsel for plaintiff and defendants, and being fully advised in the premises, finds that on March 14, 1910, Charles Loeser, father of plaintiff and defendants, deeded the land in dispute to Otto Loeser;

"That later on, a suit was filed by Frank Loeser to set aside said deed, which action resulted in a judgment for Otto Loeser, the court finding that the title to said land was in Otto Loeser;

"That an appeal was taken to the Supreme Court of the state of Oklahoma, and later the plaintiff in error Frank Loeser dismissed the appeal; thereby the judgment of the trial court becoming final and binding upon all parties to the action.

"The court is of the opinion that the action brought by plaintiff, to partition, could not be maintained and that a demurrer to said petition was properly sustained, for the reason that plaintiff had no right or title whatsoever in said property.

"The court is of the opinion that the court should not have permitted an amended petition to be filed, for the reason that all the rights to the property had been previously adjudicated and found to be in Otto Loeser, which was properly sustained; that in truth and in fact there has never been a time when a cause of action, of any description or kind, could be maintained against Otto Loeser by this plaintiff or defendants acting with them.

"That so far as the plaintiff Friederike Stockman is concerned, the record showing that she is a resident of and now domiciled in the German Empire, this would make no difference in this case for the reason if she ever had any rights, they had been adjudicated in the former trial of this case in favor of Otto Loeser and that the plaintiff Friederike Stockman could not maintain an action because she had no right whatsoever in the property.

"That the answer filed by the defendants Otto Loeser, Fred Loeser, Godfrey Loeser, and Wilhelm Loeser to the amended petition, is the first pleading in this case asking for affirmative relief whereby the court could legally and effectively dispose of the case.

"That in said answer they ask for affirmative relief in that they ask that the title be quieted in said four defendants, Otto Loeser, Fred Loeser, Godfrey Loeser, and Wilhelm Loeser.

"That the reply thereto is merely an attempt to set up the same cause of action that had been heretofore held insufficient by the trial court and, in fact, is not sufficient to constitute a cause of action, and that the motion to strike said reply, so denominated (which we treat as a petition in truth and in fact), should be and the same is hereby stricken from the record.

"By Mr. Grove: At this point, the defendants Minnie Christensen and the said Frank Loeser each and severally except to the ruling of the court.

"By the Court: Now, gentlemen, you better exercise your right to ask for relief on the pleadings right now because you are standing on them, anyhow, asking that the title be quieted and let them appeal if they desire.

"By Mr. Talbot: If the court please, we would like to offer a little documentary evidence for the reason that they still have a general denial on file.

"By the Court: Very well; you may do so.

"By Mr. Mauntel: Before you offer that, I wish to make an objection on behalf of the plaintiff Friederike Stockman. The plaintiff

Friederike Stockman, by her attorney, objects to the introduction of any testimony in support of the cross-petition and answer of the defendants Otto Loeser, Godfrey Loeser, Wilhelm Loeser, and Fred Loeser for the reason that the plaintiff Friederike Stockman is an 'alien enemy,' a citizen of and domiciled in, the German Empire at this time, and has been during the entire period of the pendency of this action and is not able by reason of said legal disability to present her case or to defend successfully against any evidence that said defendants heretofore enumerated may offer.

"By the Court: It appearing to the court that the plaintiff's interests in this case are identical with those of the defendants Frank Loeser and Minnie Christensen, and that each and all of these parties are represented by competent counsel, and have been fully and truly heard many times, the objections of the plaintiff Friederike Stockman to the introduction of any evidence on behalf of the defendants Otto Loeser, Godfrey Loeser, Wilhelm Loeser, and Fred Loeser, at this time, will be overruled:

"By Mr. Mauntel: To which ruling of the court in overruling the objections of the plaintiff Friederike Stockman to the introduction of evidence in said cause by the defendants Otto Loeser, Fred Loeser, Godfrey Loeser, at this time, the said plaintiff Friederike Stockman excepts."

The plaintiffs in error in their brief admit that the defendants in error introduce evidence in support of their amended answer and cross-petition. To the introduction of this evidence the plaintiffs in error each objected, which objections were by the court overruled, and the plaintiffs in error excepted. After the defendants in error had rested their case, the plaintiffs in error each offered to introduce testimony in support of the allegations set forth in their respective replies which had been stricken from the files by order of the court, which offer was by the court refused and denied, and the plaintiffs in error excepted to said ruling of the court.

We have endeavored to be as brief as possible in making an intelligent statement, showing the condition of the pleadings as disclosed by the record. The case-made contains more than 150 pages of pleadings, motions, and amended pleadings. The plaintiffs in error have made numerous assignments of error in their petition in error, but set out only two grounds which they assume to argue in their brief, wherein they say:

"There are but two propositions that can be presented to the court in this cause. The first is: Did the civil action in the district court of Alfalfa county wherein Frank Loeser, the son of Carl Loeser, and one of the plaintiffs in error herein, was plaintiff, and Carl Loeser, his father, who died during the pendency of the action, and the four sons who are defendants in error herein, together with Gottlieb Dautel, were defendants, present a bar to the plaintiffs in error herein?

"Was this action brought within the period of limitation?"

The defendants in error say of the second question proposed by plaintiffs in error:

"Inasmuch as the matter of limitations was not relied upon by the defendants in the lower court and was never presented to nor considered by the judge, we will concede that that question was not in this case, and that defendants claim no right nor benefit under the statute of limitations."

Therefore we do not need to consider the second question raised by plaintiffs in error.

[1] Defendants in error say that under the law if any errors were committed by the trial court in its rulings on the demurrers or motions they were all waived, except the ruling on the last motion, which was a motion to strike, because the parties obtained leave of court to plead over and did plead over. This court has announced the rule of law in this jurisdiction as follows:

"When a demurrer is sustained to a pleading, and the pleader thereupon takes leave to amend, he thereby waives the error, if any has been committed, in sustaining such demurrer. In order to take advantage of a ruling on a demurrer when such demurrer is sustained, the party must stand upon his pleading held to be defective, and not amend." *Berry et al. v. Barton et al.*, 12 Okl. 221, 71 Pac. 1074, 66 L. R. A. 513.

"Where a demurrer to a petition is sustained and the plaintiff asks for and is granted time in which to amend, the error, if any, in sustaining said demurrer, is waived and cannot be assigned as error; and the judgment of the court dismissing the plaintiff's cause of action where he fails to file an amended pleading under the state of case above given was proper." *State ex rel. Freeling v. Martin*, 26 Okl. 295, 162 Pac. 1088.

"Where a demurrer to a petition is sustained, and the plaintiff is granted time in which to amend, the error, if any, in sustaining said demurrer, is waived, and cannot be assigned as error; and the judgment of the court dismissing the plaintiff's cause of action, where he fails to file an amended pleading under the state of the case above given, is proper." *Gates v. Miles et al.*, 169 Pac. 888.

"Where a demurrer is sustained to each paragraph of the answer, except the paragraph containing a general denial, and exceptions are saved to the ruling of the court, and incorporated in the motion for a new trial, and included in the writ of error, the error of the trial court in sustaining the demurrer is properly before this court for review, notwithstanding more than six months intervened between the date of the order sustaining the demurrer and filing a writ of error in this court." *Brooks et al. v. Watkins Medical Co.*, 196 Pac. 950.

[2] The defendants in error contend that the first question proposed by plaintiffs in error is not in this case, and that the only question presented to this court is: Did the trial court err in striking the last amended

reply of Frank Loeser and Minnie Christensen from the files? They say that by law and under the decisions of this court all other questions have been waived.

We agree with the first part of their contention. It is also apparent the plaintiffs in error have abandoned the question suggested by defendants in error.

If the trial court committed any error in proceeding with the trial of said cause on account of Friederike Stockman being an alien enemy and rendered a judgment against her while a state of war existed between the government of the United States and the Imperial German government, that error was waived because the plaintiff in error has not presented the question in her brief. Not one line or word in the argument or any citations of authority are offered or suggested to this court in support of her statement in her petition in error that this constituted error. The same is true of the question suggested by defendants in error:

"Did the trial court err in striking the last amended reply of Frank Loeser and Minnie Christensen from the files?"

The only question presented by the brief of plaintiffs in error has heretofore been set out in totidem verbis, which, stripped of all surplus verbiage, would read:

"Did the civil action brought in the district court of Alfalfa county by Frank Loeser against Carl Loeser et al. present a bar to the plaintiffs in error herein?"

This does not present the question:

"Did the trial court err in striking the last amended reply of Frank Loeser and Minnie Christensen from the files?"

They do assign that question as one of their grounds of error in their petition in error, but not having presented it in their brief they have abandoned it. *Elting, J.*, has announced the law on this question and collected the decisions of this court in the case of *Oklahoma Petroleum & Gasoline Co. v. Minnehoma Oil Co.*, 80 Okl. 245, 195 Pac. 759, as follows:

"(1) The plaintiff in error had seven assignments of error, but has only presented and argued its sixth assignment. Under a rule long established in this jurisdiction, all assignments of error not presented or argued in the brief of the plaintiff in error will be treated as abandoned. The rule is stated as follows in the case of *De Vitt et al. v. City of El Reno*, 28 Okl. 315, 114 Pac. 253: 'The rule that causes assigned for a new trial in the motion for a new trial, and assignments of error in the petition in error, which are not presented or argued in the brief of the plaintiff in error, will be treated as abandoned and will not be considered by this court has long since become the settled law and practice in this jurisdiction.' See *Eskridge v. Taylor*, 75 Okl. 139, 182 Pac. 516; *Cavanagh v. Johannessen*, 57 Okl. 149, 156 Pac. 289;

Hatcher v. Roberson, 164 Pac. 1141; Ft. Smith & W. Ry. Co. v. Knott, 60 Okl. 175, 159 Pac. 847; Cox v. Kirkwood, 59 Okl. 183, 158 Pac. 930; Connelly v. Adams, 52 Okl. 382, 152 Pac. 607.

"The defendant in error, defendant below, excepted to the action of the trial court in failing to cancel the contract between plaintiff and defendant, but does not urge such error in this appeal and must be held to have abandoned its contention thereon."

The state of the pleadings at the commencement of the trial are as follows:

[3, 4] The amended petition of the plaintiff, Friederike Stockman, in which she asserted ownership of an undivided one-seventh interest in the land as an heir of Carl Loeser, deceased, and asking that she be restored to possession and the land be partitioned. To this amended petition the defendants in error had filed their amended answer and counterclaim which has heretofore been set out in full. In it they deny generally the allegations in plaintiff's petition, assert they are the owners of the land and deraign their title through a deed executed by Carl Loeser, and ask to have their title quieted. To this amended answer the plaintiff filed a reply containing a general denial and alleging she was an alien enemy. The separate reply of the plaintiffs in error Frank Loeser and Minnie Christensen had been stricken from the files by order of the court, and they did not have a pleading of any kind on file. They were not asserting any right, title, or interest in the land by any pleading.

What issues were presented for trial by these pleadings? Plaintiffs in error Frank Loeser and Minnie Christensen were not claiming anything. Plaintiff in error Friederike Stockman did not have any pleading which in any way attacked the validity of the deeds through which the defendants in error claim title. She was not asking to have these deeds canceled or set aside. If any issue was raised by plaintiffs in error, it was raised by Friederike Stockman by the general denial contained in her reply. It is not necessary in this case to pass on whether or not the unverified general denial raised an issue, and on that we are not expressing any opinion. The defendants in error assumed on the trial of the case in the court below that it did raise an issue, and to support their claim of ownership they introduced in evidence the three deeds as set forth in their answer and cross-petition. Under this proof the deed of Carl Loeser and Marie Loeser, his wife, divested him of title during his lifetime and at the time of his death he did not have any title to this land; therefore Friederike Stockman could not inherit from her ancestor who did not have title at the time of his death. The proof made by the introduction in evidence of the

other deeds set forth in the answer and cross-petition of the four defendants vested the legal title in them, and, in the absence of proof of any equities or equitable title that would impair their legal title, it was the duty of the trial court, under the issues raised by the pleadings as they then existed, to render a judgment decreeing the four defendants to be the owners of the land and quieting their title as prayed for.

The plaintiffs in error have not presented any error to this court that constitutes reversible error; therefore the judgment of the trial court is affirmed.

HARRISON, C. J., and JOHNSON, ELTING, KENNAMEY, and NICHOLSON, JJ., concur.

OKLAHOMA GAS & ELECTRIC CO. v. STATE CORPORATION COMMISSION.
(No. 12358.)

(Supreme Court of Oklahoma. Oct. 18, 1921.
Rehearing Denied Nov. 8, 1921.)

(Syllabus by the Court.)

1. Public service commissions §7—Corporation Commission may prescribe temporary rate schedule.

The rate-making power of the Corporation Commission is not limited to any particular theory or method, and the commission may, if it has the necessary facts before it, prescribe a temporary schedule of rates to be effective until the Commission has had time to make an investigation and a valuation of the property of the public utility.

2. Public service commissions §19(1)—Order held a temporary one.

It is not necessary for the Corporation Commission to fix in its order a time limitation that the schedule of rates shall continue in effect to make it a temporary order. This court may examine and take into consideration not only the order, but the entire record, in determining the scope, effect, limitation, or purpose of the order. On making such examination, held that the order in this case is a temporary order.

3. Public service commissions §7—Corporation Commission may consider former and prospective earnings in adjusting public utility rate.

In fixing the rate at any particular time, the Corporation Commission may take into consideration former earnings and probable prospective earnings, former cost of operation and probable prospective cost of operation, with a view to so adjust the rate as to prevent the public utility from practicing extortion on the public and yet allow it a fair and reasonable return.

4. Public service commissions §7—Corporation Commission may fix temporary rate from exigency arising from reduced operating expenses pending fixing of permanent rate.

The legislative power of the Corporation Commission over rates is not confined to prescribing permanent rates, but may be exercised as the exigencies of the times and changing conditions demand. A reduction in the cost of operating expenses of a public utility amounting to more than \$100,000 per annum creates such an exigency that the Corporation Commission may readjust and lower the rate to be charged the consumers in comparison with the reduced expenses.

Appeal from Order of Corporation Commission.

Proceeding by the Corporation Commission of the State of Oklahoma reducing the rates chargeable by the Oklahoma Gas & Electric Company, and the Company appeals. Order of the Corporation Commission affirmed.

Robert M. Rainey and Street B. Flynn, both of Oklahoma City, for appellant.

E. S. Ratliff and Asp, Snyder, Owner & Lybrand, all of Oklahoma City, for appellee and consumers.

MILLER, J. This proceeding was instituted by the Corporation Commission against the Oklahoma Gas & Electric Company by notifying them that the rate to be charged by them for electricity used for lighting, heat, and power would be reduced because of the reduction in the cost of fuel which is one of the large items of expense in producing electricity for commercial purposes. They appeared before the Corporation Commission, and a hearing was had extending from May 23 to and including May 25, 1921. The Corporation Commission made what it designated as a temporary order, No. 1880, readjusting the rates. From the order so made by the Corporation Commission, the Oklahoma Gas & Electric Company appeals, and appears here as appellant. The questions presented by appellant in this appeal are:

"(1) Order No. 1880 of the Corporation Commission reducing the electric light and power rates in Oklahoma City, Norman, and Moore (although denominated a temporary order), is in fact a permanent order so far as a rate order may be, which the Commission was not authorized to make, for the reason that said Commission did not make a valuation of appellant's property, used and useful in its business, which was essential to the fixing of a permanent rate.

"(2) Although the Commission did not make a valuation of appellant's property, used and useful in its business, the rate fixed by the Commission does not give a fair and adequate return to appellant upon the valuation of its

property, used and useful in its business in supplying electric current and power, as shown by the evidence offered by it in this proceeding, and the rate fixed is therefore noncompensatory and amounts to a taking of defendant's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

"(3) If appellant is mistaken in considering said Order No. 1880 as a permanent rate order, so far as a rate order may be, and the court is of the opinion that it is only a temporary order, the same is based upon an erroneous theory, for, although the Commission finds that the electric current and power rates were raised when the cost of fuel advanced (and the reduction is made on the theory that they should therefore be reduced when the cost of fuel is diminished), there is not any evidence in the record showing that the rates were increased when the cost of fuel increased."

The order No. 1880 of the Corporation Commission complained of reads as follows:

"On May 7, 1921, the Corporation Commission issued the following notice in the form of a letter to the Oklahoma Gas & Electric Company, a public utility manufacturing and distributing electric current in the cities and towns of Moore, Norman, and Oklahoma City, which includes Putnam City, Bethany, Stockyards and Britton:

"As fuel and other productions costs advanced it was the policy of the Commission to protect the public utilities of the state by adjusting rates upward to cover the increased cost. Now that fuel (and other) costs are declining, it becomes the duty of the Commission to be equally prompt in readjusting rates downward for the protection of the public.

"Considering the very substantial reduction in fuel costs now effective, also the fact that the net returns to your company under the higher production costs prevailing during the past year were ample, you are hereby instructed to make effective June 1st, next, a lighting rate of 10¢ per kwh. for the first 50 kwh. of monthly use, in lieu of the 12¢ now in effect; 9¢ per kwh. for the next 100 kwh., this in lieu of the two steps, 50 at 10¢ and 50 at 9¢, as now in effect; remainder of lighting schedule to remain as at present until further ordered.

"You are also instructed to make the power rate 6¢ per kwh. for the first 200 kwh. of monthly consumption; remainder of the power schedule to remain as at present until further ordered.

"These rates can either be made effective June 1st or you can answer in courtroom of the Corporation Commission at 10 o'clock a. m., Monday, May 23d, and show cause why such rates are not just and equitable at this time.

"No notice or other indication having been received from the company that the rates suggested would be made effective without a hearing, on the 13th of May, 1921, the Commission gave formal notice that a hearing would be held in the Commission's courtroom in the

capitol at Oklahoma City on the 23d day of May, 1921, upon the question of the reduction of the rate to be charged by the company as indicated in the letter set forth above.

"On the 23d of May, 1921, respondent company appeared through its attorneys and other representatives before the Commission at the hour of 10 o'clock a. m., and the hearing was proceeded with. Testimony upon the part of the Commission was by Mr. Grimes, the Commission's Auditor, and is shown in exhibits from 1 to 9 inclusive, of the record in the case.

"Exhibit 1 shows an increase of revenue for the year 1920 over the year 1919, of \$267,064.29, or, in percentage figures, 26.65%, while for the same years there was an increase in operating expenses of \$113,512.28, or 18.11% expressed in percentage; these figures being taken from reports on file with the Corporation Commission.

"Exhibit 2 is a comparative statement of revenues and expenses for the months of January, February, and March, 1921, as compared with the same months for 1920, and discloses an increase in revenues of 21.86% with an increase of operating expenses of 18.11%.

"Testimony further discloses that during these three months there was charged to general expenses the sum of \$61,032.81 for the year 1921, while for the first three months of the year 1920 the same item amounted to only \$42,967.11. This difference the company has failed to properly account for.

"Testimony of Mr. Strait, engineer and accountant for respondent, shows an undisputed reduction in fuel costs of \$115,575.35. Mr. Strait also testified that the reduction of return to the company by reason of the proposed decrease in rate as indicated by the notice of May 7th and May 13th, will amount to \$108,592.38.

"At the hearing the exhibits and testimony adduced upon the part of respondent, applied to and covered the towns of Moore and Norman, Oklahoma, as well as to the city of Oklahoma City; these two towns being supplied with current produced and generated from the power plant in Oklahoma City, and it is agreed that the same proportionate decrease as applied in Oklahoma City should also apply to those towns.

"This Commission on the 19th day of March, 1919, put into effect a reduction of 1¢ per kw. hour from the rate in effect at that time, for the reason that expected increases in fuel costs at the time of the making of the order had not materialized. This reduction was agreed to by the company.

"It has been the policy of this Commission during war times and during the times of constantly increasing fuel costs, to properly adjust the rates for utilities engaged in the production and distribution of electricity so as to keep fuel costs and the rate as near as possible on the same level. It now becomes its duty when fuel costs are shown to have decreased and the cost of production per kw. hour of electric energy has substantially decreased, to be equally prompt in readjusting the rates in conformity to such decrease.

"The Commission therefore finds from the testimony in this case that the proposed re-

duction will result in a reduction of revenue to the respondent company of \$108,592.38 annually; that the reduced cost of fuel for respondent has resulted in a decrease of operating expenses which will amount to the sum of \$115,575.35 annually; that this still leaves a balance of \$6,985.97 per annum in favor of the company as a return over the showing for 1920, to say nothing of the unexplained increase of the general expense item for the months of January, February, and March, 1921, as shown by the reports and records of the company.

"It is therefore the order of the Commission, premises considered, that the respondent, Oklahoma Gas & Electric Company, on and after June 1, 1921, be and it is hereby ordered to make effective the following schedule of rates:

"Oklahoma City.

"Domestic rates:

First 50 kw hour per month.....10¢ per kw hour
Next 100 kw hour per month..... 8¢ per kw hour
Next 150 kw hour per month..... 6¢ per kw hour
Next 200 kw hour per month..... 7¢ per kw hour
Next 1,000 kw hour per month..... 6¢ per kw hour
Next 1,500 kw hour per month..... 5¢ per kw hour
Next 1,500 kw hour per month.....4½¢ per kw hour
Excess kw hour per month..... 5¢ per kw hour

"Discount 10% for payment of bills within 10 days from date thereof.

"Minimum Bill, \$1.00 net per meter per month.

"Power rates:

First 200 kw hour per month..... 6¢ per kw hour
Next 300 kw hour per month..... 5¢ per kw hour
Next 500 kw hour per month.....4½¢ per kw hour
Next 1,500 kw hour per month..... 4¢ per kw hour
Next 2,500 kw hour per month.....3½¢ per kw hour
Excess kw hour per month.....2.75¢ per kw hour

"Discount 10% for payment within 10 days from date of rendering bill.

"Norman.

"Domestic rates:

First 50 kw hour per month.....11¢ per kw hour
Next 50 kw hour per month.....10¢ per kw hour
Next 100 kw hour per month..... 8¢ per kw hour
Next 100 kw hour per month..... 8¢ per kw hour
Next 200 kw hour per month..... 7¢ per kw hour
Next 500 kw hour per month..... 6¢ per kw hour
Next 1,000 kw hour per month.....5¢ per kw hour
Excess kw hour per month..... 4¢ per kw hour

"Discount of 10% for payment within 10 days from date of rendering bill.

"Minimum bill, \$1.00 net per meter per month.

"Moore.

"Domestic rates:

First 100 kw hour per month.....12¢ per kw hour
Next 100 kw hour per month.....11¢ per kw hour
Next 300 kw hour per month..... 8¢ per kw hour
Next 500 kw hour per month..... 7¢ per kw hour
Excess kw hour per month..... 6¢ per kw hour

"Discount of 10% for payment within 10 days from date of rendering bill.

"Minimum bill, \$1.00 net per meter per month.

"This order to be in full force and effect on and after June 1, 1921, and until the further order of this Commission.

Done at Oklahoma City this 25th day of May, 1921."

[1] We think the record in this case sustains the order of the Corporation Commission. It is clear that this rate is merely a readjustment of rates based on the decreased cost of the fuel. Mr. Strait who is engineer and accountant for the appellant

testified that the reduction in fuel costs would amount to \$115,575.35, and the reduction of return to the company by the proposed decrease in rate would amount to \$108,592.38.

The appellant cites the case of *Oklahoma City et al. v. Corporation Commission*, 80 Okl. 194, 195 Pac. 498, which holds that the order made in that proceeding was not a rate-making order and seeks to deduce from the opinion that the Corporation Commission cannot make an order changing a rate until it has first made a valuation of the property used and useful by such public utility. The appellant further asks this court to hold that the Corporation Commission cannot change a rate already in operation without making a valuation of the property of such public utility. Appellant relies on paragraph 6 of the syllabus, which reads:

"In determining what is a fair and reasonable rate, it is essential that the Corporation Commission determine the value of the property of the public utility used and useful in serving the people."

The real question before the court in that case is disclosed in paragraph 8 of the syllabus, which states:

"The Corporation Commission has no authority to make an order requiring the consumers of gas to pay an additional sum over and above a fixed rate, for the purpose of creating a special fund, called a patrons' fund, which may be used in the future by the public service corporation with the consent and agreement of the Corporation Commission to build additional lines and compressor stations. The Commission having no authority to make said order, the same is void, and prohibition will lie to enjoin the enforcement thereof."

In the *City of Bartlesville v. Corporation Commission* (Case No. 12066) opinion filed June 14, 1921, 199 Pac. 396, this court said:

"The rate-making power of the Commission is not limited to any particular theory or method, and the Commission may, if it has the necessary facts before it, prescribe a temporary schedule of rates to be effective until the commission has had time to make an investigation and a valuation of the property of the public utility."

In *Muskogee Gas & Electric Co. v. State*, 186 Pac. 730, this court says:

"The Corporation Commission was created and endowed with legislative, executive, administrative, and judicial powers.

"The power to fix rates is legislative, whether exercised by the Legislature directly or by an administrative body under delegated authority.

"The legislative power of the Corporation Commission over rates is not confined to prescribing permanent rates, but may be exercised as the exigencies of the times and changing conditions demand, and the Corporation Commission has authority to prescribe temporary rates when the necessity therefor is apparent.

"The rate-making power of the Corporation Commission is not limited to any particular theory or method; and the Commission may, if it has the necessary facts before it, prescribe a temporary schedule of rates to be effective until the Commission has had time to make an investigation and a valuation of the property of the public utility.

"The power of the Corporation Commission to prescribe rates is not limited to complaints filed, but is inherent in the authority delegated to the Commission, and the only question of notice that can be raised by a public utility is that prescribed for notice and hearing for the utility itself."

Higgins, J., speaking for the court in the above case, says:

"Appellant contends that said order is invalid for the reason that it is temporary and experimental, and was put into effect only until such time as the Commission could secure data upon which to make a valuation of the property of the company and a permanent schedule of rates. * * *

"The first contention strikes at the very foundation of the fundamental law creating the Commission and defining its duties, and, if sustained, must work a result quite as surprising and disastrous to the appellant as to the patrons of the company and the general public, for, if the Commission were limited to prescribing rates to instances where it had made a complete inventory and valuation, there could be little or no relief from rapidly fluctuating prices brought about by war conditions and incident to the reconstruction period.

"This contention of the appellant fails to take into consideration the purpose for which the Commission was created and the powers conferred upon it through the Constitution and the laws enacted by the Legislature. The Corporation Commission was created and endowed with legislative, executive, administrative, and judicial powers. *St. L. & S. F. Ry. Co. v. Williams et al.*, 25 Okl. 662, 665, 107 Pac. 428, 430; *Okl. Gin Co. v. State*, 158 Pac. 629, 631.

"In *Ft. S. & W. Ry. Co. v. State*, 25 Okl. 866, 868, 108 Pac. 407, 408, this court said: 'The power lodged in the Commission to promulgate rates is a legislative power, and its exercise by the Commission involves legislative discretion and policy. Any rule that would require the Commission, before it promulgates any order fixing a rate, to have before it evidence that would establish to a mathematical certainty the reasonableness of the proposed rate, would greatly hinder, if not almost entirely prevent, the Commission from exercising that power.'

In *Omaha & C. B. St. Ry. Co. v. Nebraska State Railway Commission*, 103 Neb. 695, 173 N. W. 690, the Supreme Court of Nebraska said:

"Under the Constitution and laws of this state, the Commission has a wide discretion in these matters. Even though present financial conditions, prices, and wages (showing almost unprecedented changes), together with the financial condition of the plaintiff company, do not show a situation which would be technically denominated an emergency, yet, if they do

show a situation which makes it altogether probable that the past and present rate is insufficient to yield a revenue which will pay that fair average return which the law supposes, the Commission is empowered, and it may be its duty, to permit a temporary rate, limited to the time required for making an investigation and finding of the value of the property. If it should happen that the temporary rate so fixed is too high, the condition can be rectified in the order fixing the rate after investigation. The purpose of the law being to allow those who voluntarily furnish the necessary capital to install and operate such public utilities a fair average return upon the value of the property so devoted to the public use, and to prevent unreasonable profits, in fixing the rate at any particular time, former earnings and probable prospective earnings should always be considered, with a view to so adjust the rate as to prevent extortion and allow such fair average return."

The appellant has cited this case, laying stress on the following lines:

"To permit a temporary rate, limited to the time required for making an investigation and finding of the value of the property."

[2] It contends because the order of the Corporation Commission does not specify this limitation that it is not a temporary rate. We do not think this court is limited to this narrow view in construing the order of the Corporation Commission. This court may take into consideration the entire record in determining the scope, effect, limitations, or purpose of the record. The record in this case discloses there is a proceeding pending before the Corporation Commission to make a valuation of the appellant's property used and useful in the production of electricity for light, heat, and power and determine the cost of producing the same and fix a rate to be charged therefor. It is true that all orders of the Corporation Commission are more or less temporary. It is manifest from the record that the order in this proceeding is only intended to govern until a complete adjustment of rates can be had. Therefore, we think, this order is properly designated temporary order.

[3, 4] The appellant next contends that the Corporation Commission did not make a valuation of its property and the rate fixed does not give a fair and adequate return to the appellant. The rate charged by the appellant prior to the time order No. 1880 was to go into effect had been fixed and assented to by the Corporation Commission and the appellant. It had been operating under it; therefore the constitutional presumption that the rate is just, reasonable, and correct would apply. If the rate it was already operating under was just, reasonable, and correct and the expense of the company was reduced approximately \$10,000.00 per month, we know

of no good reason why the Corporation Commission should not readjust the rates to be charged so as to reduce the income in accordance with the reduction in the expense. It would necessarily follow that, if the expenses were reduced \$115,000, and the income reduced \$108,000, this would not lessen the return to the appellant upon the valuation of its property. In *Omaha & C. B. St. Ry. Co. v. Nebraska State Railway Commission*, supra, the court said:

"In fixing the rates at any particular time, former earnings and probable prospective earnings should always be considered, with a view to so adjust the rate as to prevent extortion and allow a fair average return."

In answering appellant's third contention it is not necessary to prove that there was any increase in the price of fuel or if such increase did occur that the rate for electricity was increased.

The order makes reference to the testimony of Mr. Grimes and his Exhibits 1 to 9 inclusive. Grimes' Exhibit 1 shows this company's total revenue for the year ending December 31, 1919, was \$1,002,226.96 with operating expenses during the same time amounting to \$626,632.21. The same exhibit shows its total revenue for the year ending December 31, 1920, was \$1,269,291.25 with operating expenses for that year amounting to \$740,144.49. This would indicate that an increase in rates for electricity had been made by the company. However, it was selling electricity in 1919 at a rate agreed upon by it and the Corporation Commission. In 1920 it had a net income of \$153,552.01 more than its net income for the preceding year. If permitted to charge the same rate during the year 1921 with the decrease in cost of operation caused by the fuel item alone, its net income in 1921 would be \$115,575.35 greater than its net income in 1920, and \$269,127.36 more than its net income for 1919.

The presumption obtains that the rate in existence before order No. 1880 was made is just, reasonable, and correct, therefore a material reduction in the operating cost should be met with a reduction in the rate charged for the electricity.

We have studiously avoided any comments about the proffered valuation of the property of appellant, and the net return as that matter has not been disposed of by the Corporation Commission, and it appears from this record is still pending before it.

We think the record in this case fully sustains the prima facie presumption that the order made by the Corporation Commission is just, reasonable and correct. Therefore order No. 1880 is hereby affirmed.

HARRISON, C. J., and KANE, ELTING, and KENNAMER, JJ., concur.

GEORGE et al. v. CONNECTICUT FIRE INS. CO. (No. 9938.)

(Supreme Court of Oklahoma. Nov. 8, 1921.)

(Syllabus by the Court.)

1. Insurance ⇐179—Policy covering separate classes of property, each insured for specific amount, is divisible.

In this jurisdiction the general rule is: Where an insurance policy is issued and different classes of property are insured, each class being separate from the other, and insured for a specific amount, the contract should be considered as a divisible contract.

2. Insurance ⇐548—Reservation for personal examination of assured held to form no part of proof of loss.

The personal examination of the assured, reserved to the company by the conditions of the policy, in the instant case formed no part of the proof of loss provided by the policy. The right to so examine was a privilege reserved to the company, which they could exercise or not as they might choose, but was not a duty imposed on the assured.

3. Insurance ⇐548, 612(2)—Plaintiff's violation of policy provision for examination held not to work forfeiture, but to delay action until questions answered.

The fire insurance policy in the instant case contained a provision requiring the assured to submit to an examination, when requested by the company, and further provided that no suit should be sustainable until full compliance with the terms of the policy. The assured submitted to an examination, but refused to answer certain questions, upon advice of his counsel, contending the same were immaterial; thereafter suit was instituted upon the policy, and defendant pleaded a breach of the conditions of the policy by assured's refusal to answer certain questions. *Held*, the refusal to answer material questions was considered not to work a forfeiture of the policy when the policy contained no such provision, but the plaintiff would have no right to further prosecute his action until such questions were answered.

Appeal from District Court, Kay County; W. M. Boles, Judge.

On second rehearing. Former opinion (200 Pac. 544, 691) modified.

William S. Cline, of Newkirk, for plaintiffs in error.

John W. Scothorn and Albert L. McRill, both of Oklahoma City, for defendant in error.

George B. Rittenhouse and F. A. Rittenhouse, both of Chandler, and John F. Webster and P. T. McVay, both of Oklahoma City, *amici curiæ*.

McNEILL, J. [1] A very elaborate brief has been filed in support of the second petition for rehearing, and a proper considera-

tion of the same necessitates a consideration of not only the opinion in this case, but also a consideration of the opinion on the former appeal, being *Connecticut Fire Ins. Co. v. George*, 52 Okl. 432, 153 Pac. 116. We think the former opinion failed to consider several material questions that should have been considered and were raised by the brief in said case, and are necessary to be considered at this time in reaching the right conclusion upon this second petition for rehearing. The policy involved was for insurance in the total amount of \$2,000, and divided as follows: (1) \$200 on household and kitchen furniture, etc., while contained in above described dwelling house; (2) \$150 on iron and board roof frame barn No. 1, with shed attached including foundation; (3) \$250 upon grain, corn, ground feed and seed while in building or in stack on farm; (4) \$100 on farming utensils, wagons, harness, saddles, etc., while in building on farm; (5) \$350 on hay, straw, fodder and flax while in building or in sheds or in stacks on farm; (6) \$800 on horses, mules, and colts anywhere; (7) \$150 on cattle anywhere.

This action was brought to recover loss of: (1) For household furniture; (2) grain; (3) certain farming utensils; (4) hay.

In the former appeal this court treated the policy as an inseparable contract, and that a violation or breach of the conditions of the policy in so far as it related to one class of property would render the entire policy void. In this we think the court committed error, and overlooked the former decision of the territorial Supreme Court, to wit, *Miller v. Delaware Ins. Co. of Philadelphia*, 14 Okl. 81, 75 Pac. 1121, 65 L. R. A. 173, 2 Ann. Cas. 17, wherein the court stated as follows:

"Where an insurance policy is issued, and different classes of property are insured, each class being separated from the others and insured for a specific amount, and there is a breach of the conditions of the contract as to one class of the property insured, the contract should be considered as not one entire in itself, but as one which is severable, and in which the separate amounts specified may be distinguished, and a recovery had for one or more of them without regard to the other, provided the contract is not affected by any question of fraud, act condemned by public policy, or any increase of the risk of the company on the whole property insured because of the breach."

The identical question was before the Supreme Court of West Virginia in the case of *Bond v. National Fire Ins. Co. of Hartford, Conn.*, 83 W. Va. 105, 97 S. E. 692, and the court said:

"A fire insurance policy covering different classes of property, separately valued, containing a condition or warranty relating to one

class of property only, and not affecting the risk as to another, is a divisible contract, and is not avoided in its entirety because of a breach of such condition or warranty, notwithstanding a stipulation in the policy that it shall become void in toto upon a breach by the insured of any one of its conditions."

In the body of the opinion the court stated as follows:

"Whether in such case the policy is divisible or entire there is much conflict in the authorities. There are three distinct rules relating to the question, each finding support in the decisions of the various courts of this country. One rule is that if the premium is paid in gross, even though the property insured is separately valued, the contract is entire; another, that if the property is separately valued the policy is divisible, even though the premium is in gross; and still another rule is, where the property is separately valued, the divisibility of the policy depends upon whether the property is so situated that the risk on one item of it affects the risk on the others. If a provision or warranty in a policy relating specially to one item of property separately valued affects the risk of all, the policy is regarded as entire, whether the premium is separate or in gross; but, if it does not so affect the risk on all the property insured, the policy is divisible."

The Supreme Court of Michigan in the case of *Benham v. Farmers' Mutual Fire Ins. Co.*, 165 Mich. 406, 131 N. W. 87, L. R. A. 1915D, 736, Ann. Cas. 1912C, 853, stated as follows:

"A policy, insuring for a single premium specified sums on the dwellings on a farm and its barns, sheds, furniture, products, equipment on the premises, and live stock anywhere in certain specified counties, is divisible, and the insurance on the personalty is not avoided by breach of warranty as to condition of chimneys on the dwellings and the placing of an incumbrance on the realty without authority, except so far as it is contained in the buildings as to which the risk is increased."

The cases supporting the rule above announced are annotated in 2 Ann. Cas. 22, in the note the annotator stated as follows:

"When these rules have come to be applied to a contract for insurance on different pieces of property, there has been a contrariety of opinion. It seems to be conceded in general terms that, where the contract is entire, a breach of condition affects all the property at risk; but as to what makes an entire contract there is not uniformity of ideas. It is doubtless a sound rule that where, by a policy upon several separate and distinct classes or species of property, each of which is separately valued, the sum total of the valuation is insured on payment of a premium in gross, the contract is severable; and a breach of a condition avoiding the policy as to one of the items does not affect it as to the others if there is nothing in the terms, in the nature of the contract or of the different subjects of the insurance, or in the surrounding circumstances, from which it can be inferred that the insurer would not have

been likely to have assumed the risk on one or several of the subjects of the insurance, unless induced by the profit or advantage of having a risk upon all, and if the breach as to one item of property does not increase the risk as to the balance."

The annotator in support of this rule, states as follows:

"In *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452, holding that a breach of a condition in a policy of insurance by placing incumbrances on buildings did not avoid the policy as to chattels in the buildings which were separately valued, the court in its reasoning points out the considerations which are determinative as to the divisibility of insurance contracts: "There is nothing to show that an incumbrance upon the buildings would have been an objection to a risk on the chattel property, or that the opportunity of insuring on the buildings was the inducement to taking a risk also on the chattels. There is nothing in the nature or terms of the contract which make it so much an entirety as that it is at all difficult to tell the amount insured on the buildings, as distinguished from that at risk upon the chattels. There is nothing to show that had the chattels been insured, without insuring the buildings, the premium would have been greater or different. The risks are not necessarily indivisible; they may be dealt with in separate clauses, and are made up of distinct and independent sums on different and distinct properties. There may be reasons which, existing as to one class of the property insured, might deter an insurance company from taking a risk on any of the classes. Some such general cause, as fraud in the insured as to one class, would in its nature extend to the whole subject-matter of the contract, and vitiate and avoid the whole contract in all its parts. But it is difficult to conceive how an act, in itself not evil, though it may affect one of the classes of property insured, and so affect it as to increase the hazard, if it does not also increase the hazard on another class, should operate so as to impair the contract as to that latter class." In *Baldwin v. Hartford F. Ins. Co.*, 60 N. H. 422, it is held that an alienation by the insured, without notice, of one of several parcels of real estate covered by a fire policy containing a stipulation against alienation, avoids the policy as to property not alienated, unless the court can say as a matter of law that the risk of the remaining property is not increased."

As stated in the case of *Bond v. National Insurance Co.*, supra, the different courts are in conflict as to whether the policy is a divisible contract or an inseparable contract. One line of decisions adhere to the rule, if the premium is paid in gross, even though the property insured is separately valued, the contract is entire. Another line adheres to the rule that, if the property is separately valued, the policy is divisible, even though the premium is paid in gross. The other rule, which is the rule announced in the case of *Miller v. Delaware Ins. Co.*, supra, is to wit: Where the property is separately

valued the divisibility of the policy depends upon whether the property is so situated that the risk on one item affects the risk on the others, and if the items of property separately valued affect the risk on all the property it is regarded as an entire contract, and if it does not so affect the risk on all the property the policy is divisible. The risk upon the horses, cattle, or upon the grain or farm implements would not affect the risk upon the household furniture. We think the court committed error in holding, which it necessarily did, that the policy was an inseparable contract.

[2] We will next consider the correctness of the former opinion in so far as it ordered the case dismissed. In considering this question there are two provisions of the policy necessary for consideration. The first provision is:

"The assured shall also produce all that remains of the property hereby insured, whether damaged or not, and exhibit the same for examination and submit to examination under oath and subscribe to same to any person named by the company."

The other provision:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the assured with all the foregoing requirements, nor unless commenced within twelve months next after the loss occurred."

The courts are unanimous in holding that the provisions in the policy requiring the insured to submit to an examination under oath is a binding and valid provision. The courts are likewise unanimous in the decisions in holding when the insured submits to an examination he is only required to answer material questions, and the failure to answer immaterial questions will not avoid the policy. *Insurance Co. v. Weide*, 81 U. S. (14 Wall.) 375, 20 L. Ed. 894; *Porter v. Traders' Ins. Co. of Chicago*, 164 N. Y. 504, 58 N. E. 641, 52 L. R. A. 424; *Titus v. Glens Falls Ins. Co.*, 81 N. Y. 410.

In the instant case the insured submitted to an examination, but refused to answer certain questions. This court in the former opinion held the questions were material, and we think correctly so, in so far as the questions related to the insurance on the grain, wagons, harness, and saddle. The mortgages did not cover the household furniture, and the questions were not material in so far as they related to the insurance on household furniture. The questions which related to the insurance upon the cattle and horses were immaterial for the reason that portion of the policy was not before the court, and there was no attempt to collect for any loss on this claim or species of property.

The question for consideration is: Where

a policy contains a provision requiring the insured to submit to an examination under oath, and contains a further provision that no suit shall be sustainable until the insured has complied with the terms of the policy, will the failure to answer material questions forfeit the policy? The general rule of law is that forfeitures are not looked upon with favor by the courts. The policy does not provide that a failure to answer a material question shall forfeit the policy, but provides no suit shall be sustainable until the provisions of the policy are complied with. The word "sustain" may be susceptible of several constructions. Webster defines "sustain" to mean to "carry on," or to "maintain," and that is the general meaning of the term.

The policy itself is silent as to when this examination shall be held. It might be requested before suit was filed; it likewise may be requested after the filing of suit. It has been held, and we think correctly in this kind of a policy, that the personal examination of the insured is no part of the proof of loss provided for by the policy, but it is a right that is reserved to the company which it can exercise as it might choose. Such was the holding of the Supreme Court of Illinois in the case of *Winneshiek Ins. Co. v. Schueller*, 60 Ill. 465, where the court stated as follows:

"The personal examination of the assured, reserved to the company by the conditions of the policy, formed no part of the proof of loss provided by the policy, and it did not matter that such an examination was made more than 30 days after the loss occurred. The right to so examine was a privilege reserved to the company, which they could exercise or not, as they might choose, but was not a duty imposed on the assured."

[3] We think the correct rule under policies which contain provisions similar to the one in controversy, where a difference arises over whether certain questions are material or immaterial, was announced by Judge Dillon in the case of *Weide v. Germania Insurance Co.*, 1 Dill. 441, Fed. Cas. No. 17,358, where the court in the first syllabus stated as follows:

"Under certain provisions of a fire insurance policy, the refusal of the assured to submit to an examination on oath, or to answer material questions respecting the loss, was considered not to work a forfeiture of the policy, but only to cause the loss not to be payable until this was done; and such refusal should be pleaded in abatement, and separately from defenses in bar."

The same view was taken by the Court of Appeals in New York in the case of *Porter v. Traders' Ins. Co.*, 164 N. Y. 504, 58 N. E. 641, 52 L. R. A. 424. In that case the court stated as follows:

"The provision of the contract as to which a breach is alleged is the agreement of the insured to 'submit to examinations under oath by the person named by this company.' They did submit to examination. It cannot be claimed that they were bound to answer every question propounded, however irrelevant. They were bound to answer only such as were material, having in view the purpose of the condition. They had no guide as to what was or was not material, except their own judgment, acting, of course, in good faith. Even if they made a mistake in deciding that the inquiry with respect to the cost of the steamer was not material, it is no ground for visiting them with a forfeiture of all the benefits of the contract, and the principle above suggested should apply.

"Finally, it should be noted that the condition alleged to have been violated in this case applied only after the capital fact of a loss. The object of the provision was to prescribe the manner in which an accrued loss was to be adjusted and ascertained. The liability of the defendant having become fixed by the happening of the event upon which the contract was to mature, conditions which prescribe methods and formalities for ascertaining the extent of it, or for adjusting it, are not to be subjected to any narrow or technical construction, but construed liberally in favor of the insured."

The Supreme Court of Washington, in commenting upon the provisions in the policy which provided that no action should be sustainable until the terms of the policy had been complied with, in the case of *Barbour v. St. Paul Fire & Marine Ins. Co.*, 101 Wash. 46, 171 Pac. 1080, stated as follows:

"But, even if this were not so, when we look to the words of the policy, which it is well settled must be strictly construed against the insurance company, we do not find that it provides that no action shall be 'commenced,' but that no action shall be 'sustainable.' At the time plaintiffs sought to sustain their action by proofs, the examination had been signed and was in the hands of the defendant. All that the policy required had been performed."

The Supreme Court of Texas, in the case of *Humphrey v. National Fire Ins. Co.* (Tex. Com. App.) 231 S. W. 751, reviews most of the cases dealing with this identical question. The court followed the rule announced in the case of *Weide v. Germania Insurance Co.*, 1 Dill. 441, Fed. Cas. No. 17358, and under the practice in that state held that the failure to submit to an examination or answer material questions should be raised by a plea in abatement, and that a failure to raise the same by such a plea was a waiver of the defense. Under our practice it would be more appropriate to raise this defense by a motion to dismiss, and if the controversy arose over whether certain questions were material, if the court should decide the questions were material, the court should make an order requiring the insured within a certain time to answer

such questions, and upon failure to answer said question, the court should dismiss the case, or if during the trial of the case the court should decide that the questions were material, the case should be continued and the insured given an opportunity to answer said questions before dismissing the case.

The courts have been very liberal in construing this provision of the policy, and have never placed a technical construction upon the same. See *Johnson v. Ins. Co.*, 129 Minn. 18, 151 N. W. 413, L. R. A. 1916F, 1149; *Gordon v. St. Paul Fire & Marine Ins. Co.*, 197 Mich. 226, 163 N. W. 956, L. R. A. 1918E, 402; *Ins. Co. v. Rose*, 228 Fed. 290, 142 C. C. A. 582. To hold a refusal to answer questions which the insured and his attorneys in good faith believed were immaterial would work a forfeiture of the policy, without first giving the insured a right to comply with the same if he was honestly mistaken, would be placing a too narrow and technical construction upon the provisions of the policy. The case should be dismissed only after the court determines the questions in controversy are material, and the insured then refuses to comply with the orders of the court to answer said questions. This court in the former opinion should have ordered the case reversed, with directions to require the insured to answer those questions that were material, and upon his failure to do so then, and not until then, should the trial court dismiss the case in so far as it related to the insurance upon property covered by the mortgages, but in no event should the case have been dismissed in so far as it relates to the insurance upon the household furniture.

While the general rule is that the question decided by the Supreme Court on the former appeal becomes the law in the case in all its stages, and will not ordinarily be reversed on second appeal where the facts are the same, this court in the case of *Oklahoma City Electric Gas and Power Co. v. Baumhoff*, 21 Okl. 508, 96 Pac. 758, stated:

"The courts uniformly hold that an appellate court may review and reverse its former decision in the same case where it is satisfied that gross or manifest injustice has been done by its former decision, or where the mischief to be cured far outweighs any injury that may be done in the particular case by overruling a prior decision."

We think this case comes squarely within the above rule, and it was error for this court to order the case dismissed. We therefore conclude: First, as to the former opinion the court should have construed the contract as a divisible contract; second, that after determining certain questions were material, as to certain property covered by the policy, and the defendant should answer said questions, the court should have reversed

ed the case, with instructions to permit the defendant to answer said questions. Under the view we take of the case the same was not prematurely brought, and it was error for this court to so hold.

The opinion rendered July 5, 1921, entitled *George v. Connecticut Fire Ins. Co.*, reported in 200 Pac. 544, is adhered to, with the exception that the third syllabus should be withdrawn and not considered, as the facts stated in the third syllabus are immaterial now, in view of the conclusion we have reached that the cause of action was not prematurely brought.

For the reasons stated, the second petition for rehearing is denied.

PITCHFORD, V. C. J., and ELTING, NICHOLSON, and KENNAMER, JJ., concur.

TURNER v. AMERICAN NAT. BANK, et al. (No. 10251.)

(Supreme Court of Oklahoma. Oct. 11, 1921.
Rehearing Denied Nov. 1, 1921.)

(Syllabus by the Court.)

1. Evidence §408(1)—Deposit slip is not a written contract, in which all oral negotiations and stipulations are merged, but merely a receipt.

A deposit slip, executed by a bank and delivered to a depositor, is not a written contract, in which all oral negotiations and stipulations are merged; but it is merely a receipt, constituting prima facie evidence that the bank received the sum stated at that time, which may be explained or contradicted by parol evidence.

2. Banks and banking §154(1)—Debtor, creditor, and bank may be restrained from diverting proceeds of checks of a corporation deposited to payment of debtor's personal debt.

S., being personally indebted to T., deposited in a bank certain checks payable to a loan company, of which S. was president, and secured from the bank a deposit slip showing that S.'s indebtedness to T. had been credited to the account of the latter. Held that, upon proper proceedings, S., the bank, and T. could be restrained from diverting the proceeds of the checks so deposited to the payment of the personal debt of S., and directed to apply the same to the use and benefit of the loan company.

Appeal from District Court, Oklahoma County; Edward D. Oldfield, Judge.

Action by Guy J. Turner against the American National Bank and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Wilson, Tomerlin & Threlkeld, of Oklahoma City, for plaintiff in error.

Ames, Chambers, Lowe & Richardson, of Oklahoma City, for defendants in error.

PITCHFORD, J. The plaintiff in error commenced this action against the American National Bank, in the district court of Oklahoma county, Okl., to recover judgment for the sum of \$15,250. It appears that Alva Smith was indebted to the plaintiff in the sum of \$15,250, which amount was secured by a pledge of 100 shares of the capital stock of the Western National Bank. The capital stock of the last-named bank had been purchased by Smith, in July, 1917. At the time of the purchase, Turner furnished Smith with \$15,250, in order to complete the payments. After the sale of the stock had been consummated, Smith became its president. In November following the Western National Bank found itself in an insolvent condition and was taken over and merged into the American National Bank. About this time Turner importuned Smith for the payment of \$15,250, whereupon Smith and Turner called upon Mr. Johnson, president of the American National Bank. Smith wanted Johnson to pay Turner the \$15,250 and charge the amount to the stockholders' account of the Western National Bank. This Mr. Johnson refused to do.

After the interview with Mr. Johnson, Smith and Turner then had a talk with Mr. Carson, vice president of the American National Bank. At that time Mr. Smith informed Mr. Carson that he had a number of checks amounting to something over \$17,000, payable to the First Mortgage Cattle Loan Company, and wanted the defendant bank to receive the checks as a deposit and to credit Turner's account with \$15,250, and place the balance to the credit of the First Mortgage Cattle Loan Company. This arrangement was refused by Mr. Carson, who stated at the time that the bank would take the checks, and, if they were paid, that the account of the First Mortgage Cattle Loan Company would be credited with the amount, and the Loan Company could issue its check to Mr. Turner. Mr. Smith replied that this plan did not suit him, and then turned to Mr. Turner and informed him they would arrange the matter some other way.

After this conversation with Mr. Carson, Smith and Turner then went to Dunlop, a teller of the defendant bank, and Smith arranged with Dunlop to do practically the very thing refused by Mr. Carson; that is, Turner's account was credited with \$15,250, and a deposit slip was given to Smith for the amount. The balance of the checks, amounting to something over \$2,000, was deposited to the credit of the First Mortgage Cattle Loan Company. Smith thereupon de-

livered to Turner the deposit slip showing the credit to his account, whereupon Turner surrendered to Smith the 100 shares of stock of the Western National Bank, and Smith in turn delivered the same to the bank. The transaction with Dunlop was made after banking hours, on Friday afternoon. On the following Monday, Mr. Johnson was informed of the arrangements made with Dunlop, and thereupon, by telephonic and other inquiries, ascertained that payment of the checks so deposited had been refused, except two, one for \$7,949.69 and one for \$300. He thereupon telephoned Mr. Turner to come to the bank, and informed him of the condition of the checks, and stated that the bank would charge back, to the account of Turner and the account of the First Mortgage Cattle Loan Company, the respective amounts for which they had received credit, and tendered the shares of stock back to Turner, which were refused, and Turner immediately filed suit against the defendant bank to recover the deposit.

Smith seems to have been a man of diversified talents and various pursuits; he was not only president of the Western National Bank, but was also president of the First Mortgage Cattle Loan Company, as well as president of the C. M. Keys Commission Company. The Keys Commission Company had received from one H. A. Smith 120 head of cattle for sale on commission. These cattle were covered by a mortgage to the First Mortgage Cattle Loan Company; the cattle were sold by the Commission Company, which, knowing that the cattle were mortgaged issued the check, amounting to \$7,949.69, payable to the mortgagee. This mortgage, however, had been assigned to the American National Bank, and the check for \$7,949.69 was included among the checks deposited by Smith at the time the deposit slip was issued to Turner. The Keys Commission Company, learning that Smith was attempting to use this check in payment of his private indebtedness, and that the mortgage to the Mortgage Cattle Loan Company had been assigned, filed suit against the American National Bank, Smith, and others, to which Turner was made a party, seeking to restrain Smith from using the check as he was attempting, and have the proceeds of the check paid to the assignee of the mortgage. The two cases were consolidated and tried together. The trial court rendered judgment denying Turner any relief against the American National Bank, and also rendered judgment requiring the defendant bank to apply the proceeds of the check issued by the Keys Commission Company upon the indebtedness of the First Mortgage Cattle Loan Company.

[1] The plaintiff in error contends that the act of the defendant bank, in crediting the account of Turner with the sum of \$15,250,

at the request of Smith, was equivalent to the deposit by Turner of a check drawn by depositor of the bank and that when said credit was made that this was equivalent to an actual payment, and the bank's indebtedness to Turner for the amount became fixed and irrevocable; that there is no distinction between an oral request to the bank to charge one account and credit another, than if the request had been in writing, when the bank has acted on such request. In order to sustain this contention, plaintiff has cited numerous authorities, which we have carefully examined. The authorities cited by plaintiff establish the following rule: That where a check is issued by a customer of a bank, and the holder of the check presents the same for payment, and has the amount represented by the check placed to his credit, the bank becomes at once the debtor of the party presenting the check and cannot, on failure of the drawer of the check to pay the same, charge off the credit to the holder of the check. The authorities cited by the plaintiff are numerous and all go to this extent; the rule being well stated in the case of *First National Bank of Cincinnati v. Burkhardt*, 100 U. S. 689, 25 L. Ed. 766, wherein it is said:

"When a check on itself is offered to a bank as a deposit, the bank has the option to accept or reject it, or to receive it upon such conditions as may be agreed upon. If it be rejected, there is no room for any doubt or question between the parties. If, on the other hand, the check is offered as a deposit and received as a deposit, there being no fraud and the check genuine, the parties are no less bound and concluded than in the former case. Neither can disavow or repudiate what has been done. The case is simply one of an executed contract. There are the requisite parties, the requisite consideration, and the requisite concurrence and assent of the minds of those concerned."

In the instant case, however, no check was issued by Smith to Turner. Smith simply deposited the checks and had Turner's account credited with the amount Smith owed him. The authorities are practically uniform in holding that a deposit slip by a bank is nothing more than a receipt, and is open to explanation as to the conditions and circumstances surrounding the issuance thereof. In *American Life Insurance Co. v. Citizens' State Bank of Headrick*, 168 Pac. 437, L. R. A. 1918B, 296, the syllabus reads as follows:

"A deposit slip, executed by a bank and delivered to a depositor, is not a written contract in which all oral negotiations and stipulations are merged, but it is merely a receipt, constituting prima facie evidence that the bank received the sum stated at that time, which may be explained or contradicted by parol evidence."

To the same effect, see *American National Bank of Stigler v. Funk* (Okla.) 172 Pac. 1078, L. R. A. 1918F, 1137.

A bank, accepting checks and crediting them to a depositor's account in the absence of special agreement, takes them as a collecting agent and may charge them back to the account in the event they prove worthless or belong to another. In *Bank of Big Cabin v. English*, 27 Okl. 334, 338, 111 Pac. 386, 387, the court says:

"In *National Gold Bank & Trust Company v. McDonald*, 51 Cal. 64, 21 Am. Rep. 697, it was held that: 'Checks deposited with a bank and credited in the depositor's passbook are taken, in the absence of special agreement, for collection and not as cash; and may be afterward returned and the credit annulled if there are no funds to meet them; and this is so whether the check is drawn on the same bank or another.' To the same effect are *Hazlett v. Commercial National Bank*, 132 Pa. 118, 19 Atl. 55; *Board of Chosen Freeholders of the County of Middlesex v. State Bank*, 82 N. J. Eq. 467. The rule we think applicable to the case at bar is stated in *Rapp et al. v. National Security Bank*, 136 Pa. 426, 20 Atl. 508, as follows: 'When the amount of a check, left with a bank for collection, is credited to a depositor as cash, it may be charged back to him in case it turns out to be worthless, unless the bank has been negligent or has done something to mislead the depositor into acting, to his injury, on the faith of its goodness. The depositor has no right to be misled by the mere credit of the check as cash.'"

In *Hastings v. Hugo National Bank*, 197 Pac. 457, the third syllabus reads as follows:

"A deposit slip issued by a bank is but prima facie evidence that the bank received the amount of the deposit on the date shown by the slip. It has no more force and effect than any other form of receipt, and is open to explanation as to the conditions surrounding the deposit and the circumstances under which it was given may be inquired into."

Mr. Turner knew, at the time the deposit slip was given to him, that Smith did not have the money in the bank; he knew that Smith had secured the deposit slip by reason of the checks delivered at the time to Dunlop. Mr. Turner was evidently familiar with the banking rules, as he had been vice president of the Western National Bank, and he knew that these checks would not be placed to the credit of Smith or the First Mortgage Cattle Loan Company in such a way as to bind the defendant bank until the amounts represented by the checks were collected; he knew that the bank reserved the right to charge the amounts represented by the checks back to the account of Smith or the Mortgage Company, in the event they were not paid.

There is additional evidence showing that Turner knew how Smith was securing the deposit slip representing the credit of \$15,250. When Smith and Turner had the conversation with Mr. Johnson, it was sought to have the bank pay Turner and have the amount charged to the stockholders' account

of the Western National Bank. Mr. Turner has not been in any way injured by the action of the bank; he still has his claim against Smith. While it is alleged that he canceled his obligation against Smith, this was done upon the theory that the checks would be paid; and, further, the certificate of stock of the Western National Bank, which he is holding as collateral, and which he returned to Smith, were worthless, and were tendered back to him by the defendant bank. We conclude there was no error in the judgment of the trial court in holding that the bank was not liable to Turner for the deposit attempted to be made to the credit of Turner, as evidenced by the deposit slip issued by Dunlop.

[2] The plaintiff in error next contends that the trial court erred in decreeing that the temporary injunction be made perpetual, and ordering the defendant bank to pay upon the mortgage indebtedness of H. A. Smith the amount realized upon the check of C. M. Keys Commission Company, amounting to the sum of \$7,949.69. We fail to see where there is any merit in this contention. H. A. Smith mortgaged to the First Mortgage Cattle Loan Company the cattle sold by the Keys Commission Company. This mortgage having been assigned to the defendant bank, it follows that the First Mortgage Cattle Loan Company was holding the check in trust for the assignee; however, if the mortgage had never been assigned by the mortgagee, Smith, as an officer of the company, would not be allowed to divert the effects of the company to the payment of his individual indebtedness. The rule is well settled, that one who receives from an officer of a corporation the securities of that corporation in payment of a personal debt of the officer does so at his peril and cannot hold these securities as against their real owner. The check for \$300, which was collected was credited to the account of the First Mortgage Cattle Loan Company, the same being payable to that company, and was the property of the Loan Company; and, under the facts as developed, it was the duty of the bank to credit this amount to the Loan Company, and then it would be left for the Loan Company to disburse this amount, and Smith, as its president, would not be permitted to use said sum in the payment of his individual indebtedness. In *Jenkins v. Planters' & Mechanics' Bank*, 34 Okl. 607, 126 Pac. 757, the last part of the first paragraph of the syllabus is as follows:

"The agent of a principal, the trustee of a cestui que trust, or the officer of a corporation, is not permitted to divert to his own use the funds of his principal without authority to do so; and one who receives from an officer of a corporation the notes or securities of such corporation, in payment of, or as security for, a personal debt of such officer, does so at his peril, and in such case the rule is not relaxed

by reason of the degree of confidence reposed in the officer by the purchaser."

In *First National Bank of El Reno v. Gillette*, 52 Okl. 341, 152 Pac. 1084, the syllabus is as follows:

"Where a bank in which the funds of a corporation are deposited, and to which bank an officer of the corporation intrusted with the management of its affairs is personally indebted, knowingly accepts and pays a check drawn by such officer against the funds of the corporation in payment and satisfaction of his individual obligation, such bank is liable to the corporation for the amount of its funds so misappropriated in payment of the individual debt of such officer."

Under this rule, the American National Bank and Turner would have been liable to the First Mortgage Cattle Loan Company in knowingly diverting its funds to the payment of the individual indebtedness of Smith to Turner.

We conclude that the judgment of the trial court should be affirmed; and it is so ordered.

HARRISON, O. J., and McNEILL, NICHOLSON, and ELTING, JJ., concur.

PARKS v. SINAI OIL & GAS CO. et al. (No. 11057.)

(Supreme Court of Oklahoma. July 5, 1921.
Rehearing Denied Nov. 8, 1921.)

(Syllabus by the Court.)

1. Appeal and error ⇨1009(4)—Supreme Court will not reverse judgment in equity case unless against weight of evidence.

In an equity case, this court will examine the record, consider the evidence, and render, or cause to be rendered, such judgment as the trial court should have rendered, but will not interfere with the judgment of the lower court, unless the same is clearly against the weight of the evidence.

2. Mines and Minerals ⇨75—Production of oil and gas within one year, and continued, held condition precedent for lease extension.

Where an oil and gas lease contains a provision that it shall remain in force for a term of one year from its date, and so long thereafter as oil or gas, or either of them, is produced from said land by the lessee, it is a condition precedent to the extension of the lessee's right to continue operations beyond the one year that oil or gas should be found upon the premises in paying quantities, within one year from the date of the lease.

3. Mines and minerals ⇨78(2)—Lessee held vested with limited estate in premises on discovery of gas, and not to have lost same by searching lower sand.

When gas in paying quantities was found upon the leased premises within one year from

the date of said lease, the lessee thereby became vested with a limited estate in the leased premises for further operations in accordance with the terms of the lease, and such right, once vested by discovery of gas in the upper sand, will not be lost if the lessee continues to drill deeper in search of oil or gas in a lower sand, although he does not find oil or gas in the lower sand, within the limitations prescribed by the lease, and if oil or gas in paying quantities is found in the lower sand, he is not required to produce gas from the upper sand, but if oil or gas in paying quantities be not found in the lower sand, production from the upper sand could not long be deferred without incurring the penalty of abandonment or forfeiture, if forfeiture be prescribed.

4. Appeal and error ⇨1009(4)—Judgment held not against weight of evidence.

Evidence examined, and held that the judgment of the trial court, not being clearly against the weight of the evidence, will not be disturbed.

Appeal from District Court, Okmulgee County; Mark L. Bozarth, Judge.

Action by Mrs. Laura Parks, for herself and as trustee and independent executrix of the estate of O. F. Parks, deceased, as plaintiff, against the Sinai Oil & Gas Company, a corporation, and W. H. Shackelford, trustee, as defendants. Judgment for defendants, and plaintiff appeals. Affirmed.

West, Sherman, Davidson & Moore, of Tulsa, for plaintiff in error.

Belford & Hiatt, of Okmulgee, Geo. S. Ramsey, of Muskogee, Edgar A. De Meules, of Tulsa, and Malcolm M. Rosser and Villard Martin, both of Muskogee, and Allan R. Shaw, of Tulsa, for defendants in error.

NICHOLSON, J. This suit was brought in the district court of Okmulgee county, by the plaintiff in error as plaintiff below, against the defendants in error as defendants below, to cancel an oil and gas lease covering 160 acres of land in Okmulgee county, and to enjoin the defendants from drilling said land for oil and gas.

It appears that on the 17th day of June, 1916, the plaintiff executed and delivered to one L. C. Bellisle, an oil and gas lease covering the northeast quarter of section 9, township 15 north, range 11 east, in Okmulgee county, by which it was agreed that said lease should remain in force for a term of one year from its date, and as long thereafter as oil and gas, or either of them, were produced from said land by the lessee. Subsequently said L. C. Bellisle transferred and assigned all his right, title, and interest in said lease to the defendant Sinai Oil & Gas Company, and in May, 1917, the Sinai Oil & Gas Company entered into a contract with one B. L. Carpenter, by the terms of which he was to drill a well on said land, and receive in payment therefor an assignment

of said lease in so far as it affected 80 acres of said land. Said well to be drilled on the 80 acres assigned to Carpenter.

It further appears that Carpenter would not undertake to drill a well within the short time the lease ran, unless the plaintiff would agree to grant him an extension of said lease, in so far as it covered the 80 acres upon which the well was located. This the plaintiff agreed to do, and in carrying out said agreement executed to him a lease covering 80 acres, which lease bore date June 17, 1917, and was for a term of 60 days from that date, and so long thereafter as oil or gas, or either of them, was produced from said land by the lessee, or his assigns, in paying quantities, and in which it was provided:

"In no event and under no circumstances shall this instrument become effective until the expiration of June 17, 1917."

Drilling was commenced on June 4 or 5, 1917, and the well was completed as an oil well on June 29, 1917.

The plaintiff contended that neither oil nor gas was produced during the term of the first lease, and therefore she was entitled to a cancellation thereof. While the defendant W. H. Shackelford, trustee, claimed that gas in paying quantities was discovered during the life of said lease, and on June 9, 1917, at a depth of 465 feet; that said gas was cased off and the well deepened to the oil sand, which was reached at a depth of 1,835 feet, this depth being reached on June 22 or 23, 1917, and the well was drilled to a total depth of 1,880 feet, and was shot on June 29, 1917. The Sinai Oil & Gas Company filed a disclaimer, and, its interest in the lease having been acquired by the defendant W. H. Shackelford, trustee, the trial court found generally for said defendant, and entered a decree quieting the title to said lease in him as to the 80 acres not owned by Carpenter.

For a reversal, the plaintiff contends: First, that if the trial court predicated its decree on the theory that the evidence showed the production of either oil or gas in paying quantities prior to June 17, 1917, such decree is contrary to the evidence; and, second, if the decree is based on the mere discovery of gas, and that the fact of such discovery alone was sufficient to continue the lease in force after the fixed term, then the decree is not supported by, and is contrary to the law. The findings of the trial court were general, and we are, of course, unable to determine upon which theory he based his judgment.

[1] In an equity case, as this is, this court will consider the entire record, will weigh the evidence, and if the findings and judgment of the trial court are clearly against the weight of the evidence, will render, or cause to be rendered, such judgment as the trial court should have rendered. *Schock v. Fish*, 45 Okl. 12, 144 Pac. 584; *City of Muskogee v. Burford*, 77 Okl. 174, 186 Pac.

949; *Nowka v. West*, 77 Okl. 24, 186 Pac. 220.

[4] We have examined the record, and the evidence discloses that the well was drilled by C. E. Suppes, under the direction of B. L. Carpenter. Suppes identified the log of the well as a correct record, and this log fails to make any mention of gas until a depth of 1,833 feet had been reached, but shows a salt sand from 465 to 485 feet. In addition to the log, the plaintiff introduced as witnesses two members of the casing crew, who testified that they assisted in setting the casing in the well on June 13, 1917, and that they detected no gas on that date. Three or four other witnesses testified that they worked at or were around the well, and that no gas was discovered until that found at 1,833 feet. The plaintiff and W. H. Sander-son, her agent, both testified that B. L. Carpenter told them that there was not enough gas in the well to pay. On the other hand, witnesses for the defendants, including C. E. Suppes, the contractor and the drillers and tool dressers testified that gas was found just above the salt sand at 465 feet, and they estimated the flow at from 1,500,000 to 2,000,000 cubic feet per day. Some of the witnesses testified that it blew the water from the well. A summary of the evidence on behalf of the defendants indicates that gas in paying quantities was discovered at 465 feet.

There is a sharp conflict in the evidence. If the evidence introduced on behalf of the plaintiff is true then no gas, of any consequence at least, was found. If the evidence of the witnesses for the defendants is to be believed, gas in paying quantities was discovered during the life of the lease, and was cased off or drowned out by the water in the well. We are not prepared to say whose witnesses told the truth, and whose were mistaken. The trial court heard their testimony, observed the demeanor of the witnesses on the stand, and was in a position to judge as to their credibility. He found for the defendants, and as his findings and judgment are not clearly against the weight of the evidence, the same will be sustained by this court. *Prowant v. Sealy*, 77 Okl. 244, 187 Pac. 235; *Swan v. Duncan*, 78 Okl. 305, 190 Pac. 678.

[2, 3] Passing to the second contention of the plaintiff, that, "If the decree is based on the mere discovery of gas, and that the fact of such discovery alone was sufficient to continue the lease in force after the fixed term, then the decree is not supported by, and is contrary to, the law," we repeat that we are unable to say upon what theory the trial court proceeded, but he must have found that gas was produced during the life of the lease. That was the averment of the defendant in his answer. As before stated, the findings were general, and if gas was produced in paying quantities within one year from the date of the lease, the defendant

became vested with a limited estate in the leased premises for further operations in accordance with the terms of the lease, and such rights, once vested by the discovery of gas in the upper sand, was not lost by the lessee continuing to drill deeper in search of oil or gas in a lower sand, although he did not find oil or gas in the lower sand within the limitations prescribed by the lease. *Roach v. Junction Oil & Gas Co. et al.*, 179 Pac. 934; *Eastern Oil Co. v. Coulehan*, 65 W. Va. 531, 64 S. E. 836.

The evidence discloses that oil was found in the lower sand, and that the same is being produced, and, the defendant's interest having vested by reason of the discovery of gas in the upper sand, he is entitled to develop the land under the terms of said lease.

The judgment of the trial court is affirmed.

PITCHFORD, V. C. J., and McNEILL, ELTING, and KENNAMER, JJ., concur.

LAMB v. ALEXANDER et al. (No. 11152.)

(Supreme Court of Oklahoma. March 1, 1921.
Rehearing Denied. May 10, 1921. Second
Petition for Rehearing Denied Nov. 8, 1921.)

(Syllabus by the Court.)

1. Appeal and error \S 1096(4)—Decision on first appeal is law of case as to questions actually presented or necessarily involved.

Where a case is brought a second time on error to this court, the first decision will be deemed to be the settled law of the case, not merely as to all questions actually presented, but as to all questions existing in the record and necessarily involved in the decision.

2. Appeal and error \S 1009(4) — Equitable judgment not set aside, unless clearly against weight of evidence.

In an equitable action the judgment of the trial court will not be set aside, unless it is clearly against the weight of the evidence.

3. New trial \S 99—Elements necessary to new trial for newly discovered evidence stated.

In a motion for a new trial on the ground of newly discovered evidence, the moving party must show that the newly discovered evidence will probably change the result, that it has been discovered since the trial, that it is such that could not have been discovered before the trial by the exercise of due diligence, that it is material to the issue, that it is not merely cumulative to the former evidence, that it will not merely impeach or contradict the former evidence, and the facts constituting due diligence must be shown, so that the court may determine whether the diligence was sufficient.

4. Appeal and error \S 981—New trial \S 99—Motion for newly discovered evidence is addressed to trial court's discretion.

A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and where the record does not show an abuse of such discretion the action of the court on such motion will not be disturbed by this court.

5. Appeal and error \S 959(3)—Pleading \S 236(3)—Amendment of pleadings is within judicial discretion, subject to reversal only for abuse.

The allowance of amendments to pleadings during the progress of a trial rests within the sound judicial discretion of the trial court, and its action thereon will not be disturbed on appeal, unless clear abuse of such discretion is shown.

6. Judgment held not against weight of evidence.

Record examined, and held, that the judgment of the trial court is not against the weight of the evidence.

Appeal from District Court, Okmulgee County; Lucien B. Wright, Judge.

Action by Taylor Hardridge against Frank F. Lamb, M. M. Alexander, and others to recover real estate and quiet title, with answer and cross-petition by defendant Alexander, and answer thereto by defendant Lamb. Judgment for defendants against plaintiff, and judgment for defendant Alexander against defendant Lamb, and the latter appeals. Affirmed.

See, also, 179 Pac. 587.

Frank F. Lamb, of Okmulgee, and Phil D. Brewer, of Oklahoma City, for plaintiff in error.

Chas. A. Dickson and Cochran & Ellison, both of Okmulgee, for defendants in error.

NICHOLSON, J. This action was commenced on the 2d day of June, 1913, in the district court of Okmulgee county, by Taylor Hardridge against Frank F. Lamb and M. M. Alexander and others, to recover certain real estate lying in said county, and to have title thereto quieted in the plaintiff. Alexander filed his answer and cross-petition, claiming that he was the owner of an undivided one-half of the south 30 acres of the southeast quarter of the northwest quarter of section 27, township 15 north, range 14 east, being a portion of the land set out in plaintiff's petition, the legal title to the same being in Frank F. Lamb, his codefendant but that said Lamb held said land in trust for himself and defendant Alexander; that Alexander and Lamb acquired title to said land of Eli Hardridge through and by virtue of a contract of employment as attorneys, to render legal services to said Eli Hardridge in an action for the partition of certain lands in Okmulgee county, of which

this 30 acres was a part; that in said action said Hardridge was successful, and in pursuance of said contract of employment said 30 acres was deeded to Frank F. Lamb in trust for the use and benefit of Lamb and Alexander, and further that, by reason of a contract of dissolution of said partnership between Lamb and Alexander, Lamb agreed to hold in trust said land and convey an undivided one-half thereof, to Alexander; and praying the court to decree that the deed taken by the defendant Lamb from Eli Hardridge on the 2d day of May, 1912, was taken by him in trust for the use and benefit of said Lamb and Alexander, and that said Alexander is the owner in fee of said undivided one-half interest in and to said lands.

Lamb filed answer to said cross-petition admitting the partnership between himself and Alexander, and the dissolution thereof, but denied that Hardridge employed Lamb and Alexander as alleged in said cross-petition, and avers that said Hardridge employed said Frank F. Lamb as his attorney to prosecute said action. He admits the execution of the contract of dissolution, and claims that he carried out the terms thereof by conveying certain lands (other than the 30 acres in controversy) to A. D. Adcock upon the order of Alexander, and avers that the 30-acre tract was conveyed to him in consideration of other legal services rendered by him to said Hardridge after the dissolution of the partnership of Lamb & Alexander, and avers that said Alexander has no right, title, or interest in and to said 30-acre tract.

On the 19th day of June, 1915, said issues between Lamb and Alexander were tried, and judgment for Alexander rendered. From this judgment Lamb appealed to this court, and the judgment of the trial court was reversed and the cause remanded, with directions to grant a new trial; the ground of reversal being that the trial court erred in excluding certain evidence, offered by Lamb, tending to prove that the 30 acres was conveyed to him in payment for services rendered by Lamb, and not in consideration of services rendered under the contract of employment. *Lamb v. Alexander*, No. 7789, 74 Okl. —, 179 Pac. 587. Upon the second trial judgment was again rendered for the defendants in error, and from this judgment Lamb brings error.

In the brief of plaintiff in error it is urged, first, that the court erred in giving judgment for Alexander upon the proof in the record, for the reason that there was no substantial compliance with the requirement in the contract dated April 8, 1907, known as the condition precedent; second, that the defendant in error Alexander, as an attorney at law, having accepted a judgeship, cannot recover for alleged services rendered after accepting such judgeship, either directly or indirectly; third, that the facts of this case do not

support the findings that a trust resulted; fourth, that, if there is anything due Alexander, he could only recover the same in an action for an accounting.

[1] All of these questions were presented in the former appeal of this cause and were necessarily considered by the court there, and decided adversely to the contention of the plaintiff in error. The rule is, that when a case is brought a second time on error to this court, the first decision will be deemed the settled law of the case, not merely as to all questions actually presented, but as to all questions existing in the record and necessarily involved in the decision. *A. J. Harwi Hardware Co. v. Klippert et al.*, 73 Kan. 783, 85 Pac. 784; *Oklahoma City Electric, Gas & Power Co. v. Baumhoff*, 21 Okl. 503, 96 Pac. 758; *Wellsville Oil Co. v. Miller et al.*, 48 Okl. 386, 150 Pac. 186; *Kingfisher Improvement Co. v. Talley*, 51 Okl. 226, 151 Pac. 873; *Childs et al. v. Cook*, 68 Okl. —, 174 Pac. 274; *Midland Valley Ry. Co. v. Ezell*, 62 Okl. 109, 162 Pac. 228; *Ezell v. Midland Valley Ry. Co.*, 174 Pac. 781; *St. Louis & S. F. Ry. Co. v. Hardy*, 45 Okl. 423, 146 Pac. 38.

On the former appeal of this case, the court held that the defendant in error could maintain the action upon the contract of dissolution, the second paragraph of the syllabus reads:

"Where the liabilities of a copartnership have been discharged, and the partners have entered into a contract dissolving the same and settling all the partnership affairs between themselves, and the contract of settlement has been executed by both parties, except as to one particular partnership transaction regarding which one of the partners fails and refuses to perform the contract, the other partner may maintain an action against him to enforce the contract in regard to such transaction."

The court necessarily considered all the aforementioned questions presented, and which are again presented here, in arriving at its conclusion, and the same will not be made a subject of re-examination in this appeal, but the decision there will be deemed the settled law of the case.

The fourth paragraph of the syllabus of the opinion in the former appeal sets out the reason for reversal, and is as follows:

"Plaintiff and defendant, as attorneys, had a contract of employment with a third party in and action to recover 120 acres of land, whereby it was agreed that such third party should pay the plaintiff and defendant one-fourth of value of the land recovered. There were 120 acres of land recovered in said action. Subsequently the third party conveyed 80 acres of said land to the defendant. The plaintiff brings action against the defendant to recover a one-half interest therein, alleging that the 30 acres was conveyed to the defendant for services rendered under said contract of employment, and that the defendant took title to said land in his name for both plaintiff and defend-

ant. The defendant in his answer denies that plaintiff has any interest in the land in controversy, and further alleges that the land was conveyed to him by the third party in consideration of services rendered the third party by the defendant individually. The plaintiff introduced testimony to establish that said land was conveyed to the defendant by the third party in consideration of services rendered under the contract of employment. The defendant offered testimony to prove that said 30 acres was conveyed to him by the third party in consideration of services rendered to third party by him, and not in consideration of the services rendered under contract of employment. On objection the court excluded such evidence as not being within the issue. Held, that the evidence offered by the defendant was within the issues and competent, and that the court committed prejudicial error in excluding the same."

On the second trial, the plaintiff in error was allowed to introduce testimony in an attempt to show that the 30-acre tract in controversy was received by him in payment for other services he had rendered, and not in satisfaction of services rendered under the contract of employment in which Alexander was interested, and he was also allowed to introduce testimony in an attempt to show that he had settled with Alexander for Alexander's interest in the fees or property received under the partnership contract of employment by professional services rendered in Alexander's election contest case. The trial court found against the plaintiff in error on both of these propositions, and an examination of the record convinces us that these findings are supported by the evidence, and are not against the weight thereof.

[2] It has been consistently held by this court that in an equity case, where the judgment of the trial court is not against the weight of the evidence, it will be sustained. *Hogan v. Grimes*, 78 Okl. 184, 189 Pac. 353; *Robinson v. Pottorff*, 78 Okl. 202, 189 Pac. 744; *Parker v. Tamm*, 78 Okl. 103, 188 Pac. 1074; *Prowant v. Sealy*, 77 Okl. 244, 187 Pac. 235; *Van Winkle v. Henkle*, 77 Okl. 84, 186 Pac. 942; *Clinton v. Miller*, 77 Okl. 173, 186 Pac. 932; *Day v. Keechl Oil & Gas Co.*, 72 Okl. —, 180 Pac. 866; *Haynes v. Gaines*, 76 Okl. 268, 185 Pac. 74.

[3] In the reply brief of the plaintiff in error, he complains of the action of the trial court in overruling his amended and supplemental motion for a new trial, setting up newly discovered evidence. The newly discovered evidence set out in the motion would have been merely cumulative, and in our opinion was not such as would probably have changed the result, and we do not think the evidence was such as could not have been

discovered before the trial by the exercise of due diligence. The plaintiff in error knew that it was incumbent upon him to establish that the 30-acre tract was conveyed to him in satisfaction of services rendered other than under the contract of employment. He should have known what the evidence of *Eli Hardridge* would be, and could, it seems to us, by the exercise of due diligence have obtained the evidence mentioned in the motion for a new trial. In *Midland Valley R. Co. v. Goble*, 77 Okl. 206, 186 Pac. 723, it is held:

"A rule of wide recognition regarding the granting of new trials on the grounds of 'newly discovered evidence' exacts that the evidence fulfill the following requirements: (1) It must be such as will probably change the result. (2) It must have been discovered since the trial. (3) It must be such as could not have been discovered before the trial by the exercise of due diligence. (4) It must be material to the issue. (5) It must not be merely cumulative to the former evidence. (6) It must not be to merely impeach or contradict the former evidence."

See *Chortney v. Curry*, 78 Okl. 206, 190 Pac. 387.

[4] A motion for a new trial on the ground of newly discovered evidence is addressed to the sound discretion of the trial court, and where the record does not show an abuse of such discretion the court's action on such motion will not be disturbed. In *re Klufa's Estate, Dufek et al. v. Klufa*, 78 Okl. 13, 188 Pac. 329. We cannot see that the record shows an abuse of discretion by the trial court in overruling the motion for a new trial.

[5] The thirteenth assignment of error is that the court erred in refusing to permit Lamb to withdraw his pleadings and file his amended answer. While this assignment of error is mentioned in his reply brief, it is not argued, and is therefore waived, and furthermore the allowance of an amendment to a pleading is in the sound judicial discretion of the trial court and the action thereon will not be disturbed on appeal, unless a clear abuse of such discretion is shown. *Mackenzie v. City of Anadarko*, 72 Okl. —, 178 Pac. 483; *Burr v. Gordon*, 68 Okl. —, 173 Pac. 527; *American Nat. Ins. Co. v. Rardin*, 74 Okl. —, 177 Pac. 601.

[6] We have examined the record and find that the evidence reasonably supports the judgment of the court. Finding no reversible error in the record, the judgment of the trial court is affirmed.

HARRISON, C. J., and PITCHFORD, McNEILL, and ELTING, JJ., concur.

WHITE v. STATE. (No. A-3486.)

(Criminal Court of Appeals of Oklahoma.
Sept. 13, 1921, Rehearing Denied
Nov. 19, 1921.)

(Syllabus by the Court.)

1. **Homicide** \S 255(3)—Evidence held to sustain conviction of manslaughter in first degree.

In a prosecution for murder, evidence held to sustain a conviction of manslaughter in the first degree.

2. **Criminal law** \S 1039—Taking of exhibits to jury room cannot be considered where first complained of on motion for new trial.

An assignment of error based upon alleged misconduct on the part of the jury and bailiff in taking certain exhibits, articles of clothing offered in evidence, with them to the jury room, where no objections were made, cannot be considered by the appellate court, where the matter was first brought to the attention of the trial court on a motion for new trial.

3. **Criminal law** \S 1088(1)—Rulings incorporated in agreed statement supporting motion for new trial do not constitute record exceptions unless signed by judge.

The incorporation of rulings or statements of the court, made during the trial in an agreed statement by counsel, in support of a motion for new trial, do not make them proper matter of exception in the record, unless such agreed statement is signed by the trial judge as a bill of exceptions.

4. **Criminal law** \S 858(3)—Taking exhibits to jury room not error, where not used inconsistently with testimony.

It is not error for the jury to take to the jury room, on their retirement, certain exhibits introduced in evidence for the purpose of inspection, where it did not appear that they were used by the jury in a manner inconsistent with the testimony.

Appeal from District Court, Cotton County; Cham Jones, Judge.

John White was convicted of manslaughter in the first degree, and he appeals. Affirmed.

Morris & Wells and J. W. Brooks, all of Walters, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. O. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. The plaintiff in error, John White, was tried in the district court of Cotton county upon an information for the murder of Frank Horton. The jury by their verdict found him guilty of manslaughter in the first degree, and assessed the punishment at seven years in the penitentiary. From the judgment rendered in pursuance of the verdict he appeals.

The deceased lived about 10 miles south of Temple on a farm. On the date alleged, between 5 and 6 o'clock in the evening, he was

planting cotton near the east and west section line when the defendant walked up the road from his home about half a mile east and shot and killed the deceased.

The evidence showed that one bullet entered the left side between the ninth and tenth ribs, about five inches to the left of the spine; another entered a little below and a little nearer the spine; and one entered the left arm; and another near the wrist.

Gus Allen, the first witness for the state, testified:

"Frank Horton lived on the east 80 acres of the quarter section I lived on. I was planting some squash seed in the yard about half past 5, and I heard a gun fire and a man hollered. I looked and saw a man standing with smoke in front of him. The gun fired again and the man hollered again, and after that I heard only the report of the gun, two or three times. The man that fired the shots ran east along the section line towards John White's house. I ran down there as quick as I could, and found Frank Horton lying on his right side, his face to the west. I raised his head but could not see any sign of life. His feet were about 6 feet from the fence and his head about 12 feet. His team and the planter were 12 steps north of the body. There was a little pair of pinchers and a pocketknife in his pockets, also a pocketbook. About 10 feet north of the body, towards the planter, there was a little monkey-wrench on the ground."

The shirt, underwear, and overalls worn by the deceased at the time were introduced in evidence. Three or four witnesses testified that they made an examination of the ground where the body was found and picked up a bullet a few inches from the left arm of the deceased, and that the next morning another bullet was found four or five inches from where the first bullet was found.

Johnny White testified:

"I was 16 years old the 4th day of last October. Me and my brother Charley were fixing the fence at Horton's corner that afternoon. The bottom wire was broken, and we were stretching it with a two by four we found laying on the ground. It had been used for a prop for the west post of Mr. Horton's gate. Mr. Horton came and asked us which one got it. I told him I did. He said one of us had been getting it every time we came by there, and I told him whoever said I did lied. He said he was going to get over and kick me all over the lane and if he ever caught me on the place he would kick me off of it. When Papa came home, I told him that Mr. Horton ran on to us about the post. He asked what did he say. I said he did not say much of anything, and Papa said, 'You want to leave Mr. Horton alone,' and I went on to work."

Charley White testified:

"I will soon be 19. My sister Pearl ran to the house and said, 'Mr. Horton is killing Papa.' I walked up the lane and met Papa. I asked him what he had done, and he said: 'I

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have killed Mr. Horton. You go across to Mr. Varner and tell him where the monkey-wrench was.' I ran across to Mr. Varner and told him that Papa wanted him to see about the monkey-wrench that was pretty close to Horton."

As a witness in his own behalf, the defendant testified:

"I was 44 or 45 the 26th day of last July. I went to Byers that morning. My wife was with me and I took my gun along. We got back home about noon. My baby boy said something about Johnny and Mr. Horton having a racket. I never paid any attention to it. Some boys came along and asked for my seine. I told them they could have it, and after dinner I followed them down to the river. I sat there a while watching them seine. Then I went up in the field where the boys were at work. I asked Johnny about the racket he had with Mr. Horton. He said there was nothing to it only Mr. Horton got mad over a plank. I said, 'I want you boys to let Mr. Horton alone.' Then I went out in the cotton patch and fixed the disk on the go-devil. When I came back to the house it was getting something like sundown. My wife came around, and I said: 'Get supper. I am hungry.' I put my hat on and thought I would go up the road and see if there were any posts down. It is a half mile from my house to where Horton was. When I got about half way, I put up a wire that was down and walked on a little piece. I noticed Mr. Horton had turned his team around and stopped, so when I got close to him he hollered to me to come over, that he wanted to talk to me, and I says: 'I haven't got time this evening. I will be over in the morning.' He said, 'You blue-eyed son of a bitch, if you don't come to me, I will come to you.' I was in the center of the road, I says, 'Mr. Horton, I don't want any trouble with you.' He said, 'No, you never want any trouble, but you let your kids come up the road and go through my field, and you know I don't want them there.' I said, 'I am willing to make that right.' He said, 'You will not do anything, you say you will, and you will not make it right.' I said: 'Mr. Horton, you have no right to be mad at me. I never done you any harm in my life.' He calmed down when I told him what I would do about making the boys behave. I walked up to the fence where he was at. We stayed there and talked maybe five minutes. I said, 'If the boys have taken that prop down, I will guarantee that your fence will be put back in proper shape.' 'All right,' he said, 'the fence is not hurt, but there is another thing you remember, don't you?' I said, 'I don't know, what is that?' He said, 'You remember ordering me out of your field when I was hunting?' I said: 'Yes, I hollered to you.' You see I have my place posted. I said, 'You see that sign there on the gate.' He got mad all at once and grabbed me around the shoulders and jerked me into the fence and gave me two or three hard jerks and went with his right hand into his hip pocket. I grabbed him, and we were riding up and down this fence, first one way, then the other, and my holt gave out and he got loose and he cut with his wrench and struck at me. I dropped back and pulled my pistol out of my right-hand pocket and fired it until it quit shooting. When I fired the last

shot at him, he was in a stooping position and he stumbled back and fell. Before I killed him I hollered as loud as I could, guess I was scared. I walked right back and got about 50 yards when I saw Lon Varner coming. I hollered to him, 'There is a wrench right north of Horton's head, and I want you to watch that wrench.' Varner acted like he did not understand what I said, so when I met my boy Charley I told him to tell Mr. Varner to notice that wrench. My pistol was a 38 double action. I never put but four cartridges in it. I shot Mr. Horton because I thought he was going to kill me."

Carney Varner testified:

"My age is 15 years. I was up on the big hill and heard Mr. Horton talking loud. I looked down, and Mr. Horton and another man were fighting. I hollered to my father and told him they were fighting over there. I ran further up and looked again and heard three or four shots. I saw Mr. Horton fall. There was a pause between the first and second shot. Mr. Horton had commenced hollering, and after the shots were fired he fell. It looked to me that one was on one side of the fence and one on the other. They seemed to be scuffling back and forth. That forenoon I fixed the fence near where the killing occurred. Johnny White was with me. Johnny picked up a two by four plank and was trying to stretch the wire with it. Mr. Horton came over to us and asked Johnny which one of us got that prop. Johnny said he did. Mr. Horton told Johnny he had been taking down that prop all the year, and Johnny told him that any one that said he had taken it down was a liar, and he told Johnny he was going to get over there and kick him. Then me and Johnny went up to my house."

The testimony covers several hundred pages, but the foregoing statement is sufficient to understand the questions raised.

[2] But two grounds for reversal are relied on: The first is based upon alleged misconduct of the jury and bailiff in taking certain exhibits offered in evidence with them to the jury room.

The record shows that in support of this ground of the motion for new trial there was an agreed statement which recites:

"That in the argument of the case counsel for defense examined the clothing of the deceased and of the defendant, and stated to jury that he desired that they take this clothing, including the underclothes, shirt, and overalls of the deceased, and the clothing of the defendant introduced in evidence with them to the jury room and put them on and test them out as to the wounds, powder burns, or other evidence that might appear on such garments.

"That this argument was made in the presence of and with the consent of the defendant and the court. Counsel further said, 'You will have all these exhibits,' in his remarks just prior to his calling particular attention to the clothing.

"The bailiff in charge of the jury, after having been sworn to take charge of the jury, collected up all the exhibits in the presence of

the court and counsel for state and defendant and the defendant himself, and carried them out of the courtroom with him as he took the jury out. The act of the bailiff in gathering up the exhibits and carrying them out of the courtroom while with the jury was all done in the presence of the defendant and his counsel, and the counsel for the state, after the court had instructed the jury to begin consideration of the case on the following morning and after having instructed the bailiff that such things as they would want, would be sent them the following morning, and that defendant was never afterward consulted about what exhibits should be sent to them.

"By the Court: No expression of authority was given to the bailiff by the court to deliver the exhibits to the jury."

[3, 4] Other than this agreed statement, there is nothing in the record indicating the rulings or statements of the court. The incorporation of rulings or statements of the court, made during the trial in an agreed statement by counsel, do not make them proper matter of exceptions in the record, unless such agreed statement is signed by the trial judge as a bill of exceptions. However, the question here attempted to be presented was before this court in several cases and decided adversely to appellant's contentions. In the case of *Saunders v. State*, 4 Okl. Cr. 284, 111 Pac. 965, Ann. Cas. 1912B, 766, it was held there was no error in allowing the jury to take with them to the jury room a coat worn by the deceased when he was shot, which was introduced in evidence, where the defendant through his attorney in open court consents thereto. Nor was there any error in some of the jurors putting on the coat in the jury room to observe the location of the bullet holes therein.

In the case of *Hopkins v. State*, 9 Okl. Cr. 104, 130 Pac. 1101, Ann. Cas. 1915B, 736, it was held:

"Where, on a trial for murder, the court permitted the jury to take, on retirement, and to have the same in their possession in the jury room, while deliberating, the defendant's shotgun and the shells and the shot which had been introduced in evidence, and it not being made to appear that they were used by the jury in a manner not consistent with the evidence, it cannot be said the jury thereby received evidence out of court."

In the opinion it is said:

"In the case at bar it cannot be said that the jury received evidence out of court. These articles had been properly identified and received as evidence in the case. Nor can it be said that the jury was guilty of misconduct, such as prevented a fair and due consideration of the case, for them to take with them these articles. No injury is pointed out, and no prejudice to the substantial rights of the defendant appears; and we are of opinion that in the case at bar there was no error in that regard."

[1] The other ground urged in the brief is that the evidence is insufficient to sustain the verdict, and counsel say:

"As we view the case, the defendant was neither guilty of murder or nothing, and we contend that under the testimony in the case he was justified."

The theory of the prosecution appears to have been that the killing was an assassination. The defendant sought an acquittal on the ground that he acted in self-defense.

We deem it sufficient to say that we are impressed by the record that the altercation which resulted in this unnecessary homicide was of the defendant's own seeking. We have seldom read a record of conviction where there was less palliating circumstances in behalf of the defendant than this case presents. According to his own statement on the witness stand, and the physical facts, he is guilty of manslaughter in the first degree, and we think he ought to be thankful that the jury dealt so leniently with him.

Finding no error in the record, the judgment of the lower court is affirmed.

MATSON and BESSEY, JJ., concur.

WELCH v. STATE. (No. A-3714.)

(Criminal Court of Appeals of Oklahoma.
Sept. 12, 1921. Rehearing Denied
Nov. 19, 1921.)

(Syllabus by the Court.)

1. Larceny \S 88—Sentence of 10 years for theft of hog held excessive.

In a prosecution for the theft of a hog, the jury fixed the punishment at imprisonment for 10 years. *Held* excessive, and the judgment modified to 4 years, and affirmed as modified.

2. Criminal law \S 1184—Appellate court will reduce excessive punishment rather than grant new trial.

The Code of Criminal Procedure (section 6003, Rev. Laws 1910) provides: "The appellate court may reverse, affirm or modify the judgment appealed from, and may, if necessary or proper, order a new trial." Under this provision the remedy in cases like this, where the punishment assessed is excessive, is found, not in a new trial, but by reducing the punishment.

Appeal from District Court, Jefferson County; Cham Jones, Judge.

Clint Welch was convicted of the theft of a hog and he appeals. Modified and affirmed.

Ed Anderson, Bridges & Vertrees, and Hays Dillard, all of Waurika, for plaintiff in error.

The Attorney General and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. Upon an information charging the theft of one hog, the property of Jay Barnett, Clint Welch and Henry Garrett were tried and both found guilty as charged; the punishment of the defendant Welch was fixed at 10 years in the penitentiary, and that of the defendant Garrett at 2 years in the penitentiary. Motion for new trial was duly filed and overruled, and judgment was duly rendered as to each in accordance with the verdict. A case-made on the part of both defendants was duly signed, settled, and filed, and notices of appeal were duly served and the same filed in this court on February 25, 1920. The Attorney General has filed a motion to dismiss the appeal, because no briefs have been filed, but as the case-made is before us we will overrule the motion to dismiss.

The errors assigned are that the court erred in its rulings in the admission of incompetent and in rejecting competent evidence, to which exceptions were duly saved; that the evidence is insufficient to sustain the verdict; and that the punishment assessed is excessive.

The petition in error is silent as to the defendant Garrett; therefore there is nothing we can review as to him.

The evidence shows that Jay Barnett, who lived five miles northeast of Waurika, had a hog weighing about 250 fifty pounds stolen from a pen on his place Saturday night, November 2, 1918; the next evening the hog was found at the defendant Clint Welch's place; it had been butchered, the entrails removed, and the ears trimmed off. The owner and several other witnesses identified the hog.

Sheriff Ballard testified that he reached the defendant's place Sunday evening before sundown, and the defendants were dressing a hog, had one side scraped and the entrails removed, and both ears had been cut off; that he asked the defendant Welch where the ears were and he said the boys were monkeying around and trimmed them off and burned them up; that he asked Welch where he got the hog, and he said, "I raised it."

The defendant Clint Welch as a witness in his own behalf testified that he had bought the hog from his brother.

We have carefully examined the entire record and have failed to find any error. There can be no doubt of the sufficiency of the evidence to sustain the verdict. However, we are inclined to think that the punishment assessed is excessive.

It appears that appellant is a married man with a wife and three children of tender years, and that this is his first offense.

[1, 2] It is both the spirit and intention of our laws that punishment for crime shall be imposed for the protection of society and reformation of the criminal. As we view

the record in this case, we are convinced that the maximum punishment assessed by the jury was due to passion and prejudice, and we are satisfied that 4 years' imprisonment of the defendant will be as much protection to society and do him as much good as would 10.

The judgment sentencing the said Clint Welch to imprisonment in the penitentiary for the term of 10 years is hereby modified to the extent of reducing it to 4 years' imprisonment in the state penitentiary. As so modified, the judgment is affirmed.

MATSON and BESSEY, JJ., concur.

Ex parte BALLEW. (No. A-2767.)

(Criminal Court of Appeals of Oklahoma. Nov. 7, 1921.)

(Syllabus by the Court.)

1. Contempt \S 33—Judge of court of inquiry may punish for contempt only as specified in statute.

A judge of a so-called court of inquiry to investigate violations of the prohibitory law, under the provisions of Session Laws of 1911, p. 159, has only such powers to punish for contempt as are specifically named in the act.

2. Contempt \S 2—Assault on district judge on street held not a contempt.

Section 25 of the Bill of Rights directs the Legislature to pass laws defining contempts. Sections 2277 and 2279, Rev. Laws 1910, define both direct and indirect contempts. The act complained of here does not come within either definition. The affirmative statutory definition of the several acts constituting contempt, made pursuant to the terms of the Constitution, implies a negative as to all other acts of a contemptuous nature not mentioned in the statute.

Bud Ballew was imprisoned for an alleged direct criminal contempt of court by assaulting the person of the district judge, and he makes an original application for habeas corpus. Writ allowed, and petitioner ordered discharged.

Sigler & Howard, of Ardmore, and Prulett & Sniggs, of Oklahoma City, and R. F. Turner, of Ardmore, for petitioner.

S. P. Freeling, Atty. Gen., and Smith C. Matson and R. McMillan, Asst. Attys. Gen., for respondent.

Clinton O. Bunn and Thomas Norman, both of Ardmore, amici curiæ.

BESSEY, J. The petitioner, Bud Ballew, says he is illegally restrained of his liberty by the sheriff of Carter county, Okl., pursuant to an order or judgment of the district

judge of said county, for an alleged direct criminal contempt of court, by assaulting the person of W. F. Freeman, district judge, on May 20, 1916, on a public street in the city of Ardmore. Portions of the record tend to show that this assault was provoked by and grew out of certain remarks made by the district judge in the course of a proceeding to inquire into any violations of the prohibitory laws, under section 3611, R. L. 1910, as amended by Session Laws of 1911, p. 159, indicating that the petitioner was in collusion with known violators of the prohibitory law. Other portions of the record seem to indicate that the petitioner took offense at remarks made some time previous by the judge, in conference with the county judge, county attorney, sheriff, and county commissioners, concerning violations of the prohibitory law, in which the judge stated that the petitioner seemed to be in collusion with violators of the prohibitory law. The record also discloses that the assault may have been brought about in whole or in part by the issuance and service of a temporary injunction abating a nuisance on premises in which the petitioner may have had an interest.

It is conceded that the petitioner at this time was a deputy sheriff of Carter county. Portions of the testimony taken at the several inquisition hearings disclosed that a number of witnesses, upon information received from others, had obtained quantities of whisky, taken from and purchased in petitioner's barn in Ardmore in the nighttime. Other testimony tended to show that the petitioner had, or might have had, an interest in a certain roadhouse some distance from Ardmore where intoxicating liquor was being sold. On May 19, 1916, upon the information obtained from witnesses at these inquiry proceedings, the county attorney instituted injunction proceedings against Cyrus Pyatt for operating a roadhouse near Ardmore where intoxicating liquors were sold and in which the petitioner was said to have an interest, and the court on that day granted the injunction. Late in the evening of May 20th the petitioner, in company with Cyrus Pyatt, insultingly accosted the judge on the streets of Ardmore, and, calling the latter's attention to the objectionable remarks made at the hearing, proceeded to administer a physical assault upon the person of the judge.

One month later the judge, assuming to act as the district court, made the following order:

"Attachment for Contempt.

**"In the District Court of Carter County,
Oklahoma.**

"State of Oklahoma, Carter County—ss.:

"To the Sheriff of Carter County—Greeting:

"You are hereby commanded to attach the body of D. M. (Bud) Ballew so that you may have him, the said D. M. Ballew, instant before the judge of the district court of Carter

county, Okla., now in session, to answer for a contempt of said court, said contempt being an assault made by the said D. M. Ballew upon the person of the judge of this court, upon Main street in the city of Ardmore, Okla., on the 20th day of May, 1916, and have you then and there this writ.

**"Witness my hand this 20th day of June,
1916.
W. F. Freeman, Judge."**

The sheriff executed this order the same day and brought the petitioner before the district judge, where the following proceedings were had:

"The Court: This, Mr. Ballew, states the proceedings had in the court of inquiry in so far as the same concerns you in any way. The court now informs you of your having made an assault on the district judge of this district on Saturday, the 20th day of May, and now pauses to give you an opportunity to say anything you wish to perjure (purge) yourself of this offense. Have you anything to say?"

"The Sheriff: I want to say this. Mr. Ballew was in town this morning, and he had started home. The warrant was only given me a while ago, and I phoned and had him cut off, and he came back, and I brought him up here on this warrant or attachment. He asked me coming up here if there was any bond that could be arranged, if you will set the bond for him; he hasn't had an opportunity to take it up with counsel.

"The Court: This is a direct contempt. In an indirect contempt you are required to issue summons, file an answer, etc. This is what is known as a direct contempt and does not depend upon the testimony of anybody else for its foundation. The law only requires the court to give the defendant an opportunity to be heard why he should not be punished.

"Mr. Ballew: Judge, I haven't had time to make any arrangements to employ counsel. I would like to have time. I would like to be heard, that is all. Of course, I am not prepared to argue it with you myself, I couldn't do that.

"The Court: As I understand this proceeding, this is a direct contempt. It doesn't depend upon proof; it is done in the presence of the court; it would be the statement of the court against the defendant and any witnesses he might have. It is my duty to proceed with the case as it is. I have given you an opportunity to be heard. Have you nothing to say for yourself?"

"Mr. Ballew: That is all.

"The Court: The court will then proceed to pronounce its judgment. In doing so the court has the following to say: Your assault upon the district judge of this district was made in the afternoon of the 20th day of May. The court has waited this full month of time in order that the passion of resentment might fully abate, and that this court should reach a time when it could sit free from all passion and prejudice and sit in cool, dispassionate judgment upon this case. The court feels itself to be in that dispassionate frame of mind and has this to say in pronouncing judgment in this case:

"Your unprovoked assault upon the district judge of this county was a brutal attack upon the dignity of this court, and a bold defiance of

the authority of the people, acting through this court. To arrive at a just measure of the punishment which should be inflicted upon you we must take into consideration all those conditions and circumstances which may have moved you to commit this unprovoked assault. You were a deputy sheriff, under oath and bond, and as such it was your imperative duty to lend every assistance to this court in its effort to abate that spirit of high-handed lawlessness that was rampant among certain elements of the people, which as an officer it was your duty to put down. Instead of this assistance which the court had a right to expect of you for the enforcement of the law of this county, abundant evidence was taken in the court of inquiry which shows that you as an officer at least had a guilty knowledge of these flagrant violations of the law.

"In view of all the circumstances in this case, it is the opinion of the court that you be adjudged guilty of a direct contempt, and that you be punished as for a direct contempt.

"It is therefore ordered, adjudged, and decreed by the court that you, D. M. Ballew, be confined in the county jail for a period of 60 days and that you pay a fine of \$200.

"It is further ordered that D. M. Ballew be remanded to the custody of the sheriff of Carter county, Okl., and that the judgment of this court in this behalf be executed by the said sheriff."

[1] It appears from the record that the district judge had previously prepared a judgment record in writing and delivered it to the clerk, with the exception that the period of imprisonment and the amount of the fine were left blank; that after the rendition of the judgment or order the blanks were filled in to conform to the order or judgment pronounced.

The provisions of our statutes relative to inquisitorial proceedings to investigate violations of the prohibitory laws, out of which this controversy arose, appear in Session Laws 1911, p. 159, as follows:

"It shall be the duty of any judge of any court of record, upon the written request of the county attorney, or upon the sworn complaint of any other person, to issue subpoenas for any witness that may have knowledge of the violations of any provision of this act, and such judge shall have the power and it shall be his duty to compel such witness to appear before him and give testimony and produce any books or papers that will aid or assist in the prosecution of such investigation and inquiry into any violation of the provisions of this act; but no person shall be prosecuted or subjected to any penalty or forfeiture for, or on account of, any transaction, matter or thing concerning which he may so testify or produce evidence. The testimony of each witness shall be reduced to writing by said judge, or by some person designated by him, and the same shall be signed by such witness. No person shall disclose any evidence so taken, nor disclose the name of any person so subpoenaed and examined, except when lawfully required to testify as a witness in relation thereto; and the unlawful disclosure, by any person, of any such evidence, or of any matter or thing concerning

such examination shall be a misdemeanor. Should said judge be unable to hold and conduct such inquiry and investigation for want of time, he may appoint a special judge who shall possess the qualifications and have the power in respect to such matters as a judge of the county court. Should any witness refuse to appear before such judge, in obedience to such subpoena, or refuse to produce any books or papers when lawfully required to do so, or having appeared, shall refuse to answer any proper question, or sign his testimony when so required, it shall be the duty of such judge to commit such person to the county jail until he shall consent to obey such order and command of said judge in the premises, and in addition thereto such person may be punished, as for contempt of court, in accordance with the Constitution and laws of this state. The special judge appointed under the provisions of this section shall take the oath prescribed by the Constitution for state officers, and shall receive the compensation allowed by law for notaries public for taking depositions, and be paid by the county in which such proceeding is had, upon the order of the judge who appointed him. When it is shown upon the taking of such testimony that there is probable cause to believe that any person has violated any provision of this act, the county attorney shall immediately prepare an information charging such person with such offense and file such information in some court of competent jurisdiction."

[2] Section 25, Bill of Rights, is as follows:

"The Legislature shall pass laws defining contempts and regulating the proceedings and punishment in matters of contempt: Provided, that any person accused of violating or disobeying, when not in the presence or hearing of the court, or judge sitting as such, any order of injunction, or restraint, made or entered by any court or judge of the state shall, before penalty or punishment is imposed, be entitled to a trial by jury as to the guilt or innocence of the accused. In no case shall a penalty or punishment be imposed for contempt, until an opportunity to be heard is given."

Section 2277, R. L. 1910, is as follows:

"Contempts of courts shall be divided into direct and indirect contempts. Direct contempts shall consist of disorderly or insolent behavior committed during the session of the court and in its immediate view and presence, and of the unlawful and willful refusal of any person to be sworn as a witness, and the refusal to answer any legal or proper question; and any breach of the peace, noise or disturbance so near to it as to interrupt its proceedings, shall be deemed direct contempt of court and may be summarily punished as hereinafter provided for. Indirect contempts of court shall consist of willful disobedience of any process or order lawfully issued or made by court; resistance willfully offered by any person to the execution of a lawful order or process of a court."

Section 2279, Id., is as follows:

"In all cases of indirect contempt the party charged with contempt shall be notified in writing of the accusation and have a reason-

able time for defense; and the party so charged shall, upon demand, have a trial by jury."

Ordinarily none but courts of record and of general jurisdiction have the power to punish persons for contempt of court. Where the contempt is direct, this is usually done in a summary manner, without notice or process. In cases of indirect contempt notice and hearing must be had, and in our state one accused of indirect contempt is entitled to a trial by jury.

Now, if the contemptuous assault complained of here grew out of and took place as a consequence of the injunction proceedings, the judge then sitting as a court of record, the assault would be contempt of court, either direct or indirect, provided it comes within the purview of the Constitution and statutes on the subject of contempt. The Constitution, section 25 of the Bill of Rights, quoted above, directs the Legislature to pass laws defining contempt and to regulate the proceedings and punishment in matters of contempt. Our statutes, sections 2277 and 2279, quoted above, have defined both direct and indirect contempt. It will be seen that the charge here of an assault on the judge at the entrance to a barber shop on the street of Ardmore, after court hours, does not come within our statutory definition of direct contempt as being "insolent behavior committed during the session of the court and in its immediate view and presence," nor is it "any breach of the peace, noise or disturbance so near to it as to interrupt its proceedings." Neither was the assault complained of an indirect contempt within the definition of the statute, as being a "willful disobedience of any process or order lawfully issued or made by court," or "resistance willfully offered by any person to the execution or a lawful order or process of court." The assault complained of was none of the things constituting a contempt, as defined by statute. The people of this state, by section 25 of the Bill of Rights, directed the Legislature to define contempts, and a statute defining direct and indirect contempts has since been adopted, specifically enumerating what acts shall constitute contempt. Applying the rule of statutory construction, "*Expressio unius est exclusio alterius*," the affirmative description and enumeration of the acts constituting contempt implies a negative as to the exercise of such power in other cases not enumerated. 25 R. C. L. 982; 36 Cyc. 1122.

Ordinarily, where the judge, as in this case, is without power to punish for contempt of court, the penalties prescribed for violation of the Penal Code may be invoked. If the acts and things designated by the statutes as contempt are insufficient to preserve the dignity of the court and properly safeguard its functions, it is for the Legislature to enlarge the scope of the statute. No matter how much the appellate courts may wish

to have the statutes changed in this regard, it is for the lawmaking branch of the government to make such change.

If the assault complained of grew out of and took place as a consequence of the remarks of the judge at the informal conference of the county judge, county attorney, and county commissioners, then in any event the offense was nothing more than an assault and battery.

If the contemptuous assault grew out of and took place as a consequence of the remarks made by the judge at one of the sessions of the court of inquiry, which was in no sense a court of record or of general jurisdiction, the judge presiding over such proceeding would have only such right to punish for contempt as is provided in the act authorizing such special proceeding. The conclusion reached that such a proceeding does not constitute a court of record is predicated upon the fact that the act itself nowhere calls it a court, and provides for none of the attributes of a court of record. It does not authorize the judge to render judgment in any matter or to make any order or finding, either of law or of fact, affecting any case; there can be no action pending in such a proceeding; no provision is made for a clerk as is usual in courts of record. The duties devolving upon the judge in these special proceedings are for the most part ministerial, and not judicial. The Legislature might have delegated this power to the mayor or of the city, to some notary public, or to some other officer. The fact that this power was delegated to a judge does not necessarily make him a court of record. *Burfenning v. R. I. & P. Ry.*, 163 U. S. 321, 16 Sup. Ct. 1018, 41 L. Ed. 175; *State v. Huser*, 76 Okl. 130, 184 Pac. 113.

The power to punish for contempt is predicated upon the fact that the accused has in some manner interfered with judicial functions. The absence of judicial authority to act in the principal action or proceeding makes an order of a judge punishing for contempt in that act a nullity. *Ex parte Rowland*, 104 U. S. 604, 26 L. Ed. 861; *Ex parte Gudenoge*, 2 Okl. Cr. 121, 100 Pac. 39.

Having reached the conclusion that, under any theory of this case, the judge under the circumstances was without authority to punish as for contempt, it will be unnecessary to determine whether the accused was deprived of the right of a trial by jury or whether the alleged contempt was waived by a failure to punish the offender at or near the time of the commission of the offense.

For the reasons stated in the opinion, the writ is allowed, and the petitioner ordered discharged.

DOYLE, P. J., concurs.

MATSON, J., disqualified, not participating.

MERITT v. STATE. (No. A-3742.)(Criminal Court of Appeals of Oklahoma.
Nov. 10, 1921.)*(Syllabus by the Court.)*

1. Criminal law \S 598(10)—Refusal of continuance where defendant promptly subpoenaed witnesses which sheriff had not time to subpoena held error.

The day following the filing of the information, which was Saturday, defendant was arraigned and the cause set for trial the following Monday. Thereupon defendant caused subpoenas to issue. When the case was called for trial defendant filed an application for continuance on account of the absence of such witnesses and the failure of the sheriff to serve the subpoenas. The sheriff testified that he did not have sufficient time to serve the same. *Held* reversible error to overrule said application.

(Additional Syllabus by Editorial Staff.)

2. Criminal law \S 1151—Court has discretion in refusing continuance, reversible only for abuse.

Granting or refusing continuance in a criminal case is in the discretion of the trial court, and will be disturbed only for abuse.

3. Criminal law \S 617—Technical objection should not prevent continuance necessary to present defense.

A technical objection should not ordinarily prevent the granting of a continuance in a criminal case if it appears necessary to a proper defense.

4. Criminal law \S 1159(2, 4)—Where any substantial evidence tends to show defendant guilty, its sufficiency to support the verdict will not be considered.

The jury are the exclusive judges of the credibility of the witnesses and the weight of their testimony, and where there is any substantial testimony tending to show defendant guilty of the offense charged, the Criminal Court of Appeals will not consider the sufficiency of the evidence to support the verdict of conviction.

Appeal from County Court, Stephens County; G. T. Burrows, Judge.

Kelly Meritt was convicted of a violation of the prohibitory liquor law, and he appeals. Reversed.

R. C. Drake, of Duncan, for plaintiff in error.

S. P. Freeling, Atty. Gen., and E. L. Fulton, Asst. Atty. Gen., for the State.

DOYLE, P. J. Under an information charging him with selling "one pint of whisky to G. C. Jackson," appellant was tried and convicted, the jury leaving the punishment to the court. The court assessed

the maximum punishment, and from the judgment he appeals.

One of the grounds of the motion for new trial, and assigned as error, is that the court erred in overruling the defendant's application for a continuance. The record shows that the information was filed on January 30, 1920; that plaintiff in error was arrested and arraigned on the following day, and the case was set for trial on February 2d, which was Monday. On January 31st, the day he was arrested and arraigned, which was Saturday, the defendant caused subpoenas to issue. The sheriff on Monday, when the case was called for trial, made return that he had not served the same. Thereupon the defendant filed a motion for continuance on the ground that Joe McDonald and John Compton, material witnesses on his behalf, were absent, and if present they would testify that the said G. C. Jackson purchased the intoxicating liquor from persons other than the defendant, and that the subpoena for said witnesses had not been served.

The defendant caused the sheriff to be sworn who testified:

"I did not have time, considering the way the roads were, to serve said subpoenas."

Thereupon counsel for the defendant asked leave of court to permit the defendant to verify his motion, and the court refused to permit him so to do.

The Attorney General has filed the following confession of error:

"It seems to us that, from the situation as disclosed by the record, plaintiff in error did not have a fair and impartial trial. While it is true that the showing made by him for a continuance was not in proper form, yet we think the record discloses that it was due more to lack of knowledge than anything else, and that in addition thereto, when an endeavor was made to perfect the form of the application, the trial court would not grant such permission. Considering the fact that the party was arrested, charged with the commission of the offense, on Saturday, and he immediately had subpoenas issued for witnesses, and the case was set for trial on the next Monday, it seems to us that the trial court should have granted him a reasonable time, at least, in which to have endeavored to have secured the absent witnesses. In other words, we are unable to say that the court did not abuse its discretion in denying plaintiff in error an opportunity to secure his witnesses."

[1-3] Ordinarily the granting or refusing of a continuance is in the discretion of the court, and its decision will not be disturbed on appeal, unless it appears that there has been an abuse of such discretion. However, a continuance ought always to be granted when, from the showing, justice requires it to be done, and to enable a defendant to procure all competent evidence necessary for

his defense, if he has used due diligence to obtain the same. Technical objection should not ordinarily prevent the granting of a continuance, if it appears necessary to a proper presentation of defendant's case. On the record before us the confession of error is well founded, and in our opinion, under the admitted fact that the subpoenas for the defendant's witnesses had not been served, the state should not have insisted, and the court should not have ordered, that the trial proceed in the face of this application.

It is also insisted that the evidence is insufficient to sustain the verdict. The complaining witness, Jackson, was the only witness who testified that the liquor was purchased from the defendant. As a witness in his own behalf the defendant denied the sale of whisky.

[4] Without further detailing the evidence we deem it sufficient to say that the jury are the exclusive judges of the credibility of the witnesses and the weight to be given their testimony, and where there is any substantial testimony tending to show the defendant guilty of the offense charged against him, the sufficiency of the evidence to support the verdict will not be considered by this court. For the reason stated the judgment is reversed, and a new trial awarded.

MATSON and BESSEY, JJ., concur.

COGLE v. STATE. (No. A-3751.)

(Criminal Court of Appeals of Oklahoma.
Nov. 2, 1921.)

(Syllabus by the Court.)

Evidence held to sustain conviction of theft of automobile.

In a prosecution for the theft of an automobile, the evidence examined, and held sufficient to sustain the conviction, and that no reversible error was committed on the trial.

Appeal from District Court, Tulsa County; Redmond S. Cole, Judge.

Johnnie Cogle, was convicted of grand larceny, and appeals. Affirmed.

Crossland & Smith, of Tulsa, for plaintiff in error.

The Attorney General and E. L. Fulton, Asst. Atty. Gen., for the State.

DOYLE, P. J. This appeal is from a judgment rendered upon the verdict of a jury finding appellant guilty of the crime of grand larceny and fixing his punishment at imprisonment in the penitentiary for the term of five years. The information filed June 25, 1919, jointly charged appellant, Johnnie

Cogle, and one Millard Gentry with the theft of one Cadillac automobile, of the value of \$3,600, the personal property of A. L. Farmer. When the case was called for trial on September 30, 1919, appellant asked and was granted a severance. Thereupon the jury was impaneled to try the case, which trial resulted in a verdict as above stated.

On October 10, 1919, judgment was rendered. The appeal was taken by filing in this court on April 10, 1920, a petition in error with case-made. No brief has been filed, when the case was called for final submission it was submitted on the record, and we have nothing before us but the petition in error and case-made. The errors assigned are that the verdict is contrary to the law and the evidence, and that the court erred in its rulings in the admission and the rejection of evidence to the prejudice of the defendant. We have read and examined the entire record in this case, and we do not find any objections made or exceptions saved to the admission or rejection of testimony. We have also examined the information and instructions of the court, and the judgment, and we have discovered no error which will warrant a reversal of the judgment, and we find that the evidence sustains the verdict and judgment of conviction, and our conclusion is that this appeal is without merit.

The judgment of the district court of Tulsa county is therefore affirmed.

MATSON and BESSEY, JJ., concur.

GENTRY v. STATE. (No. A-3753.)

(Criminal Court of Appeals of Oklahoma.
Nov. 3, 1921.)

(Syllabus by the Court.)

Evidence held sufficient to sustain conviction of theft of automobile.

In a prosecution for the theft of an automobile, the evidence examined, and held sufficient to sustain the conviction, and that no reversible error was committed on the trial.

Appeal from District Court, Tulsa County; Redmond S. Cole, Judge.

Millard Gentry, convicted of grand larceny, appeals. Affirmed.

Geo. T. Bonstein, of Okmulgee, W. T. Hunt and A. C. Hunt, both of Tulsa, for plaintiff in error.

The Attorney General and E. L. Fulton, Asst. Atty. Gen., for the State.

DOYLE, P. J. Plaintiff in error, Millard Gentry, was tried, convicted, and sentenced to serve a term of five years' imprisonment

in the penitentiary upon an information jointly charging him and one Johnnie Cogle with the theft of a Cadillac automobile of the value of \$3,600, the personal property of A. L. Farmer. On October 13, 1919, judgment was rendered. The appeal was taken by filing in this court on April 10, 1920, a petition in error with case-made.

No brief has been filed, and no appearance made on behalf of plaintiff in error in this court. When the case was called for final submission it was submitted on the record, and we have nothing before us but the petition in error and case-made.

The errors assigned are that the verdict is contrary to law and to the evidence, and that the court erred in admitting certain testimony over the objection of the defendant, and erred in refusing to admit certain testimony offered by the defendant. The case is a companion case to that of *Cogle v. State*, 201 Pac. 530, decided at this term, but not yet [officially] reported. The errors assigned based upon the exceptions taken to rulings of the court upon evidence offered and rejected are without merit, and we find that the evidence sustains the verdict and judgment of conviction.

Having discovered no error which will warrant a reversal, the judgment of the district court of Tulsa county is affirmed.

MATSON and BESSEY, JJ., concur.

GILLENTINE et al. v. STATE. (No. A-4046.)

(Criminal Court of Appeals of Oklahoma.
Nov. 7, 1921.)

(Syllabus by Editorial Staff.)

Criminal law §1131(5)—Defendant's appeal will be dismissed, where he has become a fugitive from justice.

Where defendant, who has appealed from a criminal conviction, has become a fugitive from justice, his appeal will be dismissed.

Appeal from County Court, Cotton County; J. C. Norman, Judge.

T. T. Gillentine and N. B. Warren were convicted of a violation of the prohibitory liquor law, and they appeal. Appeal dismissed.

Alonzo Turner, of Deval, for plaintiffs in error.

The Attorney General and E. L. Fulton, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiffs in error were jointly charged, tried, and convicted for transporting intoxicating liquor from a point unknown to a certain point in Cotton

county, and the punishment of each assessed at a fine of \$250 and 30 days in jail. From the judgments rendered on the verdict, they appealed.

The plaintiff in error N. B. Warren, by his counsel of record, has filed a motion to dismiss the appeal. Said motion is sustained, and the appeal herein as to the plaintiff in error Warren is dismissed.

It also appears that plaintiff in error T. T. Gillentine has become a fugitive from justice pending his appeal. It has been uniformly held that this court will not consider an appeal unless the plaintiff in error is where he can be made to respond to any judgment or order which may be rendered or entered in the case, and where it appears that plaintiff in error has become a fugitive from justice pending the determination of his appeal, the appeal will be dismissed. It follows that plaintiff in error T. T. Gillentine has waived the right to have his appeal in this case considered and determined.

The appeal as to said plaintiff in error Gillentine is therefore dismissed. Mandate forthwith.

CANTY v. STATE. (No. A-3755.)

(Criminal Court of Appeals of Oklahoma.
Nov. 10, 1921.)

(Syllabus by the Court.)

1. Homicide §255(3)—Evidence held to sustain conviction of first degree manslaughter.

The evidence upon the trial of an information for murder considered, and conviction of manslaughter in the first degree affirmed.

2. Homicide §218—Admission of dying declaration is for the court's determination.

It is the province of the court to determine, in the first instance, the admissibility of declarations offered in evidence as dying declarations.

3. Homicide §203(3)—Dying declaration, held admissible where deceased had been advised by physician that recovery was impossible.

Where it is shown that deceased had been advised by the attending physician, and that the advice was such as to induce in his mind a belief that recovery was impossible and death impending, a declaration, made by deceased after he had been so advised, is admissible as a dying declaration.

Appeal from District Court, Love County; Thos. W. Champion, Judge.

Ben Canty was convicted of manslaughter in the first degree, and he appeals. Affirmed.

Cameron & Walden, of Marietta, and Ben F. Williams, of Norman, for plaintiff in error.

The Attorney General and E. L. Fulton, Asst. Atty. Gen., for the State.

DOYLE, P. J. Plaintiff in error, Ben Canty, was charged in an information filed in the district court of Love county with murder, for that he had shot and killed Walter Tate, and upon a trial he was convicted of manslaughter in the first degree and his punishment assessed at seven years in the penitentiary. From the judgment rendered upon such conviction he has appealed, but there has been no appearance in his behalf on his appeal. When the case was called for final submission it was submitted on the record, and we have nothing before us but the petition in error and case made.

The errors assigned are based upon exceptions taken to the rulings of the court upon the admission of evidence, and exceptions taken to an instruction given and refusing to give instructions requested.

[1] The facts attending this homicide, briefly stated, are as follows:

On Sunday night, September 17th, the deceased, Walter Tate, a deputy sheriff of Love county, accompanied by Scott Knight, Andy Rambo and Luther Simmons, went to the home of Hugh Allison, near the town of Oswalt for the purpose of arresting the defendant, Ben Canty, on a bench warrant issued on an information filed in the district court of Love county, charging Ben Canty with the crime of obtaining money under false pretenses. The party arrived at Allison's house about 10 o'clock. The deceased hallooed. Allison came to the door and asked what was wanted. Deceased said, "I am looking for Ben Canty: is he here?" Allison answered, "I do not know; he was here a while ago." The deceased told Allison to light a lamp. When the lamp was lit deceased walked up and said, "Get up, Ben." Immediately two shots were fired. Deceased came out of the house, and said, "He shot me."

Charley Tucker, a witness for the state testified that—

"I met the defendant, Ben Canty, about three weeks before the shooting near Oswalt, and he said Walter Tate wanted to arrest him, and if he attempted to arrest him he would run if he had a chance, and if he didn't he would fight."

Frank Smith, sheriff of Love county, testified:

"I arrested the defendant, Canty, at Ardmore the next day after the shooting, I put him in jail at Marietta, and on November 16th, about the time his case was to be called for trial, he escaped. The next time I saw him was near Pond Creek, Ark. He ran into the cane brake, and I could not find him. About the 5th of April, 1919, I arrested the defendant near the Cimarron river in Creek county."

Dr. Hardy testified:

"Walter Tate was a patient in my sanatorium in Ardmore. He had a gunshot wound on the left side between the tenth and eleventh ribs, about 3½ inches from the median line, and

came out 1½ inches from the spinal column, upward 2 inches from its entrance. It was necessarily fatal. He died the third day. About 10 or 12 hours before his death he made a statement; I had advised him that he could not live."

G. W. Whitfield testified:

"I was pastor of the Baptist church at Oswalt. I first saw Walter Tate that night lying on the porch at Grady Poole's house. I was with him from then, on with the exception of one night and a few hours the next day, until about an hour before he died. He made a statement in the morning of the day he died. Before making this statement he said he was conscious of impending death. I asked him if he was prepared to die; he said he was afraid it was too late. He was thoroughly conscious of his condition when he made the statement."

Thereupon, against the defendant's objections, the court admitted the statement, and it was read to the jury as follows:

"Ardmore, Okla., Sept. 20, 1917.

"My name is Walter Tate. I am 34 years of age. I had orders from Frank Smith to get Ben Canty, and I went to Hughey Allison's house, where Ben was, at about 10 o'clock at night on the 17th day of September, 1917, at Hughey Allison's house, and after I got there I asked Hughey Allison to get up and light the lamp, that I had come after Ben Canty, and Hughey Allison went to the kitchen door and started to open it, and I told him to come to the front door where I was and let me in, and Hughey Allison said that he could not open it because he could not find any matches, and I said 'Open up that door,' and then he opened the front door, and I asked him if Ben Canty was in there, and he said that he was a few minutes ago, but he didn't know where he was now. I looked in the window as Hughey Allison struck the match, and I saw Ben Canty hunkered down at the foot of the bed, and about that time Hughey Allison opened the door and I walked in the house, and stepped across the pallet and told Ben Canty to come on, and he cut down on me with his gun, and shot me in the belly, and then I shot back at him, and then I run out of the house, and went up to the road, and I called for Hughey Allison to bring me some water, but I did not see him or Ben Canty any more that night. This is the way the shooting occurred. I, Walter Tate, being in my right mind, and being informed by Dr. W. Hardy that I cannot recover from the gunshot, and realizing that I am about to die, make this statement as to how Ben Canty shot me."

For the defense, Hugh Allison, codefendant, testified:

"I was living on my farm, 18 or 20 miles northwest from Marietta, with my wife and four children. My home was a two room box house. I had known Walter Tate about 18 years. He lived 2½ miles west of me. About 5 o'clock that evening Ben Canty and his wife came to my house. They were walking and leading a pony with some clothes and a gun tied on the saddle. His wife is my niece. He asked for a job, and I told him I might give him

a few days' work picking cotton. We retired between 8 and 9 o'clock. I had gone to sleep, and I heard some one calling. I went to the door, and discovered it was Walter Tate. He told me to light the lamp and open the door, and I did, and he came in. He had a six-shooter in his hand, and took about three steps and fired. Both shots sounded like one gun. The shots were so close together I could not tell who fired first."

Mrs. Hugh Allison testified that her husband opened the door and said, "Come in, Walter," and Walter Tate stepped in and said, "Ben." Then both shots were fired.

Mrs. Anna Canty testified:

"I am the wife of Ben Canty. We left my brother's that afternoon and went through a pasture a part of the way, then down the public road to Hugh Allison's. When I woke up the first I saw was Walter Tate, who had come in, and when I first saw him he fired at my husband."

As a witness in his own behalf, Ben Canty testified:

"I am 26 years old. I have lived in Love county about 20 years; lived in the same neighborhood with Walter Tate. I bought the gun from my brother, Will, a couple of months before the shooting; I was asleep, and the first thing I remember seeing after I woke up was a man coming through the door with a six-shooter in his hand. I grabbed my gun and ran around between the bedsteads and sat down. He said, 'Ben,' and threw down his gun and shot me. I threw up my gun and fired to protect myself; then I ran out. He shot me in the right hand. The next day I was taken to the Marietta jail. When this case came on for trial I left on account of my lawyer quitting me. I thought I had better get away and save up some money so I could hire a good lawyer and come back. My gun was a 20-25 Winchester rifle."

The only exceptions taken to the admission of evidence are based on the admission of the dying declaration.

[2, 3] It is essential to the admissibility of dying declarations, and is a preliminary fact to be proved by the state, that they were made under a sense of impending death. This may be made to appear by the language of the declarant, or be inferred from his evident danger, or the opinions of his medical attendants stated to him, or from other circumstances of the case, such as the length of time elapsing between the making of the declarations and of his death, and the fact that the declarant was so weak that he could not sign his name, and so affixed his mark, all of which are resorted to, to ascertain the state of declarant's mind.

It is for the court to consider from the evidence whether a declaration was made under circumstances rendering it admissible as a dying declaration, and the credibility to be attached to a dying declaration is for

the jury. *Morris v. State*, 6 Okl. Cr. 29, 115 Pac. 1030; *Addington v. State*, 8 Okl. Cr. 703, 130 Pac. 311; *Udike v. State*, 9 Okl. Cr. 124, 130 Pac. 1107; *Hawkins v. State*, 11 Okl. Cr. 73, 142 Pac. 1093; *Carter v. State*, 12 Okl. Cr. 236, 154 Pac. 337; *Williams v. State*, 13 Okl. Cr. 189, 163 Pac. 279; *Allen v. State*, 16 Okl. Cr. 139, 180 Pac. 564.

The preliminary proof in this case was clearly sufficient to warrant the conclusion of the court that the declaration was made under a sense of impending death and without hope of recovery. The statement of deceased was therefore properly admitted in evidence.

The instructions given by the court covered every phase of the case, and were exceedingly favorable to the defendant.

After a careful examination of the record we are satisfied that there was no error which could have been prejudicial to the defendant, and no one can read the evidence without being impressed that the defendant has not been adjudged the degree of punishment he so richly deserves. Juries frequently render such verdicts, and this can only be accounted for upon the theory that the verdict was the result of a compromise of opinion. The judgment of the district court of Love county is affirmed.

MATSON and BESSEY, JJ., concur.

Ex parte JOHNSON. (No. A-4076.)

(Criminal Court of Appeals of Oklahoma. Oct. 29, 1921.)

(Syllabus by the Court.)

1. Municipal corporations §58—Cities under special charter may have larger powers of self-government than those existing under general laws.

Within the limits prescribed by the Constitution and statute laws of this state, cities existing under a special charter form of government may have larger powers of self-government than are accorded to cities existing under general laws.

2. Sunday §2—State may prohibit moving picture shows on Sunday or delegate such power to cities.

It is within the authority of the state, in the exercise of its police powers, to prohibit moving picture shows on Sunday; and such authority may be, by general law or by special charter, delegated to cities in the exercise of local self-government.

3. Municipal corporations §589—Lawmaking body or people may determine necessity or expediency of specific police regulations.

It is for the lawmaking body of a municipality or for the people themselves, in the ex-

ercise of the initiative and referendum, to determine, within the bounds of reason, the necessity or expediency of specific police regulations, subject only to the limitations prescribed by the Constitution and statutes of this state.

4. Municipal corporations ¶592(1)—City may make further regulations on a subject which the state does or may regulate.

Where the Legislature has made or may by general law make a specific police regulation, that fact of itself will not prevent the lawmaking power of a city from making further regulations on the same subject, not inconsistent with general laws. A municipality may move in the same direction as the Legislature, but not contrary to nor in an opposite direction.

5. Constitutional law ¶208(11), 239, 295—Prohibiting moving picture shows on Sunday is not unconstitutional as class legislation, as denial of due process, nor as depriving accused of an equal protection of law.

The prohibiting of moving picture shows on Sunday is not unconstitutional as class legislation, nor does it confiscate nor impair the value of property without due process of law, or deprive the accused of the equal protection of law under the federal Constitution.

6. Jury ¶23(1)—Where punishment for violation of ordinance is imprisonment or fine and costs exceeding \$20, defendant entitled to jury trial.

In this state persons charged with the violation of a city ordinance, where the punishment is or may be imprisonment, or a fine and costs in excess of \$20 with or without imprisonment, are entitled to a trial by jury. A municipal court in this state may summarily and without a jury impose a fine and costs not in excess of \$20, and may imprison the accused for the payment of such penalty, but not otherwise.

(Additional Syllabus by Editorial Staff.)

7. Sunday ¶2—Regulation or prohibition of Sunday amusements held an implied power, and not unreasonable.

The regulation or prohibition of Sunday amusements, including moving picture shows, by a municipal corporation by ordinance, is not unreasonable, and is a necessarily implied power granted to municipalities under the Constitution.

William Johnson was convicted of operating a moving picture show on Sunday in the city of Bartlesville, and his punishment fixed at a fine of \$50 and costs, in default of which he was incarcerated in the city jail, and he petitions for writ of habeas corpus. Writ allowed, and respondent ordered to release petitioner.

Foster & O'Neil, of Bartlesville, for petitioner.

E. L. Fulton, Asst. Atty. Gen., A. O. Harrison, of Bartlesville, and D. A. Richardson, of Oklahoma City, for respondent.

BESSEY, J. William Johnson, the petitioner, was on the 4th day of September, 1921 (Sunday), arrested for violating certain ordinances of the city of Bartlesville, by operating and maintaining a moving picture show in said city on Sunday. On the 6th day of September, 1921, the petitioner was tried on this charge and found guilty, and his punishment was fixed at a fine of \$50 and costs, amounting to \$6.75, in default of the payment of which the petitioner was committed to and incarcerated in the city jail until such fine and costs should be paid.

At the trial the petitioner pleaded not guilty and demanded a trial by jury, which was by the court denied. Application was made to the district court of Washington county for petitioner's release on a writ of habeas corpus, which application was by that court denied. Whereupon a like application was lodged in this court, which is now under consideration.

The grounds alleged in the application may be summarized as follows:

(1) That the ordinances under which the petitioner was tried and convicted, being ordinance No. 580, and No. 882, amendatory thereto, are void for the reason that the city of Bartlesville, under the law and the provisions of its charter, is without authority to enact an ordinance regulating or prohibiting the operation of moving picture shows in Bartlesville on Sunday.

(2) That the ordinance, as amended, provides for a penalty in excess of the maximum penalty prescribed by statute for work and labor done and performed on Sunday, and is therefore void.

(3) That the ordinance is class legislation, unconstitutional and against common rights, and its enforcement is calculated to and has deprived this petitioner of his liberty without due process of law.

(4) That the petitioner was deprived of his right of a trial by jury.

The ordinance complained of, as amended, is as follows:

"An ordinance prohibiting the operation and running of moving picture shows, inclusive of any vaudeville acts, and likewise the staging and producing of theatrical entertainments on Sunday, providing penalties for violation, repealing all conflicting ordinances, and declaring an emergency.

Be it ordained by the board of commissioners of the city of Bartlesville, Oklahoma:

Section 1. It is hereby declared unlawful for any person, firm or corporation to operate or conduct or to cause to be operated or conducted within the limits of this city, any moving picture show or to exhibit for hire or otherwise any moving pictures, inclusive of any so-called vaudeville acts or performance on the Sabbath day, or the first day of the week, commonly known and designated as Sunday.

Section 2. It is hereby declared unlawful for any person, firm or corporation to stage, ex-

hibit or produce or to cause to be staged, exhibited or produced, any form of theatrical entertainment for hire, or otherwise, within the limits of this city on the Sabbath day or the first day of the week, commonly known and designated as Sunday.

Section 3. Any person assisting in any fashion as servant, agent, laborer or employee, or otherwise, in a violation of the provisions of sections 1 and 2 of this ordinance shall likewise be deemed guilty of a misdemeanor and shall be punished as provided by the terms of this ordinance.

Section 4. Any person, firm or corporation adjudged guilty of the violation of any of the provisions of this ordinance, upon conviction shall be fined in a sum of not more than fifty dollars (\$50.00) nor less than five dollars (\$5.00), together with the costs of the action.

Section 5. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

"Section 6. Owing to the fact that at the present time there is no adequate ordinance in force in this city covering the subject of this ordinance, and to the further fact that certain persons, firms and corporations are about to stage, exhibit and produce certain theatrical entertainments and moving pictures on the Sabbath day,

"Now, therefore, for the preservation of the public peace, an emergency is hereby declared to exist by reason whereof this ordinance shall be in full force and effect from and after its due passage, approval and publication as required by law."

[1] Section 3, art. 18, of our Constitution provides that any city containing more than 2,000 inhabitants may frame a charter for its own government, consistent with and subject to the laws of this state, which when approved shall be the organic law of the city.

Section 4, art. 1, of the charter of the city of Bartlesville is, in part, as follows:

"The city shall have all the powers conferred upon cities of the first class by the Constitution of the state of Oklahoma and by the laws of the state not rendered inoperative by the adoption of this charter, and shall have all such legislative, executive, and judicial power as is necessarily incident to or proper in the conduct of its business and affairs and such as will promote the interests and secure the rights of its inhabitants, as fully as if specifically enumerated herein. The enumeration of any particular powers shall in no wise limit the plenary powers above provided for said city."

Section 1, art. 5, of said charter is as follows:

"The board of commissioners shall consist of three members, elected in the manner prescribed by this charter, and, except as otherwise provided herein, shall be vested with all legislative powers of the city."

Within the limitations prescribed by the Constitution, it was clearly the intent of the framers of the Constitution to delegate local self-government to cities under a charter form of government in a larger measure and to a greater extent than is accorded cities

existing under general law. Under the general laws of this state municipal corporations are vested with local police powers delegated to them by statute, specifically expressed or necessarily implied. Cities may make and enforce within their limits all such local police, sanitary, and other regulations as are calculated to promote the health, sanitation, comfort, convenience, and welfare of the community, not in conflict with the Constitution and general laws. If cities existing under general laws have these powers, cities existing under special charters may have all these and more, depending upon the provisions of the charter.

It is practically impossible to define with precision the term "police power" because of the vast variety of conditions and circumstances governing its application. Chief Justice Shaw states:

"It is the power to make, ordain, and establish all manner of wholesome and reasonable laws, statutes, and ordinances, either with penalties or without, not repugnant to the Constitution."

It is always easier to determine whether a particular case comes within the general scope of its powers than to give an exact abstract definition of the power itself. 3 McQuillin on Municipal Corporations, §§ 889, 890, 894.

It is well recognized that police regulations appropriate for a rural community, a small city, or a large city may be quite different. For instance, traffic regulations relating to the operation of automobiles in a city of 2,000 inhabitants, while entirely appropriate and adequate in that city, might not be appropriate nor adequate in a city of 100,000 inhabitants. It is for the local lawmaking power to determine the necessity or expediency of such regulations, and when made they will not be disturbed so long as they reasonably tend to promote the order, comfort, or welfare of the community and are not in conflict with some general law. To us it seems that in doubtful cases the courts should have a greater inclination to uphold an ordinance passed as in this case, pursuant to a referendum vote of the people, than where the ordinance is enacted on the initiative of the lawmaking body alone.

[2, 4] This court held in the case of State v. Smith, 198 Pac. 879, that it was within the power of the state Legislature to prohibit moving picture shows on Sunday. If the state has that power and fails to exercise it, we think the city of Bartlesville may do so under its express and implied powers derived from the Constitution, general laws, and its charter. Even if the Legislature should hereafter, by general law, specifically prohibit moving picture shows on Sunday, the lawmaking body of the city might still legislate upon the same subject so long as it did so without being in conflict with the general

law. In other words, a municipality may move in the same direction as the Legislature, but not contrary to nor in an opposite direction. 3 McQuillin on Municipal Corporations, § 894; Ex parte Johnson, 13 Okl. Cr. 30, 161 Pac. 1097; Ex parte Monroe, 18 Okl. Cr. 62, 162 Pac. 233.

[3] The express and implied powers granted to municipalities in this state, relating to police regulations, cover a multitude of subjects, among those enumerated in the statutes being to enact, ordain, alter, modify, or repeal any and all ordinances, not repugnant to the laws of the United States and the Constitution and laws of this state, as shall be deemed expedient for the good government of the city, the preservation of the peace and good order, the suppression of vice and immorality, and measures affecting the health and general welfare of the community. Section 572, R. L. 1910, et seq. Where such powers are delegated to municipalities in general terms, the lawmaking power is not limited to the treatment of subjects specifically named, but there is the implied power of determining, within the bounds of reason, when any specific act or omission is deemed to be inimical to the good order or general welfare of the community.

[7] It is well recognized in this country that the cessation from ordinary labor one day in seven is a salutary regulation, calculated to promote the peace, health, and good order of the people. We hold, therefore, that the regulation or prohibition of Sunday amusements is not unreasonable, and is a necessarily implied power granted to municipalities under the Constitution, statutes, and charter of the city, in the exercise of its police power. 3 Dillon on Municipal Corporations (5th Ed.) § 719.

On Sunday regulations, see 25 R. C. L. 1416, 1417, and cases cited; on delegated police power, 19 R. C. L. 728 et seq.; 3 McQuillin on Municipal Corporations, § 894; Ex parte Bochmann, 201 Pac. 537, decided by this court, but not yet officially reported; on moving picture shows, 3 McQuillin on Municipal Corporations, § 958; on Sabbath observance, 3 McQuillin on Municipal Corporations, § 963, and State v. Smith, 198 Pac. 880.

A municipality may pass and enforce ordinances prohibiting acts or omissions which are also prohibited by statute. Oklahoma City v. Spence, 8 Okl. Cr. 121, 126 Pac. 701; In re Simmons, 4 Okl. Cr. 662, 112 Pac. 951, on rehearing, 5 Okl. Cr. 399, 115 Pac. 380. The doctrine announced in these cases has never been changed in this state, so far as we know, except that the right to a trial by jury in municipal courts has been modified, as will be noticed further on in this opinion.

[5] In our opinion, this ordinance is not class legislation, does not confiscate nor impair the value of the property of the accused, in the sense that it deprives him of due process of law, and is not in violation of any

other constitutional right. In the present complex state of society, individuals may be required to yield certain rights and privileges they once enjoyed, in order that the majority may enjoy other rights and privileges of more importance. Individual rights and privileges, in many cases, must yield and be subservient to the rights and comforts of the people as a whole.

Not many years ago it was earnestly contended by those engaged in the liquor business that they had a natural and constitutional right to manufacture and use intoxicating liquor. The brewers and distillers engaged in this business claimed that liquor was property, and that a state statute prohibiting the manufacture and sale of liquor directly and indirectly deprived them of their property without due process of law; that the enactment of prohibitory and local option laws was confiscatory in effect because the enforcement of such laws tended to depreciate and make valueless their breweries and distilleries and other property and equipment used in their business. At one time this may have been an open question, but it has now been uniformly held that, while such rights did exist, it was within the authority of the state, in the exercise of its police power, to extinguish and abolish these rights in the interest of society as a whole. This question is ably treated by Mr. Justice Harlan in the case of Peter Mugler v. State of Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205.

This case has been well and comprehensively briefed by counsel on both sides. To refer to all the decisions cited by counsel would extend this opinion to too great a length. There has been so much written in the text-books and law reports upon the subject of police powers that to analyze all the citations given would amount to writing a treatise on that subject. A careful reading of the Mugler Case will be sufficient to illustrate the point here involved.

[6] We next come to the question of whether or not a violation of a municipal ordinance is criminal in its nature and whether or not one charged with the violation of an ordinance is entitled to a trial by jury. Section 1, c. 147, Session Laws of 1915, concludes as follows:

"Such proceedings are hereby declared to be criminal in their nature; and except as otherwise specifically provided, shall be governed by, and subject to, general laws relating to criminal procedure."

This section was amended by Act March 5, 1917, Session Laws of 1917, p. 190, wherein it is provided:

"In the trial of all cases in said municipal courts, where the offense as defined by the city ordinance is punishable by a fine only, the defendant shall be tried without a jury, but in all cases where the defendant is charged with

the violation of a city ordinance, and where said offense may be punishable by imprisonment, the defendant shall be entitled to a trial by jury in the justice of the peace court within said city."

While this amendatory section does not in specific terms state that a violation of a city ordinance is criminal in its nature, the declaration that "Where the offense may be punishable by imprisonment the defendant shall be entitled to a trial by jury" indicates that such action is criminal in its nature.

Section 4646, R. L. 1910, provides:

"Actions are of two kinds: first, civil; second, criminal."

Section 5544, R. L. 1910, defines a criminal action thus:

"The proceeding by which a person charged with a public offense is accused and brought to trial and punished, is known as a criminal action."

Taking into consideration the provisions of the Code of Criminal Procedure, together with the Constitution and statutory enactments relating to municipal courts, we cannot conceive how any action where an accused will or might be subjected to imprisonment on any charge amounting to more than a petit offense can be anything but a criminal action. It has been so decided by this court in a number of cases. To review the reasons and arguments here in detail would extend this opinion unnecessarily. Those who desire to analyze the reason for such holding are referred to the following decisions of this court. *Ex parte Tom Johnson*, 13 Okl. Cr. 30, 161 Pac. 1097; *Ex parte Monroe*, 13 Okl. Cr. 62, 162 Pac. 233; *Ex parte Doza*, 13 Okl. Cr. 287, 164 Pac. 130; *Ex parte Gownlock*, 13 Okl. Cr. 293, 164 Pac. 180; *Ed Franks v. City of Muskogee*, 14 Okl. Cr. 391, 171 Pac. 492; *City of Blackwell v. Burgett*, 14 Okl. Cr. 682, 166 Pac. 442; *Miller v. State*, 191 Pac. 1119; *Ex parte Joe King*, 13 Okl. Cr. 51, 161 Pac. 1102.

In the *King Case*, in the *Franks Case*, and in the *Blackwell Case* the offenses charged were not crimes under the statutes; in all the other cases cited the offense made so by ordinance was also a violation of statutory law, but this court has made no distinction in this regard. The test as to whether or not the accused is entitled to a jury is whether or not the punishment will or might be imprisonment, or a fine and costs in excess of \$20 for the nonpayment of which the accused may be imprisoned. The dividing line between mere petit offenses that could be tried summarily without a jury and the graver offenses of a criminal character, where the accused is entitled to a jury, must be arbitrarily made at some point. The federal Constitution, the statutes of this state, and decisions of this court have fixed this

dividing line at a penalty of \$20, including costs. In other words, a municipal court, under the holdings of this court, may summarily and without a jury impose a fine and costs not in excess of \$20, and may imprison the accused for the nonpayment of such fine, but not where the punishment is or may be in excess of this sum. See, also, *Ex parte Bochmann*, just decided by this court, but not yet officially reported.

Under the conditions here the petitioner was imprisoned for the nonpayment of a fine and penalties in excess of \$20, and following the rule laid down by this court in other decisions, the petitioner was wrongfully denied the right of a trial by jury.

For the reasons stated the writ is allowed, and the respondent is ordered to release the petitioner.

DOYLE, P. J., and MATSON, J., concur.

Ex parte BOCHMANN. (No. A-4082.)

(Criminal Court of Appeals of Oklahoma.
Oct. 20, 1921.)

(Syllabus by the Court.)

1. Municipal corporations \S 639(1)—Prosecution in municipal court must be begun by duly verified complaint.

In this state a municipal court is a constitutional court and as such is bound by the constitutional provision found in section 17 of the Bill of Rights: "Prosecutions may be instituted in courts not of record upon a duly verified complaint."

2. Municipal corporations \S 635—Proceedings for violation of municipal ordinance governed by Constitution and laws on criminal procedure.

Under the federal Constitution and under our Constitution (section 17, Bill of Rights) and section 5544, R. L. 1910, and the Act of March 15, 1917 (Sess. Laws, c. 127), all prosecutions for the violation of a municipal ordinance, where the punishment is or may be imprisonment, involving a fine and costs in excess of \$20 is an action criminal in its nature, and, as such, is governed by the Constitution and laws relating to criminal procedure, so far as applicable.

3. Municipal corporations \S 639(1)—All criminal prosecutions require verified written complaint.

That part of section 650, R. L. 1910, providing that "The complaint when made by the marshal, assistant marshal or regular policeman against any person arrested without process * * * need not be in writing," is in conflict with section 17 of the Bill of Rights. *Held*, that all prosecutions of a criminal nature should be maintained upon a verified written complaint.

4. Jury \Leftrightarrow 23(1)—City may summarily and without jury impose fine and costs not exceeding twenty dollars and imprison for nonpayment thereof.

A municipal court in this state may summarily and without a jury impose a fine and costs not in excess of \$20 and may imprison the accused for the nonpayment of such fine and costs, but not where the punishment is or may be imprisonment, or is or may be a fine and costs in excess of this sum.

5. Municipal corporations \Leftrightarrow 592(2)—City may enact police regulations against vagrants not inconsistent with the state laws thereon.

Vagrancy is made an offense by general law, as well as by the ordinances of the city of Lawton. A municipality may enact police regulations not inconsistent with general laws on the same subject. The municipality may move in the same direction as the Legislature, but not contrary to nor in an opposite direction.

(Additional Syllabus by Editorial Staff.)

6. Evidence \Leftrightarrow 31—Criminal Court of Appeals will take judicial notice of municipal charter provisions.

The Criminal Court of Appeals will take judicial notice of the provisions of municipal charters in this state.

7. Municipal corporations \Leftrightarrow 109, 110—Publication and enrollment of ordinance not essential to validity.

While the law and Lawton City Charter, § 40, contemplate that all ordinances shall be recorded at length by the clerk immediately after passage, this is a ministerial duty, and the omission of enrollment and publication will not affect its validity.

8. Habeas corpus \Leftrightarrow 85(1)—Record of municipal court should show conviction upon sufficient legal testimony at public trial or plea of guilty.

In habeas corpus proceedings, presumptions of regularity of proceedings of courts of record do not apply to municipal and other courts not of record, and the municipal court record should show a conviction under a municipal ordinance upon sufficient legal testimony at a public trial or upon a plea of guilty in open court in view of Rev. Laws 1910, § 650.

Andy Bochmann was convicted of vagrancy in violation of an ordinance of the city of Lawton, Okla., and sentenced to a fine of \$20 and costs amounting to \$8, in default of which he was committed to the city jail, and he applied to the county court of Comanche county for a writ of habeas corpus, which was denied, whereupon he filed an application in this court for habeas corpus. Writ allowed, and respondent ordered to release petitioner.

C. R. Reeves, of Lawton, for petitioner.
E. L. Fulton, Asst. Atty. Gen., and S. I. McElhoes, of Lawton, for respondent.

BESSEY, J. Andy Bochmann, hereinafter referred to as the petitioner, was on the

3d day of September, 1921, convicted of vagrancy, in violation of a city ordinance of the city of Lawton. This ordinance was passed as an emergency measure by the board of commissioners on the day preceding the conviction. The penalty assessed was a fine of \$20 and costs amounting to \$8, and in default of the payment of this fine and costs the petitioner was committed to the city jail of Lawton, there to be held until the fine and costs should be paid. Application was made to the county court of Comanche county for a writ of habeas corpus, which application was denied, whereupon this application was filed in this court.

From the record before us it appears that this arrest and conviction was one of a series against this petitioner; that a former ordinance had provided for a maximum penalty of a fine of \$100 and imprisonment for a period of 30 days. From an arrest and imprisonment under the latter named ordinance the petitioner was, on the 2d day of September, 1921, discharged by a writ of habeas corpus granted by the county court of Comanche county. Upon the same day the emergency ordinance here in controversy was passed, the scope and terms of both ordinances being the same, except that the later one reduced the maximum penalty for its violation to a fine of \$20 and costs. This ordinance provides as follows:

"An ordinance defining vagrancy, prescribing a penalty therefor, and declaring an emergency.

"Be it ordained by the board of commissioners of the city of Lawton, Oklahoma:

"Section 1. The following persons are vagrants within the meaning of this ordinance:

"First. An idle person who lives without any means, or who has no visible support and makes no exertion to obtain a livelihood by honest employment.

"Second. Any person who strolls or loiters idly about the streets of the city of Lawton, having no local habitation and no honest business or employment.

"Third. Any person who strolls about to tell fortunes or to exhibit tricks not licensed by law.

"Fourth. Any common prostitute, any manager or controller of a house of prostitution or ill fame or any one employed therein as barkeeper, caller of figures for dances, or habitual frequenters thereof.

"Fifth. Any professional gambler or gambler commonly known as a tin-horn gambler, card player, or card sharp.

"Sixth. Any person who goes about to beg alms, who is not afflicted or disabled by a physical malady or misfortune.

"Seventh. Any habitual drunkard.

"Eighth. Any person who abandons or neglects or refuses to support his family.

"Section 2. Any person violating any of the provisions of the above and foregoing sections shall be fined in any sum not exceeding \$20.

"Section 3. It being immediately necessary

for the preservation of the public peace, health and safety, an emergency is hereby declared to exist, by reason of which this ordinance shall take effect and be in full force and effect from the date of its passage.

"Passed this 2d day of September, 1921."

The petitioner here contends:

(1) That the ordinance is void because it was never published nor enrolled.

(2) That the municipal court had no jurisdiction of the petitioner because there was no written verified complaint filed against him.

(3) That the alleged judgment of conviction rendered and entered was void, for the reason that the petitioner was not informed of the specific accusation against him and that no witnesses were sworn and no testimony was introduced, and that he had no trial as contemplated by the Constitution and laws of this state.

(4) That the petitioner was arrested without a complaint showing probable cause and without a warrant, at a time when he was not engaged in the commission of an offense and not having been charged with nor suspected of committing a felony.

(5) That the petitioner was denied the right of a trial by jury.

[6, 7] As to the claim that the ordinance under which petitioner's arrest was made is void because it had not been published nor enrolled at the time of the arrest, it seems that the publication was not necessary under the provisions of section 40 of the charter of the city of Lawton. This court will take judicial notice of the provisions of municipal charters in this state. Section 40 of the charter, among other things, provides:

"An emergency ordinance shall take effect and be in force immediately upon its passage."

It is true that the law and the charter contemplate that all ordinances shall be recorded at length by the clerk in an ordinance book immediately after their passage, but this is a ministerial duty of the clerk, the omission of which will not affect the validity of the ordinance. *Marth v. City of Kingfisher*, 22 Okl. 602, 98 Pac. 436, 18 L. R. A. (N. S.) 1238.

The only written record, file, or document appearing in this case appears to be the police court docket, as follows:

Police Court Docket.

-City of Lawton, Oklahoma, Plaintiff, v. Andy Bochmann, Defendant.

Case No. 964.

City Attorney.

Carl Froneberger, Witness.

— Logan, Witness.

In the Police Court of the City of Lawton, State of Okla. Before —, Police Judge. —, Acting Police Judge.

And now on this 3d day of September, 1921, comes the defendant, arrested by Policeman

Logan, upon warrant issued upon witness complaint (or upon verbal charge of said officer) alleging that said defendant did within the corporate limits of said city unlawfully and willfully violate ordinance No. — in the following manner, to wit, vagrancy.

And said defendant being arraigned at the bar and demanded of how he would acquit himself, for plea says he is not guilty.

Therefore the court finds that the defendant is guilty as charged, and it is ordered by the court that the said defendant pay a fine of \$20, together with the costs of this case taxed at \$8, and serve — days in the city jail and the defendant stand committed until fine and costs are paid.

John Manning, Police Judge.

[1, 2] It is conceded that there was no formal written complaint, verified or otherwise, made in this case.

Section 1, art. 7, of the Constitution provides:

"The judicial power of this state shall be vested in the Senate, sitting as a court of impeachment, a Supreme Court, district courts, county courts, courts of justices of the peace, municipal courts, and such other courts, commissions or boards, inferior to the Supreme Court, as may be established by law."

Section 647, R. L. 1910, provides that the police judge shall have original exclusive jurisdiction to hear and determine all offenses against the ordinances of the city.

Section 17 of the Bill of Rights provides:

"Prosecutions may be instituted in courts not of record upon a duly verified complaint."

From section 1, art. 7, of the Constitution, quoted above, it will be seen that the municipal court is a constitutional court, and it would seem that the constitutional provision requiring a verified complaint is mandatory upon such a court. This conclusion is confirmed by the provisions of section 1, c. 147, Session Laws of 1915, as amended by Act March 15, 1917 (Session Laws, p. 190). Section 1, c. 147, Session Laws of 1915, is as follows:

"The term 'municipal courts' as herein used is hereby defined to mean and include all the courts of the state of Oklahoma, organized and existing in the various towns and cities thereof which shall have and possess, under the laws of the state, original jurisdiction to hear and determine offenses against the ordinances of municipalities, and an 'offense' is hereby defined to mean the doing of some act, or the failure to perform some duty, commanded by some municipal ordinance or by law and for the violation of which a penalty or punishment is provided thereby. Such proceedings are hereby declared to be criminal in their nature; and except as otherwise specifically provided, shall be governed by, and subject to, general laws relating to criminal procedure."

So the law stood until the act of March 15, 1917, was passed, entitled "An act amending sections 1, 3, 4 and 6, and repealing section

11 of the act of 1915," etc. Section 1 of this amendatory act is as follows:

"The term municipal courts, as herein used, is hereby defined to mean and include all courts in the state of Oklahoma, organized and existing in the various towns and cities thereof, that shall have and possess under the Constitution and laws of the state, original jurisdiction to hear and determine offenses against ordinances of municipalities, and offense is hereby defined to mean the doing of some act prohibited, or the failure to perform some duty commanded by the municipal ordinances, and for the violation of which a penalty or punishment is provided. It is further provided that in the trial of all cases in said municipal courts where the offense as defined by the city ordinance is punishable by a fine only, the defendant shall be tried without a jury, but in all cases where the defendant is charged with the violation of a city ordinance, and where said offense may be punishable by imprisonment, the defendant shall be entitled to a trial by a jury in the justice of the peace court within said city, * * * and it shall be the duty of the city attorney to prosecute said offense in such justice of the peace or county court in the name of the city, said jury to be drawn and selected in the justice court in the same manner as provided by law for juries in said justice of the peace courts, and each jurymen shall receive fifty (50) cents per day for each trial, same to be taxed as costs in the case and jury trials in the county court to be conducted in all respects the same as now provided therein. All fines collected by the justice of the peace or county court in the trial of such cases shall be paid to the city treasurer and his receipt taken therefor, and all such fines shall be credited to the general fund of such city. And, provided further, that when any person is arrested, charged with any offense as herein defined, he shall be taken forthwith before the municipal judge, the county judge, or some justice of the peace having jurisdiction, and the amount of his bail shall be fixed and an opportunity given him to make such bail, and such judge or justice of the peace shall admit said defendant to bail in the amount and manner provided by the ordinance of said city."

While this amendatory section does not in specific terms state that a violation of a city ordinance is criminal in its nature, the declaration that "an offense is hereby defined to mean the doing of some act prohibited or failure to perform some duty commanded by the municipal ordinances, and for the violation of which a penalty or punishment is provided," considered with the other provisions of this act, indicates that the proceeding is criminal in its nature in every case, excepting mere petit offenses, in which the punishment is or may be imprisonment.

Section 4646, R. L. 1910, provides:

"Actions are of two kinds: First, civil; second, criminal."

Section 5544, *idem*, defines a criminal action thus:

"The proceeding by which a party charged with a public offense is accused and brought to trial and punishment, is known as a criminal action."

Taking into consideration the provisions of the Code of Criminal Procedure, together with the Constitution and statutory enactments relating to municipal courts, we cannot conceive how any action in which an accused will or might be subjected to imprisonment on any charge amounting to more than a mere petit offense can be anything but a criminal action. It has been so decided by this court in a number of cases. To review the reasons and arguments here in detail would extend this opinion unnecessarily. Those who desire to analyze the reason for such holding are referred to the following decisions of this court: *Ex parte Tom Johnson*, 13 Okl. Cr. 30, 161 Pac. 1007; *Ex parte Monroe*, 13 Okl. Cr. 62, 162 Pac. 233; *Ex parte Doza*, 13 Okl. Cr. 287, 164 Pac. 130; *Ex parte Gownlock*, 13 Okl. Cr. 293, 164 Pac. 130; *Ed Franks v. City of Muskogee*, 14 Okl. Cr. 391, 171 Pac. 492; *City of Blackwell v. Burgett*, 14 Okl. Cr. 682, 166 Pac. 442; *Miller v. State*, 191 Pac. 1119; *Ex parte Joe King*, 13 Okl. Cr. 51, 161 Pac. 1102.

In the *King Case*, in the *Franks Case*, and in the *Blackwell Case*, the offenses charged were not crimes under the statutes; in all the other cases cited the offense made so by ordinance was also a violation of statutory law, but this court has made no distinction in this regard. The test as to whether or not the accused is entitled to a jury is whether or not the punishment will or might be imprisonment, or a fine and costs in excess of \$20, for the nonpayment of which the accused may be imprisoned. In other words, a municipal court, under the holdings of this court, may summarily and without a jury impose a fine and costs not in excess of \$20, and may imprison the accused for the nonpayment of such fine and costs, but not where the punishment is or may be imprisonment, or is or may be a fine and costs in excess of this sum. *Ex parte Johnson*, 201 Pac. 533, just decided by this court, but not yet officially reported.

[3, 5] Section 650, R. L. 1910, provides:

"The complaint, when made by the marshal, assistant marshal or regular policeman against any person arrested without process and in custody, need not be in writing."

Section 5654, R. L. 1910, provides how a peace officer may make an arrest without a warrant, as follows:

First. For a public offense, committed or attempted in his presence.

Second. When the person arrested has committed a felony, although not in his presence.

Third. When a felony has in fact been committed and he has reasonable cause for believing the person arrested to have committed it.

Fourth. On a charge, made upon reasonable cause, of the commission of a felony by the party accused.

Every person accused of an offense, under the Constitution and statutes of this state, has a right to be informed of the nature and cause of the accusation against him. He has a right to be represented by counsel and to have compulsory process to obtain witnesses in his behalf. It is difficult to see how this can be safely and orderly accomplished without a definite written accusation or complaint. McQuillin on Municipal Ordinances, §§ 305 and 306.

Doubtless it was for this reason that our Constitution provides for a verified written complaint, and a written complaint is required in municipal courts in nearly all of the states. The exceptions, so far as we are able to ascertain, are in Nevada, Massachusetts, and Arkansas, where a complaint may be made orally and made a matter of record by the police magistrate. 3 McQuillin on Municipal Corporations, § 1045 and notes.

There are many loose, general statements in the books as to the authority of a peace officer to make an arrest for a misdemeanor without a warrant. At common law officers had power to arrest for the commission of a misdemeanor when the offense was committed in the presence of the officer. Our statutes on this subject follow the common law. This rule, of course, does not apply where the accused is charged with or suspected of a felony.

If a prosecution in a municipal court, under our Constitution and statutes, may be maintained without a written complaint against one in custody, arrested without a warrant, it necessarily follows that such arrest and custody must be for an offense committed or attempted in the presence of the officer. Otherwise, the arrest and detention of the accused would be in violation of both the Constitution and the statutes. It may be that the offense of vagrancy, according to the several definitions of the offense contained in the ordinance, could be committed in the presence of the arresting officer. Upon this point the record in this case is silent, and to obviate such uncertainties and possible miscarriage of justice there should be some kind of complaint or written accusation to promote and facilitate an orderly investigation of a specific, definite charge, to which the accused could intelligently plead and from which he could appeal if he so desired.

Where the Constitution and statutes touch-

ing upon the same proposition are in conflict, and irreconcilably so, the Constitution must of course prevail. This is especially true where the constitutional provision is definite, certain, and mandatory, evincing a clear policy intended by the framers of the Constitution, and where such policy is salutary and reasonable.

In this country every person accused of an offense must be given an opportunity to defend himself. He has the right of being confronted with his accusers and of being apprised of the accusations against him. This is a maxim of natural justice, dear to every human heart and associated with every principle of our jurisprudence. Conviction-founded upon ex parte accusations is the most terrible species of despotism that the human mind can conceive. It is not only a violation of the most obvious dictates of common law, but it is destitute of every principle by which the social compact is supported. 3 McQuillin on Municipal Corporations, § 1086 and notes.

We hold, therefore, that in all cases involving a penalty for the violation of a municipal ordinance, pending before a municipal judge, prosecutions should be predicated and maintained upon a verified written complaint.

[8] The petitioner contends that no witnesses were sworn and no testimony introduced, and the record of the proceedings and admissions of counsel might bear out this contention. Otherwise the record is silent upon this question.

"In no case shall a judgment of conviction be rendered, except upon sufficient legal testimony given at a public trial, or upon a plea of guilty made in open court." Section 850, R. L. 1910.

In courts not of record there should be a showing that this provision of the statute was observed. Presumptions of the regularity of proceedings of courts of record do not apply to municipal courts and other courts not of record.

[4] Under the conditions here the petitioner was imprisoned for the nonpayment of a fine and penalties in excess of \$20, and, following the rule laid down by this court in other decisions, the petitioner has a right to a trial by jury, and under the circumstances here such right to trial by jury was not waived.

For the reasons stated the writ is allowed, and the respondent is ordered to release the petitioner.

DOYLE, P. J., and MATSON, J., concur.

SCOTT et ux. v. WALLACE et al.

(Supreme Court of Oregon. Oct. 28, 1921.)

1. Fraud §31—Remedies of defrauded purchaser.

Purchaser, having been induced to enter into a contract by fraud, may, upon discovery of the fraud, either affirm the contract and sue for damages, or disaffirm it and be reinstated in the position in which he was before it was consummated, but cannot avail himself of both remedies.

2. Vendor and purchaser §117—Purchaser to rescind contract must promptly restore consideration.

Purchaser to rescind contract for fraud must act promptly and return or offer to return what he has received under the contract.

3. Fraud §59(3)—Measure of damages for false representations stated.

The measure of damages for false representations inducing exchange of property is the difference between the market value of the property parted with by the person defrauded and the market value of the property received by him.

Department 1.

Appeal from Circuit Court, Lane County; G. F. Skipworth, Judge.

Action by L. S. Scott and wife against Ida A. Wallace, G. W. Wallace, and another. Decree for plaintiffs, and named defendants appeal. Affirmed.

Claiming that there is an unpaid balance thereon due from the defendants to him, L. S. Scott and his wife, as plaintiffs, bring this suit to foreclose a contract whereby the defendants agreed to purchase from L. S. Scott a tract of 150.04 acres of land in Lane county. The agreement is admitted by the defendants, and in substance is that they agreed to exchange a tract of 17 acres for the larger tract of 150.04 acres, taking the latter property subject to a mortgage of \$4,000 and agreeing to pay \$4,000 in addition thereto, as evidence of which they gave their note to Scott dated June 24, 1919, and due September 1 of that year, for \$4,000, with interest at 8 per cent. per annum from its date until paid. It appears that the defendants conveyed to the plaintiffs the 17-acre tract, and, as the contract provided, the latter put into escrow for the defendants a deed to the 150.04 acres, to be delivered on payment of the note. When the note matured, the defendants refused to pay it; hence this suit to foreclose the contract.

The defendants essay to counterclaim in damages on the ground that the plaintiffs fraudulently represented that there were 90 acres of the land under cultivation, whereas in fact there were but 65 acres, that there were said to be 70 acres of growing wheat

thereon, when the area thereof was only 37.37 acres, and that the plaintiff L. S. Scott represented that there was no rock on the land except three piles of loose rock on the cultivated land, whereas in truth the land under cultivation is full of rock, both loose and in boulders and ledges. The damages claimed by the defendants on account of the various alleged misrepresentations amount to \$4,500. As a further counterclaim, the defendants allege that the plaintiffs represented that the land was free of incumbrance except the \$4,000 mortgage mentioned, whereas in fact there was an additional mortgage of \$204.56 upon which had been paid \$23.34. The reply traversed the allegations of fraud and averred new matter not necessary to be considered.

The circuit court heard the testimony and made findings of fact and conclusions of law to the effect that the defendants were not damaged in any sum, because they had received full value for all they had parted with and agreed to pay, but that they were entitled to an abatement of the purchase price in the sum of \$181.22, that being the amount unpaid on the mortgage of \$204.56, and entered a decree of foreclosure, from which the defendants appeal.

John M. Williams, of Eugene (M. Vernon Parsons, of Portland, and Williams & Bean, of Eugene, on the brief), for appellants.

Charles A. Hardy, of Eugene, for respondents.

BURNETT, C. J. (after stating the facts as above). [1, 2] The defendants agreed to buy the land on the terms specified in the contract. In respect to the question of fraud in such cases the rule has been established in this state by the leading case of *Scott v. Walton*, 32 Or. 460, 464, 52 Pac. 180, 181, in this language:

"A party who has been induced to enter into a contract by fraud has, upon its discovery, an election of remedies. He may either affirm the contract, and sue for damages, or disaffirm it, and be reinstated in the position in which he was before it was consummated. These remedies, however, are not concurrent, but wholly inconsistent. The adoption of one is the exclusion of the other. If he desires to rescind, he must act promptly, and return or offer to return what he has received under the contract. He cannot retain the fruits of the contract awaiting future developments to determine whether it will be more profitable for him to affirm or disaffirm it. Any delay on his part, and especially his remaining in possession of the property received by him under the contract, and dealing with it as his own, will be evidence of his intention to abide by the contract."

[3] In this case the defendants have remained in possession of the land in question, and there is no pretense that they have offer-

ed to return it to the plaintiffs. Called upon to pay the balance due on the purchase price, they have adopted the alternative of affirming the contract and counterclaiming for damages for the alleged fraud. The rule upon the question of damages is thus stated in *Ward v. Jenson*, 87 Or. 314, 317, 170 Pac. 538, 539:

"It is settled in this state that in an action to recover damages for false representations, inducing an exchange of property the measure of damages is the difference between the market value of the property parted with by the person defrauded and the market value of the property received by him"—citing numerous authorities.

With these rules of law established, as they are, by a long list of precedents, the question resolves itself into one of fact whether or not the defendants have been damaged. The query is whether their alleged damage, when tested by the standard of *Ward v. Jenson*, *supra*, amounts to something or nothing.

The circuit court, having met the witnesses face to face and having heard them testify, has arrived at the conclusion that in the final analysis the defendants received full value for what they gave and promised to pay. A careful reading of the paper record before us induces the conclusion that the decision of the circuit court is sustained by the preponderance of the testimony. The trial judge was in a far better position to determine this question of fact than we, who have before us only the cold lines of the printed record. But we are the more ready to affirm his decision because the data before us convinces us that the question of fact was rightly decided.

Computing the amount due upon the note given by the defendants, the court deducted what was due and unpaid upon the second mortgage on the land in question, and entered judgment for the balance and for attorneys' fees in the sum of \$300. Arriving at the same conclusion on the hearing *de novo*, the decree will be that the plaintiff L. S. Scott will recover from defendants the net balance due upon the note as thus computed, together with attorneys' fees of \$300; that unless this balance is paid within 90 days from the filing of the mandate in the circuit court, the land shall be sold for the satisfaction of the amount due on the decree, and the cost and charges of sale, and, if any surplus remain, it shall be paid to the defendant Ida A. Wallace, as it is admitted that she was to have the title to the land; and that neither party recover costs or disbursements in this court or in the circuit court.

McBRIDE, HARRIS, and BROWN, JJ,
concur.

BROWN v. AUSTIN et al.

(Supreme Court of Oregon. Nov. 8, 1921.)

1. *Frauds, statute of* §44(1)—Oral contract to pay a person certain sum when he arrived at age of 21 held void as not to be performed in one year.

An oral agreement of one who married plaintiff's mother to pay plaintiff \$1,000 when he should arrive at the age of 21 years, in consideration of \$400 turned over to him by the mother, who was holding it in trust for plaintiff, which was impossible of performance within one year, was void, under Or. Laws, § 898.

2. *Limitation of actions* §149(5)—No tolling by new promise where promise not accepted.

Where decedent received trust moneys from plaintiff's mother, and agreed to pay plaintiff \$1,000 when he reached 21 years of age, and plaintiff attained majority in 1905, when decedent informed him that, if plaintiff would forego payment at that time, he would provide for him in his last will and testament, there was no tolling of Or. Laws, § 1241, as on a new promise, where such offer was not agreed to by plaintiff, and, for all that appears, plaintiff could have commenced an action at any time, and in 1919 it must be held that action to recover such \$1,000 and interest was barred.

In Banc.

Appeal from Circuit Court, Multnomah County; John McCourt, Judge.

Action by Charles Brown against John Austin and another, as executors of the will of George Gardner, deceased. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

The defendants are the executors of the last will and testament of George Gardner, deceased, who died May 30, 1919, and whom Annie Brown, the mother of the plaintiff, married in September, 1885. Paul C. Brown, father of Charles Brown, plaintiff herein, died in February, 1885. All the foregoing statements are admitted by the pleadings.

The complaint alleges that Paul C. Brown left "in trust for his child, Charles Brown, plaintiff herein, the sum of \$400." That pleading charges that, shortly after the marriage of George Gardner and Annie Brown, he prevailed upon her to loan to him the trust fund of \$400 on his promise that, when Charles Brown should attain the age of 21 years, Gardner would pay to the plaintiff \$1,000, and that the plaintiff's mother, then the wife of Gardner, loaned the \$400 to Gardner on those conditions. The complaint also contains the following allegation:

"That when said Charles Brown, plaintiff herein, attained the age of 21 years, he demanded of the said George Gardner an accounting, in the matter of payment of \$1,000 on account of the trust fund of \$400, loaned to the

said George Gardner. That the said George Gardner informed the said Charles Brown that if he, the said Charles Brown, would forego payment at that time of the said sum of \$1,000 due from the said George Gardner to the said Charles Brown, that he, the said George Gardner, would in his last will and testament, provide that the said Charles Brown would share equally in the estate of the said George Gardner with the surviving children of the said George Gardner. That the said Charles Brown, plaintiff herein, relying on the promises and representations of the said George Gardner, and the agreement then entered into, that he, the said Charles Brown, would at the death of the said George Gardner share equally with the surviving children of the said George Gardner in the estate, took no further action to enforce the payment of the said \$1,000."

It is charged and admitted that Gardner left a will, which was duly admitted to probate on June 4, 1919, bequeathing to Charles Brown the sum of \$400 only. The complaint avers that Gardner left an estate of the value of \$12,000, and that by reason of his failure to make a will allowing the plaintiff a one-fourth interest in the estate the latter has been damaged in the amount of \$3,000. It is admitted that the plaintiff presented a claim to the defendants, and they rejected it. The amount of the claim is not stated, but the plaintiff demands judgment against the defendants as executors in the sum of \$3,000. The allegation relating to the original loan of \$400 and the promise to pay \$1,000 on the arrival of the plaintiff at majority, and the allegation quoted relating to the arrangement made between the plaintiff and Gardner at the time the plaintiff reached the age of 21 years, as well as the damage alleged, are all denied.

During the progress of the trial the court held that the agreement attempted to be stated in the quoted allegation was within the statute of frauds, and hence was void, because no writing was produced in evidence thereof. The defendants moved for nonsuit, on the ground that no cause had been proved sufficient to be submitted to the jury; but the court overruled the motion and allowed the case to proceed, on the theory that enough was averred in the complaint to show a cause of action as for money had and received. Under this view of the pleadings the trial resulted in a verdict in favor of the plaintiff for \$1,448. From the consequent judgment the defendants appeal.

W. Y. Masters, of Portland, for appellants.
Leslie S. Parker and Allen & Roberts, all of Portland, for respondent.

BURNETT, C. J. (after stating the facts as above). The plaintiff's testimony is to the effect that he was about 9 months of age when his father died, in February, 1885, and that he attained the age of 21 years in May,

1905. It is admitted in the pleadings that his mother married Gardner in September, 1885. He states that in the autumn of 1904, prior to his coming to the age of majority, he had a talk with Gardner and his then wife; plaintiff's mother having died, and Gardner having married again. He said he had been informed by one of the defendants that there was money coming to him from Gardner, and that during that talk referred to, which he afterwards had with Gardner and the latter's wife, "they owned up to it that I had money coming from my father, and they told me, then and there, that if I didn't make any trouble for them they would give me an equal share with the rest of the children." He further says in substance, that, after the death of the then Mrs. Gardner, "My stepfather said at different times that he would give me an equal share with the rest of them. He came to my place, and he said he was going to see that I got my share, just like the rest of them." Interrogated as to the property that Gardner left at his death, he stated that it was realty. There is no testimony that Gardner had anything but real estate at the time of his death. The plaintiff also offered in evidence a claim which he presented to the defendants as executors, in this form:

"Estate of George Gardner, Deceased, to Charles Brown, Dr.,

"For moneys due Charles Brown, at time of attaining his majority, on May 30, 1905, with interest to date:

Amount due, May 30, 1905.....	\$1,000 00
Interest at 6 per cent. per annum to date	448 00

Total	\$1,448 00 [sic]
Less amount of bequest in will of said George Gardner, deceased.....	400 00

Total amount due..... \$1,448 00

Interest is also demanded on the said sum of \$1,000 until paid.

"Note.—After the death of the father of the said Charles Brown, to wit, Paul Brown, and the marriage of mother of Charles Brown to the said George Gardner, there was loaned to the said George Gardner, by the said Charles Brown's mother (then Mrs. George Gardner), the sum of \$450, which moneys came from the estate of the said Paul Brown. This money was loaned to the said George Gardner, with the distinct understanding and agreement that, at the time the said Charles Brown should attain his majority, the said George Gardner should pay to him the sum of \$1,000, being the said \$450 and the agreed accumulated interest to that time. On Charles Brown becoming of age, he demanded the money from the said George Gardner, his stepfather, but was put off with the promise that, when the said George Gardner died, he would receive the said sum of \$1,000, with interest to date. The will, however, only leaves to this claimant herein, the sum of \$400."

The only writing produced in evidence was this claim, presented to the executors.

[1] The plaintiff has not appealed, and hence we must accept the theory upon which the circuit court permitted the case to go to the jury, which was that there was sufficient in the complaint upon which to found an action as for money had and received. If the plaintiff would recover the sum of \$1,000 and interest on such a theory, it must be by virtue of the traversed allegation to the effect that the deceased contracted with the plaintiff's mother to pay him \$1,000 when he should arrive at the age of 21 years. This was a contract not to be performed in one year, as disclosed by the evidence; and since there is no writing on the subject, it is void under section 808, Or. L., which says that evidence of an agreement shall not be received, other than the writing or secondary evidence of its contents in the cases prescribed by law, in case of an agreement that by its terms is not to be performed within a year from the making thereof. Again, on the face of the claim presented to the executors and exhibited in evidence, it appears that the claim was barred by the statute of limitations, which the law forbids the administrators to allow: Section 1241, Or. L. The allowance of such a claim by the administrator having been interdicted, the statute cannot be evaded by an action based on the same claim.

[2] The allegation respecting the demand made by the plaintiff upon Gardner for an accounting, which is quoted above, does not operate to toll the statute as upon a new promise. It is true that Gardner is said to have informed the plaintiff that, if the latter would forego payment of the \$1,000, Gardner would provide for him in his last will and testament. This constitutes an offer on the part of Gardner, but it is not stated anywhere that the plaintiff accepted that offer and agreed to forbear to sue. For all that appears in the pleadings, the plaintiff could have commenced an action against Gardner the next day for the \$1,000. In that case, if the latter had set up the matter quoted as a defense, the plaintiff could have said to him:

"True enough, you offered to remember me in your will; but I did not accept the offer, or agree to take that in lieu of payment of the \$1,000 you owed me."

The court erred in refusing judgment of involuntary nonsuit. The judgment is reversed, and the cause remanded for further proceedings not inconsistent herewith.

McCOURT and RAND, JJ., did not participate in this decision.

CAPALIJA v. KULISH.

(Supreme Court of Oregon. Oct. 25, 1921.)

1. Judgment \S 163—Dilatory pleas before leave to answer by certain date not considered in motion to set aside default.

On a motion to set aside a default judgment, defendant having been given leave to file an answer on a day certain, prior dilatory tactics of defendant are not considered.

2. Judgment \S 143(13)—Refusal of motion to set aside default held an abuse of discretion.

Refusal of defendant's motion to set aside a default, where defendant while out with his fishing crew was prevented from arriving in time to answer by stress of weather, held an abuse of discretion.

In Banc.

Appeal from Circuit Court, Clatsop County; James A. Eakin, Judge.

Action by Mark Capalijs against John Kulish. Application by defendant to set aside default judgment and for leave to answer overruled, and he appeals. Reversed and remanded, with directions.

The plaintiff commenced an action against the defendant for damages for breach of a contract, the substance of the complaint in which is that the defendant hired the plaintiff as a member of the former's fishing crew for the fishing season of 1919, agreeing to pay the plaintiff a share of the net proceeds of the season's catch; and that the plaintiff entered upon the performance of the contract about May 25, 1919, and continued until August 10 of that year, when the defendant wrongfully discharged him and refused to pay him anything for the labor he had performed. He claims damages in the sum of \$800. He sues also on a similar cause of action assigned to him by another party.

The defendant filed a motion to make the complaint more definite and certain, which was denied, and afterwards interposed a demurrer on several grounds, which was overruled, and the court gave him until November 3, 1919, in which to plead further. Nothing else having been filed on behalf of the defendant, his default was entered on November 4, 1919, and judgment rendered in favor of the plaintiff for the full amount of his claim. On November 6 the defendant filed a motion and affidavits to set aside the judgment and for leave to file an answer which he tendered with this motion. The essence of his showing is that he went on a fishing trip on the Pacific Ocean; that his vessel had a collision with another ship; and that he was compelled to put into port at Seattle, where he was delayed in connection with the collision, but sailed for his home port in time to have arrived and filed his answer except for the fact that he ran

into foul weather and on account of the violence of the storm and the condition of his boat he could not cross the bar into the Columbia river, and by reason of this delay did not get to court in time to file his answer. He also tenders an answer to the effect that the plaintiff himself breached the contract and the parties had an accounting and settlement in which the balance found due the plaintiff was paid to him. The circuit court denied the application to set aside the judgment, and the defendant appeals.

Arthur H. Lewis, of Portland (C. W. Robison, of Dillon, Mont., on the brief), for appellant.

Howard K. Zimmerman, of Astoria, for respondent.

BURNETT, C. J. (after stating the facts as above). [1] Much is said, in opposition to defendant's contention for leave to file his answer, about his dilatory tactics in filing first a motion to make the complaint more definite and certain, and afterwards demurring to the same. Those things were res adjudicata and were past considerations. It was determined by the court that the defendant should have until November 3 in which to answer, and it was his duty to answer at that time, unless prevented by some unavoidable occurrence. This is the question for disposition.

[2] As stated in the plaintiff's brief, the rule is that—

"To justify setting aside a default judgment taken through neglect of defendant, defendant must not only apply for relief promptly, but he must show that his neglect in being in default was excusable."

The following cases are cited by the plaintiff on the issue before us: *Payne v. Savage*, 51 Or. 463, 94 Pac. 750, which was an action commenced in Marion county by a plaintiff who with his attorneys resided in Multnomah county. They delayed their reply until a day before the expiration of the time in which to file the same, and then sent from there to a local attorney a motion to strike out part of the answer; but owing to the delay of mail it came to the latter attorney a day or two after the time it should have been filed. Leave to reply was denied, on the ground that there was no excuse except bald delay, which was not found to be pardonable under the circumstances. *Nye v. Bill Nye Milling Co.*, 46 Or. 302, 80 Pac. 94, was a case where leave to answer was denied because the defendant was contending that the manager of the corporation was absent; but the court, scrutinizing the record, found that the answer tendered was based on the defendant's by-laws and that the manager's presence was not necessary. Leave to answer was denied in *Schiffman v. Robison*, 99 Or. 410, 195 Pac. 818, because the defendant's letter to his attorney, which appeared in the record, indi-

cated a desire on his part wrongly to harass the plaintiff; and besides this, a lack of diligence was disclosed by the affidavits on file. *Stivers v. Byrnett*, 56 Or. 565, 108 Pac. 1014, 109 Pac. 386, is an instance where the plaintiff was not allowed to reply after the death of a member of the plaintiff firm, because the transaction out of which the litigation arose was conducted by the surviving member of the firm, and both he and the widow of the decedent member knew of the counterclaim interposed and both of them had informed the attorney for the defendant that the action would be withdrawn and no opposition made to the counterclaim. In *Dietzel v. Conroy*, 53 Or. 446, 101 Pac. 215, the defendant had been arrested and had escaped and fled to British Columbia. His attorney had notified the plaintiff's attorney that the latter could try the case on demurrer whenever he pleased and that nothing further would be done with the litigation, and it was held under these circumstances that the defendant would not be allowed to change front to the extent of filing an answer out of time. In all of these cases the failure to plead in time appeared to be inexcusable. The present case is not like any of them. Stress of weather over which he had no control prevented the defendant from arriving in time to file his answer. His failure to answer in time was excusable on that account. He has acted with reasonable promptness in applying for relief.

The general rule is thus stated by Mr. Justice Wallace in *Watson v. Railroad Co.*, 41 Cal. 17, 20, adapted by Mr. Justice McBride in *Hall v. McCan*, 62 Or. 556, 558, 126 Pac. 5:

"In a case where, as here, the application is made so immediately after default entered as that no considerable delay to the plaintiff is to be occasioned by permitting a defense on the merits, the court ought to incline to relieve. The exercise of the mere discretion of the court ought to tend, in a reasonable degree, at least, to bring about a judgment on the very merits of the case; and when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application."

This excerpt is also approved in an opinion by Mr. Justice Robert S. Bean in *Hanthorn v. Oliver*, 32 Or. 57, 51 Pac. 440, 67 Am. St. Rep. 518.

Besides all this, courts ought to and will be more compassionate towards a defendant than to a plaintiff in default, because the latter begins the litigation and generally may withdraw his suit and begin again without material prejudice. On the other hand, the defendant cannot abandon a case against himself. He must combat the plaintiff at his peril, and, if he is cast in judgment, he cannot commence again. From the record it appears that this cause was not decided on its actual merits. It is undisputed that the

plaintiff was paid \$139.84 on August 28, 1919, but no credit for this is given in his complaint. His allegation about the value of the season's catch is upon information and belief, and hence the real essence of the case was not presented for trial. The plaintiff relies greatly upon the fact that the defendant went away on a three months' fishing trip. The toilers of the sea "must take the current while it serves, or lose their ventures," and the law does not require any one, when an action is instituted against him, absolutely to refrain from all other business. It is enough if he answers by the day appointed. If he is prevented from answering by matters over which he has no control and which he could not reasonably have avoided, he is entitled to have the default taken off. As we view the matter, the court ought to have allowed the defendant to file his answer on the showing made, and it abused its discretion in not doing so.

The judgment of the circuit court is reversed, and the cause remanded, with directions to allow the defendant to file his answer, and for such further proceedings as may be required.

STATE v. CECCHETTINI et al. (No. 2505.)

(Supreme Court of Nevada. Nov. 4, 1921.)

1. Criminal law §1131(3)—Motion to dismiss appeal waived, if not made at time of hearing.

On appeal, where there was no formal motion to dismiss, but the matter argued and submitted as though such a motion had been made, the objection that there was no motion was waived.

2. Criminal law §1130(1, 5) — Briefs and points and authorities necessary.

Contention that briefs and points and authorities are unnecessary when transcript of entire trial is made the bill of exceptions is without merit, as attorneys must point alleged errors of the trial court; the reviewing court not being required to comb the record.

Appeal from District Court, Churchill County; E. J. L. Taber, Judge.

On petition for rehearing. Petition denied. For former opinion, see 199 Pac. 1004.

McCarran & Mashburn, of Reno, for appellants.

Geo. J. Kenny, Dist. Atty., of Fallon (A. L. Haight, of Fallon, of counsel), for the State.

COLEMAN, J. A petition for rehearing has been filed herein.

[1] It is first contended that no motion to dismiss was made. The exact fact is that notice of motion was served upon counsel for appellants, and at the time stated therein

counsel for the state and for appellants appeared. No formal motion was made, but the matter was argued and submitted as though such a motion had been made. Such is the usual practice. The objection now urged does not go to the merits of the matter argued upon the hearing. Counsel cannot now contend that there was no motion. If they had desired to urge this point, they should have done so at the time of the hearing. They did not do so, and cannot now complain of their oversight. They waived the point now made by failing to raise it upon the hearing and by participating in the argument. 28 Cyc. 7, 9, 10.

[2] It is said, also, that neither briefs nor points and authorities are necessary when the transcript of the entire trial is made the bill of exceptions. This is, indeed, a startling contention. What are attorneys for, if not to point out the alleged errors of the trial court? This court, in *State v. Milosovich*, 42 Nev. 273, 175 Pac. 139, held that it would not comb the record to ascertain the matter urged as reversible error. If we were right in the view then expressed, as we think we were, we know of no sound reason for now holding substantially to the contrary.

It is contended, further, that our position, to the effect that the judgment should be affirmed for lack of appearance, is not supported by the cases cited in our opinion, for the reason that "no appearance whatever was made by the appellant" in those cases, while appearance was made in the instant case. Prior to service of notice of motion to dismiss, the only appearance in this case was to ask for further time. This is not an appearance such as is contemplated by the statute. The appearance contemplated by the statute is one wherein it is sought to point out some error committed by the trial court. Prior to the time the right to do so had been cut off, nothing of that nature was done in this case.

Our attention is directed to what is termed the discretionary language of the statute (R. L. § 7299), providing that judgment of affirmance may be granted without argument if appellant fail to appear. There is nothing in said statute to sustain the petition for rehearing. Counsel for appellant obtained several extensions of time in which to file their brief. On the day the last extension was granted they appeared in open court and asked for 10 days further time. They were granted 5 days, whereupon they assured the court that the brief would be filed within the time allowed by the court. They failed to comply with the assurance given the court; in fact, no brief had been filed 23 days thereafter, when the state moved to affirm the judgment.

We do not deem further consideration of

the petition necessary. We cannot see that the court was not justified in the order heretofore entered in the case.

The petition is denied.

SANDERS, C. J., and DUCKER, J., concur.

MEXICAN DAM & DITCH CO. v. SCHULTZ et al. (No. 2508.)

(Supreme Court of Nevada. Nov. 5, 1921.)

Appeal and error §544(1)—In absence of statement or bill of exceptions, order denying motion for new trial must be affirmed.

Though application for new trial, unless made under Rev. Laws, § 5320, subsds. 1, 2, 3, or 4, supported by affidavit as required by section 5321, must be made on the minutes without statement or bill of exceptions, and the court in such case may refer to the pleadings, evidence, etc., and under Civ. Prac. Act, § 414, on appeal from an order denying the application, appellant need only furnish the court with certified copies of the notice of appeal, the order appealed from, the papers used on the hearing in the court below, and a statement, if any, where the transcript contains no settled or agreed statement or bill of exceptions, there is nothing to be reviewed, in the absence of a judgment roll, whether or not St. 1915, c. 143, 3 Rev. Laws, p. 3342, requiring inclusion in the transcript of a bill of exceptions including errors based on grounds urged for new trial, an amendment to which (St. 1919, c. 40) requires that assignments of error be based on bills of exceptions, is mandatory or violative of Const. art. 4, § 17, as embracing more than one subject.

Appeal from District Court, Ormsby County; Mark R. Averill, Judge.

Action by Mexican Dam & Ditch Company against Joseph Schultz and others, doing business under the name of Schultz Bros. Judgment for plaintiff. From an order denying a new trial, defendants appeal. Affirmed.

H. V. Morehouse and Wm. McKnight, both of Reno, for appellants.

W. M. Kearney, of Reno, and W. E. Baldy, of Carson City, for respondent.

SANDERS, C. J. This is an appeal from an order denying to the defendants, Schultz Bros., a new trial in an action brought against them by the Mexican Dam & Ditch Company in the district court of Ormsby county.

As the case comes to us upon the motions of the ditch company to dismiss the appeal and to strike from the files appellants' assignments of errors, it would serve no useful purpose to make a statement of the several issues raised by the voluminous pleadings.

The motions to dismiss the appeal and to strike the purported assignments of errors are that the transcript on appeal contains no bill of exceptions, including errors based upon any ground urged for a new trial, as required by the Civil Practice Act, as amended by the statute of 1915 (Stats. 1915, p. 164, 3 Rev. Laws, p. 3342), that the purported assignments of errors are not based upon any bills of exceptions, and that said assignments are not in conformity with the requirements of said act as amended with respect to assignments of error. Stats. 1919, p. 55.

The answer of appellants to the motion to dismiss is: First, that the statute of 1915 is merely an optional method of appeal from an order denying a motion for a new trial, which may or may not be followed in bringing up the record on appeal from such order; second, that the statute of 1915, with respect to appeals from orders granting or overruling motions for new trial, is useless legislation, and violative of section 17, article 4, of the Constitution, which provides that each law enacted by the Legislature shall embrace but one subject; third, that on an appeal from an order all that is required of the appellant is to furnish this court with copies of the notice of appeal, the order appealed from, and the papers used on the hearing of the order in the court below, certified by the clerk to be correct.

Since counsel for appellants, by their first and second positions, concede and admit that appellants have ignored and made no effort whatever to comply with the requirements of the act of 1915, with respect to the preparation, service and filing of bills of exception after entry of the order, it is unnecessary for us to consider and discuss whether or not the requirements of the act of 1915 concerning bills of exception is mandatory or directory, or whether or not it is violative of section 17, article 4, of the Constitution.

Passing, then, to a consideration of the third position, without a further statement of it, it is conceded that the application for a new trial was made upon the insufficiency of the evidence to justify the decision, that it is against law, and for errors in law occurring at the trial and excepted to by the defendants. Rev. Laws, § 5320.

There is appended to the transcript on appeal the certificate of the clerk, which recites that the transcript, from page 1 to 760, is and contains full, true, and correct copies of the pleadings, orders, documentary evidence, and a copy of the stenographic report of the testimony and the record of the proceedings on the trial—all declared by the certificate of the clerk to have been presented to, used and referred to by the trial judge in passing upon the motion.

It is provided in section 5321, Revised Laws, that when the application for a new trial is made upon subdivisions 1, 2, 3, or 4 of section 5320 it must be supported by affidavit. In all other cases it must be made upon the minutes of the court without statement or bill of exceptions. The trial court is expressly privileged by the provisions contained in section 5321, in passing upon an application made upon the minutes of the court, to refer to the pleadings and orders of the court; and, also, reference may be had to the depositions, documentary evidence, stenographic notes or report of the testimony and the records of the court.

Section 414 of the Civil Practice Act provides (Rev. Laws, § 5356), among other things, that on an appeal from an order the appellant shall furnish the court with a copy of the notice of appeal, the order appealed from, and a copy of the papers used on the hearing in the court below, and a statement if there be one, such copies to be certified by the clerk of the court to be correct.

It is the contention of counsel for appellants that no statement or bill of exceptions is now required in order that the lower court may decide a motion for a new trial, and that the appellants having furnished this court with copies of the papers used on the hearing of the motion, certified by the clerk to be correct, the appeal from the order must be considered upon its merits, and cannot be dismissed. If we clearly interpret the position of counsel, it is their contention that when the papers used on the motion are certified, as directed by section 414, and the trial court is privileged to refer to the pleadings, records, documentary evidence and stenographic report of the testimony, these papers can be used in the Supreme Court upon the certification of the clerk, without being embodied in a statement on appeal or bill of exceptions. Prior to the supplementary and amendatory act of 1915, and subsequent to the adoption of the practice act approved March 17, 1911, the court, in the case of *Ward v. Pittsburg Silver Peak G. M. Co.*, 39 Nev. 80, 148 Pac. 345, 153 Pac. 434, 154 Pac. 74, ruled adversely to the contention of appellants, and expressly held that upon an appeal from an order denying a motion for a new trial, when the transcript on appeal contains no statement and no bill of exceptions, there is nothing before this court for review. This conclusion is but a reaffirmance of the rule stated in the case of *State v. Eberhart Co.*, 6 Nev. 186, which declares that where the transcript contains no settled or agreed statement, either on motion for new trial or on appeal, nor any bill of exceptions, there is nothing which can be reviewed. This rule is based upon the repeated holdings of this court that, in the absence of a statement on appeal or bill of exceptions, the court is

confined to a consideration of the judgment roll alone. As the appeal in this case is taken from the order, there is no judgment roll to be considered.

In the case of *Smith v. Wells' Estate Co.*, 29 Nev. 414, 91 Pac. 815, it is pointed out that the practice act distinguishes between the methods of certification of statements and of transcripts on appeal.

Without going into the question of whether or not the copies of the papers purporting to have been used on the hearing of the motion are properly authenticated, so as to entitle them to be considered as a part of the record on appeal, we are of the opinion that from the beginning of our judicial history the rule of practice has been as above stated in *State v. Eberhart Co.*, *supra*, and in *Irwin v. Samson*, 10 Nev. 282.

The failure of appellants to bring up the errors based upon any ground for new trial by a statement or bill of exceptions has deprived them of the right to have their case considered upon its merits. This is to be regretted. As has been frequently stated, it is always a source of regret to a court to decide a point of practice so as to affect substantial rights, but when the point is made the only thing for the court to do is to adhere to the law.

The order denying to the defendants a new trial is affirmed.

DUCKER and COLEMAN, JJ., concur.

STATE v. DAWSON. (No. 2506.)

(Supreme Court of Nevada. Nov. 4, 1921.)

Rape \Leftrightarrow 33—Information for attempted rape held insufficient.

Information charging that defendant did attempt to carnally and unlawfully know a designated female *held* insufficient to charge an attempt to commit rape under St. 1919, c. 284, in that it failed to aver an overt act toward the commission of the offense under Rev. Laws, § 6291, defining an attempt to commit a crime as "an act done with intent to commit" the crime.

Appeal from District Court, Washoe County; Edw. F. Lunsford, Judge.

G. R. Dawson was convicted of attempted rape, and he appeals. Reversed.

Frame, Morgan & Raffetto, of Reno, for appellant.

L. B. Fowler, Atty. Gen., Robert Richards, Deputy Atty. Gen., and L. D. Summerfield, Dist. Atty., of Reno, for the State.

SANDERS, C. J. Appellant was charged, tried, and convicted upon the following information:

"L. D. Summerfield, district attorney within and for the county of Washoe, state of Nevada, in the name and by the authority of the state of Nevada, informs the above-entitled court that G. R. Dawson, the defendant above named, has committed a felony, to wit, attempted rape, in the manner following:

"That said defendant on the 19th day of September, A. D. 1920, or thereabouts, and before the filing of this information, at and within the county of Washoe, state of Nevada, did then and there, he, the said defendant, being then and there a male person over the age of 16 years, willfully, unlawfully, and feloniously attempt to have carnal knowledge of a female child, to wit, one Mabelle Lockridge, said female child then and there being under the age of 18 years, to wit, of the age of 10 years. * * *

From the judgment of imprisonment in the state prison for the term of not less than 3 years nor more than 20 years, and also from an order denying to him a new trial, the appellant appeals. The assignment of error relied upon for the reversal of the judgment is stated as follows:

"The court erred in rendering judgment against the defendant, for the reason that the information did not state facts sufficient to constitute a public offense, and particularly that of an attempt to commit rape, and the court therefore was without jurisdiction to enter judgment and pronounce sentence in said cause."

Any person of the age of 16 years or upwards who shall have carnal knowledge of any female child under the age of 18 years, either with or without her consent, shall be adjudged guilty of the crime of rape. *Stats.* 1919, p. 439.

Section 6291, Revised Laws, provides in part as follows:

"An act done with intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime; and every person who attempts to commit a crime, unless otherwise prescribed by statute, shall be punished as follows. * * *

The question presented for our determination is whether an information (or indictment) grounded upon section 6291, Revised Laws, which merely avers that the defendant did attempt to carnally and unlawfully know a designated female, is so defective that no judgment could properly be rendered upon it. It is manifest that the offense of an attempt to commit a crime as defined by the statute is composed of two elements: First, the intent to commit a crime; second, a direct act done toward its commission, and tending, but failing, to accomplish it.

In the early case (1867) of *State v. Brannan*, 3 Nev. 238, it was held that an indictment which merely states that the defendants did attempt to commit the crime of grand larceny was so defective that no judgment could be rendered upon it. In the case of

State v. Lung, 21 Nev. 210, 28 Pac. 235, 37 Am. St. Rep. 505, it was held that an indictment for an attempt at rape must aver the necessary facts and elements of the offense with such particularity that the court may determine whether or not they constitute an offense. In the case of *State v. Pierpoint*, 38 Nev. 173, 147 Pac. 214, an indictment for an attempt at rape was upheld against an attack upon the ground that it did not sufficiently charge an overt act toward the commission of the offense. In its opinion the court quotes section 6291, Rev. Laws, upon which the indictment was founded, and cites with approval, and in support of its conclusion, the case of *Glover v. Commonwealth*, 86 Va. 382, 10 S. E. 420, and 33 Cyc. 1431. While there is some little discord in the authorities, this court is committed to the rule that in a case of an attempt at rape an overt act toward the commission of the offense must be charged and proved.

It is urged by counsel for the state that, conceding the information to be defective in the respect pointed out, the sufficiency of the information not having been raised by demurrer it cannot now be taken advantage of for the first time on appeal. If the defect be one of form, upon reason and authority, we should hold with the prosecution on this proposition, but if such defect be one of substance, upon reason and authority, we must hold that it can be raised for the first time on appeal, and is not waived by a failure in the district court to make the point on demurrer. *State v. Trolson*, 21 Nev. 419, 32 Pac. 930.

In view of the authorities above cited, and the greater weight of authority in general, we are of the opinion that the failure of the information before us to aver any overt act toward the commission of the offense charged is a defect of substance, and not of form. *Hogan v. State*, 50 Fla. 86, 39 South. 464, 7 Ann. Cas. 139; *Williams v. State*, 10 Okl. Cr. 336, 136 Pac. 599; *Bond v. State*, 12 Okl. Cr. 160, 152 Pac. 809; *Glover v. Commonwealth*, supra.

It is finally insisted by the state that, since the statute in express terms designates the elements of the offense, and the information charges the offense in the words of the statute, it is sufficient. But the information does not charge the offense in the language of the statute, defining the offense of an attempt to commit a crime. It merely alleges the statutory designation of such an offense, to wit, "attempt to carnally know," which, in our opinion, even under the most liberal construction that obtains under our law, is not sufficient to advise the defendant of the accusation against him.

The judgment is reversed.

DUCKER and COLEMAN, JJ., concur.

ROMAN v. STATE. (No. 508.)

(Supreme Court of Arizona. Oct. 29, 1921.)

1. Indictment and Information \S 139—Defendant failing to move to set aside information before pleading, cannot object that he was not legally committed, or that information was not signed by county attorney.

Under Pen. Code 1913, §§ 972, 973, defendant's failure to move to set aside information before he pleads precludes him from thereafter objecting that he was not legally committed by the magistrate, or that the information was not signed by the county attorney.

2. Indictment and Information \S 41(6)—Prosecution on information without preliminary examination or waiver thereof held not violative of defendant's constitutional rights.

Where defendant charged with homicide waived preliminary examination, his prosecution on another information, charging the same offense, after county attorney had been permitted to withdraw the first information without a preliminary examination or waiver of such examination, held not violative of defendant's constitutional rights.

3. Criminal law \S 129(3)—Assignment of error from which it could not be determined whether testimony was competent held insufficient.

Assignment of error, complaining of answer of witness to certain question containing the question and answer, and objection to answer not assigning any reason why it was incompetent or irrelevant or immaterial, held insufficient, in that it could not be determined therefrom whether the answer was competent.

4. Homicide \S 327½, New, vol. 13A Key-No. Series—Insufficient assignment considered in first degree murder prosecution.

In prosecution for first degree murder, the Supreme Court will consider insufficient assignment of error in view of the gravity of the charge, involving the death penalty.

5. Criminal law \S 419, 420(10)—Testimony as to statement made to defendant not inadmissible as hearsay.

Testimony as to statement by father of the witness held not inadmissible as hearsay, in view of the father's previously given testimony that the statement had been made to the defendant.

6. Criminal law \S 1166½(12)—Court's remark harmless in view of testimony.

Court's remark, on objection to testimony as to statement made by father of witness, that it presumed the statement to have been made to the defendant, held harmless, in view of father's previously given testimony that the statement had been made to the defendant.

7. Criminal law \S 1036(6)—Opinion testimony not considered on appeal in absence of objection.

Admission of opinion testimony will not be considered on appeal, in absence of objection in

lower court that the testimony constituted the opinion of the witness, or that the witness was not competent to testify as an expert.

8. Criminal law \S 520(1), 522(1)—Confessions obtained by coercion, threat, or promise inadmissible.

Confessions obtained by coercion, threat, or promise are not admissible, since such confessions are as apt to be false as true.

9. Criminal law \S 520(2), 522(1)—Confession held not to have been obtained by coercion, threat, or promise.

Confession to having committed first degree murder, made by defendants after they had been arrested and had been shot after attempting to shoot officers in resisting arrest, but before they had been accused of any crime, in response to question, "What have you boys done that makes you so wild?" held not to have been obtained by threat, coercion, or promise.

10. Criminal law \S 520(2), 522(1)—Confession in response to appeal to conscience held not procured with threat.

Confession to having committed first degree murder, made by defendants after they had been arrested and had been shot after attempting to shoot officers in resisting arrest, but before they had been accused of any crime, in response to question; "What have you fellows done that you didn't want to be arrested? If you are the men that done the robbery and murder at Tempe you better say so, because you will save some innocent man suffering"—held not to have been made under a threat or promise; the question being merely an appeal to their conscience.

11. Criminal law \S 519(9)—Confession in response to an appeal to religious or moral sentiment not inadmissible.

A confession in response to an appeal to religious or moral sentiment is not inadmissible.

12. Criminal law \S 517(6)—Confession not inadmissible because made to an officer.

A confession was not inadmissible because made to an officer.

13. Homicide \S 30(1)—Defendant guilty of murder regardless of whether he or accomplice fired particular shot.

Where many shots were fired by defendant and his accomplice while robbing a store, both were guilty of murder of a boy killed during the shooting, regardless of which of the two fired the particular shot that killed the boy, they having acted together in such manner as to make each responsible for the act of the other in the furtherance of their criminal purpose.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Tomas Roman was convicted of murder in the first degree, and he appeals. Affirmed.

Thalheimer & Hart, of Phoenix, for appellant.

W. J. Galbraith, Atty. Gen., and R. E. L. Shepherd, Co. Atty., of Phoenix, for the State.

ROSS, O. J. By information the appellant was charged with the crime of murder, committed on January 11, 1921, in Maricopa county, by shooting and killing one Thomas Hintze. Thereafter, on February 16-19, 1921, the appellant was tried and convicted of murder in the first degree and his punishment was fixed at death. He appeals from the verdict and judgment of conviction and from the order overruling his motion for a new trial. He assigns several errors which he claims occurred in the course of the trial. The first two are so intimately related we will consider them together. They are:

"(1) The information upon which defendant was tried and convicted was not a legally filed information, and the court did not have jurisdiction under said information to try and convict the defendant.

"(2) The defendant was never legally arraigned under such information, nor did he waive such an arraignment."

[1] These alleged errors are predicated upon the following facts: The county attorney filed two informations against the defendant, one on February 2, 1921, upon which defendant was arraigned the same day and given until February 5th to plead. Neither on February 5th, nor on any other day, was defendant's plea to the first indictment taken, but on said day he was arraigned on a new information, and given until February 7th to plead. On the convening of court on February 7th the county attorney asked to be allowed to withdraw the first information and to file the second one, and to the second he then pleaded not guilty. The record discloses that defendant was charged with the same offense in the informations as in a complaint theretofore filed before a committing magistrate upon which he waived preliminary trial. At the trial and at the time when the prosecution was about to offer evidence upon the charge in the information, the appellant objected to the introduction of any testimony "on the grounds that the court does not have jurisdiction of the matter because of the fact that the defendant has never been legally committed or had a preliminary hearing or waived any such preliminary hearing as provided in article 2, § 30, of the Constitution of the state." The defendant made no objections to the second information at the time of his arraignment, nor at the time that he pleaded thereto. The statute (section 972, Penal Code) provides that an information may be set aside on motion on two grounds: first, that the defendant has not been legally committed by a magistrate; and, second, that the information is not signed by the county attorney. Under section 973, Id., a failure on the part of the defendant to interpose a motion to set aside the information before he pleads precludes him from thereafter objecting that he was not legally committed by

a magistrate, or that the information was not signed by the county attorney. If the defendant felt that his rights had been impaired or disregarded by the county attorney, he should have adopted the method provided by the statute to signify his dissent. Not having pursued the method provided by the statute, he will not be permitted to raise the objection upon the offer to introduce evidence. *Quen Guey v. State*, 20 Ariz. 368, 181 Pac. 175; *Thomas v. Territory*, 11 Ariz. 184, 89 Pac. 591; *People v. Stacey*, 34 Cal. 307; *People v. Bawden*, 90 Cal. 195, 27 Pac. 204.

[2] The provision of the Constitution the defendant asserts was violated, forbids the prosecution of any person for felony by information without his having had a preliminary examination or waived such examination. The record in this case clearly shows that defendant waived the preliminary examination for the specific offense with which he was charged and convicted. We take it that the whole of defendant's grievance is that the county attorney was permitted to withdraw the first information filed against him and to file another information charging the same offense. We cannot see how this in any manner could have prejudiced his rights. No issue had been joined on the first information, as he had not pleaded to it. At most what was done was no more than an immaterial irregularity.

The next assignment is directed to the testimony of Helen Teeter, who was testifying in behalf of the state, and to the language of the court in that connection. We give the question and answer, and also the court's remarks as they appear in defendant's assignment.

"Q. Do you recall anything that happened there at that time concerning the shooting? A. Yes, sir.

"Q. Go ahead in your own words and tell what you saw and heard at that time and place. * * * A. My father pushed the door open * * * and said, 'What is the matter, man?'

"Mr. Hart: We object to what the father said, if the court please.

"The Court: Just a minute, please. The objection is overruled. This was addressed to what I would presume to be the defendant."

[3, 4] It is obvious that it cannot be determined that the witness' answer or that part of it to which defendant objected was competent or not, nor can it, for that matter, be determined whether the remarks of the court were error from an inspection of the assignment. In other words, the assignment does not contain enough of substance upon which to base a decision. The objection assigns no reason why what the father said was not competent or relevant or material. No motion to strike the answer was made, nor were the remarks of the court objected to nor asked to be stricken. For the failure to

specify wherein the answer of the witness was improper or the failure to object to the court's remarks so that he might correct them if erroneously made, we might well refuse to examine the assignment, but in view of the gravity of the charge against the defendant, involving as it does the death penalty, we will treat the assignment as being sufficient to present the question of the competency of the witness' answer, as well also the right of the court to make the remarks complained of. Before Helen Teeter was put on the stand her father, D. S. Teeter, had testified. In his testimony he had stated that while he was eating his supper at about 6:30 p. m. on January 11, 1921, he heard some 10 or 15 shots fired, and that he and two or three others of his family went to the door of his house facing on the alley when he saw defendant; that he stepped outside, and the defendant came within about six feet of him and said, "For God sake get out of my way," and "I said to him, 'What is the matter, man?' and he said, 'For God sake get out of my way.'" D. S. Teeter, it will be seen, testified positively that he was speaking to the defendant when he said, "What is the matter, man?" And this is the language repeated by the daughter to which the above objection was made.

[5, 6] The defendant in his brief insists that the evidence was hearsay, and its admission for that reason was error. This cannot be so, inasmuch as the language was directed to the defendant and was uttered in his presence. There had been evidence by Mr. Teeter that his remark was addressed to the defendant, and the comment of the court was doubtless based upon that positive testimony. The court was clearly right in overruling the objection, and in view of the positive identification of the defendant as the person to whom it was addressed, in presuming that the remark was addressed to the defendant.

Defendant's next assignment is in the following language:

"While the witness F. L. Goulette was testifying for the state, the following question was asked:

"Q. Did you find a bullet hole there? A. Yes, sir.

"Mr. Thalheimer: If your honor please, we object to the witness testifying, unless he testifies as to the character of the indenture upon the front of the door.

"The Court: That is what he is going to do.

"Mr. Thalheimer: He said a bullet hole.

"The Court: Counsel has said a bullet hole. He is asking about a bullet hole. I think the objection may be overruled. He may answer."

[7] Defendant argues in his brief that the above evidence was objectionable because it was the opinion or conclusion of the witness. That may be true, but no such objection was made at the time, nor was it objected that

the witness was not competent as an expert. In other words, the question which he now presents was never presented to the lower court for a ruling.

Two witnesses, Henry R. Swink and Harry J. Saxon, testifying in behalf of the prosecution, were permitted, over the objections of the defendant, to state a confession of one Victoriano Martinez and the defendant, made at Calabasas near the Mexican line, at the time of their apprehension. The admission of this testimony, it is earnestly urged, was error. The confession and the circumstances under which it was made can be best understood and appreciated if we relate briefly the facts of the crime and circumstances of the arrest of the defendant.

On the evening of January 11, 1921, at about 6:30 o'clock, two Mexicans, operating together, held up and robbed what is known as the Baber-Jones Store in the city of Tempe, Maricopa county. One of them stood guard on the outside with a rifle, while the other entered the store and held up Mr. H. C. Baber, a member of the firm, and took from him about \$290. During the time that it took to rob the store a great many shots were fired. The man on the outside had a rifle and was shooting indifferently at everybody that came in sight, while the man in the store who was doing the looting shot Mr. Baber twice and possibly discharged his revolver more times. Besides wounding Mr. Baber very seriously, a nine year old boy by the name of Thomas Hintze, and a deputy constable by the name of Spangler, were killed. The desperadoes then fled from the scene, and were traced by an unbroken chain of evidence to Calabasas near the Mexican border where they were arrested.

On the morning of the 14th of January, at about 8:30 o'clock the automobile stage running between Tucson and Nogales reached Calabasas, where there happened to be at that time two United States government inspectors and line riders, Henry R. Swink and Earl A. Lemon. There were also there at the time two cattle men, Harry J. Saxon and R. Pugh Leatherman. After the stage had stopped the defendant and his companion Victoriano Martinez alighted, and they had proceeded away from the stage only a few feet when Swink said to them, "Stop! you are prisoners." He then called to Lemon, who brought a pair of handcuffs. As Swink was walking with his head down, unlocking the handcuffs, and when he had approached within about four feet of his prisoners, the defendant, Roman, jumped back and said, "No," and at the same time drew a revolver, threw it down on Swink, and demanded that the latter surrender, at the time discharging his revolver. At about the same time some one shot at the defendant, striking the arm holding his revolver, whereupon it fell to the ground; almost instantly he was shot again, and he fell to the ground,

and as he fell he called to his companion, Martinez, to shoot. Martinez thereupon grabbed the gun that had fallen from defendant's hand, and threw it down on Swink, who thereupon shot Martinez, the bullet entering his neck. The defendant and his companion were placed upon a blanket and made as comfortable as possible, where they remained for awhile. After a bit they requested to be allowed to sit up.

Harry Saxon relates that he took a seat right near by the defendant and Martinez, and asked them the question:

"What have you boys done that makes you so wild?" and "they hesitated a little, and then Martinez spoke up and said, 'We robbed a store. * * * Martinez, before he told me that, turned to this Roman and said, 'We might as well tell, we are up against it now,' and Roman nodded his head as if to say 'Yes.' Roman didn't talk much. He seemed to be pretty sick. Martinez then said, 'We robbed a store and killed some few people in Tempe,' and I said to Roman, 'Is that right?' and he said, 'Yes.'"

Upon Swink returning from the house where he had gone to get a drink of water or a blanket, Saxon asked Martinez and defendant questions in Swink's presence, and they made the same statement, or practically the same statements. Swink in his testimony relates that he heard Saxon say:

"What have you fellows done that you didn't want to be arrested? If you are the men that done the robbery and murder at Tempe you better say so because you will save some innocent man some suffering."

And to this Martinez said:

"We are the men that robbed the store and killed some people at Tempe."

Then Roman, being asked by Saxon, "Is that so?" nodded his head in assent and said, "Yes." Before the witness Swink testified as to the confession the court asked the defendant whether he wished to question the witnesses concerning the circumstances of the confession, and the defendant's counsel replied that they would do that on cross-examination. In the cross-examination no effort was made to show the statement was induced by threats or promises.

The defendant testified in his own behalf. On his direct examination he gave his version of the confession as follows:

"One of the gentlemen in the crowd says to us, 'If you are the ones that made the assault at Tempe, why do you not say it?' As I did not consider myself guilty, I didn't answer and kept quiet. Then Martinez answered and says, 'Yes, I am,' and they says, 'Are you?' and I says, 'I want some water.' That was all, and I didn't speak a word. * * * I didn't nod my head when they asked me whether what Martinez said about the crime in Tempe was true. * * * I was sick, but I was with my five senses."

[8-10] The question is: Were these extrajudicial statements by defendant under the circumstances in which they were made voluntarily made? If so, they were admissible. Otherwise, they were not. It is the law that confessions "obtained by coercion or threat or promise will be subject to objection." *Hardy v. United States*, 186 U. S. 224, 22 Sup. Ct. 889, 46 L. Ed. 1137; *Bram v. United States*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568. This is upon the theory that such confessions are as apt to be false as true.

"The fundamental principle upon which confessions have been excluded which are induced by promises or threats, hope or fear, is that under such circumstances the temptation to speak falsely is so great as to render the statement entirely untrustworthy." *Territory v. Emilio*, 14 N. M. 147, 89 Pac. 239.

The defendant and Martinez, at the time they made their statement, had not been accused of any crime, and it is doubtful if they were even suspected by Swink as having committed the murders and robbery at Tempe at the time he undertook to arrest them. It is not shown how long after the defendant and Martinez had been subdued it was before they confessed. It was, however, not immediately. It was not first made to the officer, Swink, but in his absence, to the civilian Saxon. Saxon did not accuse them. He said, "What have you boys done that makes you so wild?" There was certainly no threat or promise in this question. The desperate resistance to arrest no doubt aroused in the mind of the questioner a suspicion and prompted the question, and whatever may have been the reason that actuated the defendant and Martinez in confessing their connection with the Tempe murders it is not apparent that they did so under any threat, or fear, or hope, or promise.

[10] True, Swink in his testimony gives a slightly different version of what was said when upon his return Saxon sought to get a repetition of the confession made to him. Swink says Saxon's question was:

"What have you fellows done that you didn't want to be arrested? If you are the men that done the robbery and murder at Tempe you better say so because you will save some innocent man suffering."

[11] The courts have in many cases held that an adjuration to an accused "that it would be better to tell the truth" may be so worded as to imply a threat or a promise making it inadmissible as evidence. A number of such cases are cited by Mr. Justice White in his very able and elaborate opinion in *Bram v. United States*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568. We do not think the admonition to the defendant and Martinez in this case is of that character. In effect they were told that if they had committed the crime at Tempe, by admitting it, they would save innocent persons from there-

after being accused of it or punished for it. There was no promise of leniency held out to them in that; nor did it contain any threat. It was rather an appeal to their consciences. The rule seems to be that a confession in response to an appeal to religious or moral sentiment is not inadmissible. *State v. Williams*, 129 La. 215, 55 South. 769, Ann. Cas. 1913B, 302, and note. Both the defendant and Martinez had been very seriously wounded, and were at the time doubtless suffering considerable pain. Martinez died very shortly thereafter. Believing that death was impending, it is possible that there was enough of the milk of human kindness in these men to prompt them to save, as suggested by the officers, others from being charged with the offense of which they were guilty, and hence their confession. The inducement to speak up was not of a temporal or worldly nature.

[12] The confession was not inadmissible, because it was made to an officer. *Sparf v. United States*, 156 U. S. 51, 715, 15 Sup. Ct. 273, 89 L. Ed. 343; *Wilson v. United States*, 162 U. S. 613, 16 Sup. Ct. 895, 40 L. Ed. 1090; *Lindsey v. State*, 66 Fla. 341, 63 South. 832, 50 L. R. A. (N. S.) 1077, and note 1084, Ann. Cas. 1916C, 1167.

The defendant who was a witness in his own behalf did not claim in his testimony that any coercion or threat or promise was made by Swink and others who arrested him and Martinez. He admits that Martinez confessed that he was guilty of the Tempe offense. From his own mouth he admits hearing Martinez confess to the crime. He says that he was in possession of his "five senses." He does not deny admitting that he was present and participated with Martinez in the crimes. We think this assignment of error is without merit, and that the confessions were properly admitted.

The refusal of the court to give the following instruction requested by the defendant is next assigned as error:

"You are instructed that, even though you may believe from the evidence that the defendant was the man who shot H. C. Baber, the owner of the store which was robbed, unless you further believe from the evidence beyond all reasonable doubt that the defendant fired the shot which killed the boy Hintze, and that such killing of the boy Hintze was a willful, premeditated, and deliberate action on his part, you must bring in a verdict of not guilty."

[13] From the statement of facts heretofore given it is clear that this instruction is erroneous, and was very properly refused. It could make no difference whether defendant or Martinez actually shot and killed Thomas Hintze. It is clear that they acted together in such a manner as to make each responsible for the act of the other in the furtherance of their criminal purpose.

We have very carefully and thoughtfully looked into the record of this trial, and are satisfied that the defendant was accorded all of the rights he was entitled to under the law, and that no error of a prejudicial character was committed in his trial.

The judgment is therefore affirmed.

The date of April 29, 1921, originally fixed for defendant's execution, having passed, it is ordered that judgment be entered by this court fixing the time when the original sentence of death shall be executed, as required by section 1177 of the Penal Code.

McALISTER and FLANIGAN, JJ., concur.

FARMERS' HIGH LINE CANAL & RESERVOIR CO. v. WEBBER.
(No. 9862)

(Supreme Court of Colorado. June 6, 1921.
Rehearing Denied Nov. 7, 1921.)

1. Waters and water courses \S 152(5)—General averment of ownership of water right, as against defendant claiming same priority under same appropriation, held sufficient.

In action to establish plaintiff's title to water out of defendant's ditch for irrigation purposes, where plaintiff and defendant claimed the same priority under the same appropriation, made through the same ditch, at the same time, by one construction, allegation of the ownership of the water right without the facts showing appropriation held sufficient.

2. Judgment \S 251(1)—General allegation as to ownership of water held to support judgment on proof of title by appropriation.

In action to establish plaintiff's title to water, general allegation of ownership held to support judgment for plaintiff on proof of ownership right by appropriation, notwithstanding specific allegation as to having acquired title by prescription, where defendant was not permitted to amend complaint during trial by alleging title by appropriation, since if complaint was not good without such allegation, the amendment should have been allowed.

3. Pleading \S 248(17)—Amendment of allegation as to title to water by appropriation held not to state a new cause of action.

In action to establish plaintiff's title to water for irrigation, where complaint contained general averment of ownership and a specific allegation as to title by prescription, amendment alleging title by appropriation did not state a new cause of action.

4. Waters and water courses \S 152(8)—Evidence held to sustain finding as to ownership of water by right of appropriation.

In action to establish plaintiff's title to water out of defendant's ditch for irrigation of land, evidence held to sustain finding as to plaintiff's ownership of water by right of appropriation.

Department 2.

Error to District Court, City and County of Denver; Clarence J. Morley, Judge.

Action by Blanche Webber against the Farmers' High Line Canal & Reservoir Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Bartels & Blood, of Denver, for plaintiff in error.

John A. Rush and Foster Cline, both of Denver, for defendant in error.

DENISON, J. The defendant in error was plaintiff below, and obtained a decree establishing in her the title to 15 inches of water out of the ditch of defendant, plaintiff in error, for the irrigation of certain land.

The plaintiff derived title to the said water from her uncle, one Hill, who, she claimed, was one of the original appropriators of the first priority acquired by this ditch, and she also claimed by adverse use for more than 20 years. The court expressly found in her favor on both the appropriation and the adverse use. We affirm the judgment on the former ground, appropriation, and leave the other undecided.

Plaintiff in error argues: (1) That the complaint does not state a cause of action. (2) That there was no proof of title in plaintiff by appropriation. The complaint alleged ownership of the land, and "that plaintiff during all the times mentioned herein was and is now the owner of 15 inches of water in the ditch of the defendant company, and during all of said times was and now is entitled to the use of the same;" also "that the plaintiff and her grantors for more than 20 years last past have had the free use of said water, and have used the same openly, notoriously, and adversely, to the defendant for irrigating about 15 acres of lands aforesaid;" also that said water was necessary for such irrigation; that plaintiff could get no other, and without it her crops would be destroyed and her land unproductive.

[1] The objection to the complaint is that it states no facts constituting ownership of the water right except adverse use, which is insufficient, and that a bare statement of ownership of a water right, unlike the case of land or chattels, is not enough. Plaintiff in error cites *Farmers', etc., Co. v. Southworth*, 13 Colo. 111, 21 Pac. 1028, 4 L. R. A. 767, and *Kenney on I. & W. R.*, § 1633.

The *Southworth* Case was upon a question of priority between two appropriations. Which was first? The court held that the facts showing appropriation should have been set forth in the pleadings. No such situation is before us now. Both parties here claim the same priority under the same

appropriation, made through the same ditch at the same time by one construction, applied to the several lands of the constructors of the ditch. It is a question of ownership, not priority of right. The same is true of *Downing v. Ag. D. Co.*, 20 Colo. 546, 39 Pac. 336.

Where the question is one of title only, we can see no reason why the allegation of ownership of a water right should not be as simple as of land, nor why under the Code it should be more complex than at common law or in equity. It is enough to say that the goods are the goods "of the plaintiff" or the lands are the lands "of the plaintiff." *Baker v. Cordwell*, 6 Colo. 199; *Elliot v. Bank*, 30 Colo. 279, 70 Pac. 421; 2 Chit. Pl. 860, 863. See *Clink v. Thurston*, 47 Cal. 21. We think the general averment of ownership was sufficient.

[2] But defendant claims that the specific allegation controls the general; that, having specified title by prescription or adverse possession for 20 years, he can prove only the specification, and cannot bring forward other evidence to sustain ownership. Plaintiff, however, asked leave to amend to conform to the evidence by inserting an allegation that plaintiff was the owner by right of appropriation of her grantors. This leave was denied. In view of the subsequent findings of the court the reason for this denial must have been that the amendment was unnecessary. If it was unnecessary, the complaint was good; if not, the amendment should have been allowed, and in either case the judgment should be affirmed.

[3] Defendant objected that the amendment would state a new cause of action. Not so. There is but one cause of action stated here whatever be the source of title. There is but one primary right, viz. the right to the use of the water, based on ownership; but one violation of that right, viz. deprivation of use. *Pom. R. & R. Rts.* (2d Ed.) §§ 2, 3, 454-457, 518-522.

[4] As to the second point: The evidence tended to show long-continued use, about 60 years, which went strongly to support the claim of original appropriation of the 15 inches by Hill and some evidence tending to show that he and plaintiff's father, one Wanamaker, helped construct the ditch or to extend it in consideration for a share, viz. the 15 inches aforesaid in the appropriation. We cannot say that this evidence was insufficient to support plaintiff's claim, especially since the court viewed the premises, a species of evidence which in the nature of things cannot be reproduced before us.

Judgment affirmed.

TELLER, Acting C. J., and WHITFORD, J., concur.

**NEW MERCER DITCH CO. et al. v. NEW
CACHE LA POUDRE IRRIGATING
DITCH CO. (No. 9866.)**

(Supreme Court of Colorado. June 6, 1921.
Rehearing Denied Nov. 7, 1921.)

1. Waters and water courses \S 152(8)—Evidence held sufficient to show abandonment of priority rights in waters.

In a suit to enjoin the use of part of the waters claimed under an adjudication of priority, on the ground of abandonment thereof, evidence held sufficient to show abandonment.

2. Waters and water courses \S 152(7)—Evidence of conditions previous to decree awarding priorities, parties' declarations, and proceedings in suit held competent on issue of abandonment.

Evidence of abandonment of priority rights in waters must relate to facts occurring after the decree awarding such priorities, but previous conditions, declarations of the parties, and the proceedings in the suit resulting in such decree are competent to show conditions and intent subsequent thereto, and evidence as to what was a reasonable use of such waters on the land is relevant not only to intent but to what was actually used.

3. Judgment \S 743(2)—Decree in suit for change of point of diversion not res judicata in suit to enjoin use of water on ground of abandonment.

Since the question of abandonment of priority rights in waters cannot be raised in a suit for change of point of diversion, the decree in such suit is not res judicata in a suit to enjoin the use of such waters on the ground of abandonment.

4. Waters and water courses \S 152(2)—Suit to enjoin use of waters on ground of abandonment of priority rights not barred by limitations.

Rev. St. 1908, \S 3318, barring review or reargument of a decree adjudging priority rights in waters after two years, and sections 3313 and 3314, barring adverse claims to such rights after four years, do not affect the right of a claimant to enjoin the use of such waters on the ground of abandonment of such priority rights, but limit only the power to question the decree of the right and measure of diversion.

5. Estoppel \S 93(7)—Claimant of water rights not estopped to assert abandonment thereof.

In a suit to enjoin the use of waters on the ground of abandonment of defendant's priority rights, where it appeared from a decree changing the point of diversion for the benefit of a purchaser of part of defendant's stock subject to the success of such suit that plaintiff claimed to be the owner of the rights, the diversion of which was to be transferred, and there was nothing in the case to give notice that they had not already been paid for, and no proof of knowledge of or notice to plaintiff of conditions which would make delay harmful to such purchaser, nor any harm shown except payment

for the stock, plaintiff, who can be said to have had notice only of whatever properly appeared in the pleadings in the suit for diversion, was not estopped by its acquiescence in and failure to object to the expenditure of large sums by such purchaser for such rights; knowledge being an essential factor in estoppel.

6. Waters and water courses \S 152(2)—Delay in asserting claim to rights in waters for less than statutory period not laches.

Where it was not shown that purchasers of part of the stock of a ditch corporation possessing priority rights in waters were placed in a worse position by an adverse claimant's delay in asserting his claim, such delay, being for a shorter time than the statute of limitations, was not laches.

En Banc.

Error to District Court, Larimer County; Robert G. Strong, Judge.

Action by the New Cache la Poudre Irrigating Ditch Company against the New Mercer Ditch Company and another. Judgment for plaintiff, and defendants bring error. Affirmed.

R. W. Fleming, Paul W. Lee, and George H. Shaw, all of Ft. Collins, for plaintiffs in error.

Harry N. Haynes, of Greeley, for defendant in error.

DENISON, J. The defendant in error brought suit to enjoin plaintiffs in error from using more than 10 second feet of the adjudicated priority of the Josh Ames ditch, 35.91 second feet. Plaintiff alleged abandonment of the remainder, 25.91 second feet. The court enjoined the use of 10.91 of said 35.91 second feet leaving to defendants the use of but 25. The defendants bring error.

The following points are argued:

(1) That the evidence of abandonment was insufficient.

(2) That incompetent and irrelevant evidence was admitted.

(3) That the question of abandonment is res adjudicata.

(4) That the relief is barred by the statute of limitations.

(5) That the plaintiff is estopped by conduct to claim abandonment.

(6) That plaintiff is guilty of laches.

Omitting unnecessary details, the facts are as follows:

By the decree of 1882 there was adjudicated to the Josh Ames ditch 35.91 second feet of water from the Cache la Poudre river to irrigate about 640 acres, perhaps slightly more. There was a continuous use of this right by the owners of land under that ditch thereafter; the amount of water used however, is disputed. In 1912 a part of the stock of the Josh Ames corporation was sold to the New Mercer Ditch Company et al., and the

diversion of 10 second feet of the water represented by this stock was transferred to the New Mercer headgate; a decree having been duly obtained to authorize the change. Thereafter the Josh Ames ditch, plaintiff claims, continued to use the same amount of water as before, so that the 10 second feet transferred was an additional diversion and use to the injury of juniors.

The plaintiff was a party to the transfer suit but did not appear, though duly served. The present suit was begun November 2, 1916, more than four years after the decree of transfer.

[1] 1. We cannot say that the evidence was insufficient to show abandonment. The needs for irrigation under the Josh Ames ditch were much less than the appropriation, the ditch was for years in no condition to carry that amount, and the greatest flow it could carry at any time after 1882 might, from the evidence, be found to be not over 25 second feet. There is, moreover, evidence that for 20 years after 1882 the land on which it was used needed much less than the appropriation and that much less was used thereon. The finding of the court, therefore, that not more than 25 second feet had been diverted since 1890, was justified, and this justifies the conclusion that 10.91 second feet had been abandoned.

[2] 2. We think the evidence the objections to which were overruled was proper. Evidence of abandonment must, of course, be of facts which occur after the decree which awards the priorities, but previous conditions, declarations of the parties, and the proceedings in the suit of which that decree is the result, are competent to show conditions and intent subsequent to the decree. *Cent. Tr. Co. v. Culver*, 23 Colo. App. 317, 321, 322, 129 Pac. 253, affirmed 58 Colo. 334, 145 Pac. 684; *New Mercer D. Co. v. Armstrong*, 21 Colo. 357, 40 Pac. 989.

What was a reasonable use on the land under the Josh Ames ditch was, under the decisions in this state, relevant not only to intent but to what was actually used.

[3] 3. It is claimed that the question here in litigation was determined in the suit for change of point of diversion, but we have several times held that that question could not be raised in such a suit (*Consolidated, etc., Co. v. Evans*, 59 Colo. 482, 485, 149 Pac. 834); consequently it is not *res adjudicata*.

[4] 4. We cannot see that any statute of limitations bars the present suit. It is urged

that at least plaintiff's right to assert abandonment is barred by the two-year limitation, R. S. 1908, § 3318, and by the four-year limitation, R. S. 1908, §§ 3313, 3314; but we think those sections do not affect that question, but that they limit only the power to question the original decree of the right and measure of diversion.

[5] 5. It is pleaded as estoppel that the New Mercer Company purchased the stock representing the 10 second feet above mentioned subject to the success of the suit for the change of point of diversion to be paid for only if such change were permitted; that after the decree of permission the New Mercer Ditch Company paid a large sum for the water right and expended other moneys in respect thereto, all with knowledge of plaintiff, and that plaintiff acquiesced in and failed to object to the same. It is now claimed that it was plaintiff's duty to speak when it knew that the New Mercer Company was going to buy and lay out money in respect to the stock and water and so spare that company from the loss now inflicted upon it. The plaintiff denies all knowledge of the matters above mentioned. This knowledge is, of course, an essential factor in the estoppel, and if it is not proved the estoppel fails.

The plaintiff must be said to have had notice of whatever properly appeared in the pleadings in the suit for change of diversion. Those pleadings are not shown in the abstract of record, but we infer from the decree, which is shown, that the present plaintiff and its copurchaser claimed in their petition to be then and there the owners of the rights the diversion of which was to be transferred, and that there was nothing in that case to give notice that they had not already paid for them. There is no other proof of knowledge of or notice to plaintiffs of conditions which would make delay harmful to the purchasers, nor is any harm to them shown except the payment.

We must say that there is no estoppel.

[6] 6. Was the plaintiff guilty of laches? Delay for a shorter time than the statute of limitations is seldom regarded as sufficient to impute laches unless opponents have been placed in a worse position. *Warren v. Adams*, 19 Colo. 515, 528, 36 Pac. 604. No such condition is shown. We must say that no laches appears.

Judgment affirmed.

SCOTT, O. J., not participating.

PARSONS v. PARSONS' ESTATE.
(No. 9807.)

(Supreme Court of Colorado. April 4, 1921.
Rehearing Denied Nov. 7, 1921.)

Divorce — 247—Right to alimony held not to survive husband's death.

Divorce decree embodying agreement made between the parties providing for payment to wife of specified monthly sum for the maintenance of herself and minor child did not entitle wife to recover such amount against husband's estate for a period subsequent to his death, in the absence of any provision of the contract or the decree showing an intention that the right to monthly payments should survive the husband's death.

Department 1.

Error to District Court, Montrose County;
Thomas J. Black, Judge.

Claim by Minnie M. Parsons, individually and as next friend of Zelta Louise Parsons, a minor, against the estate of Henry R. Parsons, deceased. Claim disallowed, and claimant brings error. Affirmed.

Catlin & Blake, of Montrose, for plaintiff in error.

John L. Stivers, of Montrose, for defendant in error.

ALLEN, J. This cause is before us upon a writ of error to review a judgment of the district court of Montrose county disallowing a claim of a divorced wife against the estate of her former husband, now deceased.

In March, 1918, the claimant, Minnie M. Parsons, brought an action for divorce against Henry R. Parsons. On April 17, 1918, prior to the trial of the case, the parties entered into a written stipulation and agreement intended to settle their property rights and fix the amount and manner of payment of permanent alimony for the support of the plaintiff and of a minor child of plaintiff and defendant. That part of the written agreement which is material upon this review reads as follows:

"The defendant agrees and binds himself to pay to plaintiff the sum of thirty-five dollars (\$35.00) per month so long as she shall remain single for the full maintenance and support of herself and the minor child of plaintiff and defendant, Zelta Louise. * * *"

Thereafter and on the same day the cause was tried upon its merits, resulting in findings for plaintiff. No testimony was taken for the purpose of fixing the amount of alimony, but in exact accord with the stipulation of the parties the court ordered that—

"Plaintiff shall receive from the defendant the sum of thirty-five dollars a month alimony for the support of plaintiff and said child as

long as said plaintiff shall remain single and unmarried."

The defendant in the divorce action died October 13, 1918. During his lifetime he paid all alimony due for the period of time ending October 17, 1918. Several months thereafter the plaintiff filed in the county court, a claim against the estate of the deceased for alimony as having accrued since October 17, 1918, notwithstanding the death of the divorced husband. The claim was disallowed, and on appeal to the district court was again denied.

The question to be decided is whether the divorced wife, Minnie M. Parsons, is still entitled to receive from the estate of Henry R. Parsons, deceased, the monthly allowance awarded to her as alimony for the support of herself and minor child, or whether she ceased to be entitled to the payment of such alimony upon the death of her divorced husband.

The decree as to the allowance of permanent alimony was a consent decree. It embodied fully the agreement made and filed by the parties, giving effect to and ratifying the agreement both as to the amount and as to the manner and time of payment of the alimony. It is generally held that agreements affecting the amount of alimony may be adopted by the court. 19 C. J. 251, § 586. This was done in the instant case.

We will assume, without deciding, that under our divorce statute the courts have the power to make a decree for alimony which will survive the death of the husband. In *Stone v. Bayley*, 75 Wash. 184, 134 Pac. 820, 48 L. R. A. (N. S.) 429, it is said:

"Authority is not wanting that the making of a contract by the parties that a decree may be entered providing for the payment of alimony or for the support of minor children, to continue after death of the father, has the effect of giving the court power to make such a decree, even if the court would not ordinarily possess that power under the statute."

In *Stone v. Bayley*, supra, the court was concerned with a contract, and not a decree. In *Storey v. Storey*, 125 Ill. 608, 18 N. E. 329, 1 L. R. A. 320, 8 Am. St. Rep. 417, the court construed a consent decree, and not a contract. In each case the decision finally rested on the intention of the parties as to whether payments of alimony should continue after the husband's death.

The contract upon which the claimant relies in the instant case does not disclose any intention that it should survive the death of the husband. There being an absence of any agreement of the parties to that effect, and the decree not showing that the court intended to bind the husband's heirs after his decease, the alimony does not survive the former husband's death. 19 C. J. 278, §§ 633, 635; 1 R.

C. L. 933, §§ 80, 81. It was not error to disallow the claim.

The judgment is affirmed. Former opinion withdrawn.

TELLER, J., sitting for SCOTT, C. J., and DENISON, J., concur.

**MANATEE COUNTY STATE BANK v.
BRUEN-FISHER FRUIT CO.
(No. 9791.)**

(Supreme Court of Colorado. June 6, 1921.
Rehearing Denied Nov. 7, 1921.)

1. Banks and banking ¶127—Evidence held sufficient to show purchase of a draft.

In action to attach proceeds of a draft in hands of correspondent bank, evidence held sufficient to support a motion for directed verdict for an intervening bank on the ground that it had purchased the draft.

2. Evidence ¶590—Of drawer and seller of draft, who had no interest in it, was that of a disinterested party.

Where the drawer of a draft sold it unconditionally to a bank, and it was collected through a correspondent bank, his liability on the draft ceased when it was paid, and his testimony in a suit to attach the proceeds of the draft is that of a disinterested party.

3. Banks and banking ¶127—Proceeds of a draft purchased from the drawer and in hands of a correspondent bank for collection are not liable to garnishment by creditor of a drawer.

Where the drawer of a draft sold it to a bank which took it on the guaranty of a correspondent bank, and advanced the drawer unconditional credit, proceeds of the draft in the hands of correspondent bank are not liable to garnishment by a creditor of the drawer.

Department 1.

Error to District Court, City and County of Denver; C. J. Morley, Judge.

Action by the Bruen-Fisher Fruit Company against one McRee, in which the Manatee County State Bank intervened. From a judgment for plaintiff, the intervener brings error. Reversed and remanded.

Hughes & Dorsey and W. M. Bond, Jr., all of Denver, for plaintiff in error.

Archibald A. Lee, of Denver, for defendant in error.

TELLER, J. The defendant in error purchased of one McRee, of Florida, a carload of oranges upon the guaranty by the Capitol Hill State Bank that a draft, drawn by McRee on said fruit company in payment of the oranges, would be paid. The draft was drawn, and deposited in the Manatee State Bank, and by it forwarded to Denver, where

it was accepted by the fruit company and paid. Immediately following said payment the proceeds of the draft were attached, as belonging to McRee, in a suit brought against him by the fruit company, upon the claim that the fruit, on arrival, was in bad condition, because of which the fruit company had suffered damages. No appearance was made on behalf of McRee, and judgment by default was entered against him.

Prior to such judgment, the Manatee County State Bank, by leave of court, intervened in the action, claiming to be the owner of the funds seized under the writ of attachment. On trial to a jury the plaintiff had judgment, and the intervener brings the case here on error.

[1-3] It appears that the court erred in not granting a motion for a directed verdict in its favor. The only evidence in the case is by deposition. McRee testified to the selling of the oranges and the drawing of the draft; that he took the draft with the bill of lading attached to Mr. Lamb, the vice president of the intervener bank, and that he deposited it in the bank, and received credit on his passbook for the same; that the credit for the amount of the draft was unconditional, and subject to the immediate check of the witness. He further testified that he paid out the money in question the same day that it was credited him, and that the draft had not been charged against him, nor had the bank made any demands upon him in respect to it. Accompanying his deposition was his passbook, showing a deposit on the date of the draft. Lamb, vice president, testified that he was the manager of the bank, and that, on November 14, 1918, he took a deposit from McRee, which was a sight draft on the fruit company for \$1,314, the amount of the draft in question, with a bill of lading for one car of fruit and a guaranty from the Capitol Hill State Bank attached; that the draft was immediately sent to the Capitol Hill State Bank, with instructions to collect and remit the proceeds. The credit for the amount of the draft was placed to the account of McRee on his passbook, and an unconditional entry of credit made on McRee's account; that the proceeds of the draft so credited were withdrawn immediately by McRee; that such action was anticipated by the bank when it gave the credit; that the bank had refused the purchase of an earlier draft, because the guaranty from the bank was conditional. Upon cross-examination the witness testified that he purchased the draft for the bank; that the bank made no arrangement with McRee for its protection in the event of the nonpayment of the draft, but took it on the faith of the guaranty of the Denver bank. The testimony of one Howz, cashier of the intervener bank, fully corroborated the testimony of Lamb.

The only question before the court was whether the draft was purchased or taken for collection. The undisputed testimony upon that point is that the bank purchased the draft. It is contended that, inasmuch as Lamb and Howz were officers of the bank, their testimony, although undisputed, cannot be taken as true and determinative of the issue. McRee's testimony, however, is direct and positive that the transaction was a purchase. As drawer of the draft, his liability upon it ceased when the draft was paid, and his testimony, therefore, is that of a disinterested party. It must be held that this case is governed by the recently determined case of *Union National Bank of Fostoria v. Maines-Hough Motor Co.*, 197 Pac. 753, decided at this term. In that case, as in this, the evidence showed a purchase, and we held that the money in the bank where the draft was paid was not liable to garnishment by a creditor of the drawer. The claim of the intervener to the money having been supported by competent testimony, and there being no evidence to the contrary, the motion for a directed verdict in favor of intervener should have been sustained.

The judgment is accordingly reversed, and the cause remanded, with instructions to the trial court to enter judgment for the intervener.

BAILEY, J., sitting for SCOTT, C. J., and ALLEN, J., concur.

FIRST NAT. BANK OF ZILLAH v. BRUEN-FISHER FRUIT CO. (No. 9854.)

(Supreme Court of Colorado. June 6, 1921.
Rehearing Denied Nov. 7, 1921.)

Banks and banking §127—Evidence held sufficient to show purchase of a draft by bank.

In an action in which proceeds of a draft were garnished in the hands of correspondent bank, which held the draft for collection, evidence held sufficient to show a purchase of the draft by an intervening bank.

Department 1.

Error to District Court, City and County of Denver; C. J. Morley, Judge.

Action by the Bruen-Fisher Fruit Company against Pennington & Co., in which the First National Bank of Zillah intervened. From a judgment for plaintiff, the intervener brings error. Reversed.

Hughes & Dorsey, W. M. Bond, Jr., and Walter M. Campbell, all of Denver, for plaintiff in error.

Archibald A. Lee, of Denver, for defendant in error.

TELLER, J. This cause is before us on error to a judgment of the district court of the city and county of Denver in an action in which the defendant in error was plaintiff, and Pennington & Co., a corporation, was defendant. The plaintiff in error was an intervener. The said defendant, having drawn a draft upon the defendant in error for the proceeds of a car of apples, assigned said draft, with a bill of lading for the apples attached, to the plaintiff in error. The draft having been forwarded to the First National Bank of Denver for collection, the fruit company paid the same, and immediately garnished the money as the money of Pennington & Co. in an action in which damages were claimed from Pennington & Co. because of a failure to ship certain apples, as agreed. Pennington & Co. made default, and judgment was accordingly entered against them.

On a trial of the issue between the fruit company and the intervening bank, evidence was introduced in behalf of the bank, by deposition of the president of Pennington & Co., to the effect that said company had, weeks prior to the shipment of said carload of apples, by writing duly executed, assigned to the said National Bank of Zillah "all claims, demands, and moneys that shall become due on account of fruit which we may during the season of 1918 sell, and which fruit we will buy at Yakima, Wash., during the season of 1918, south of Union Gap, in said Yakima county, Wash." He further testified that the said draft and bill of lading were transferred to the said bank, and that Pennington & Co. received immediate credit therefor; that at the time of said credit Pennington & Co. was indebted to the bank in a sum largely in excess of the amount of the draft; that there was no arrangement or agreement by which the draft, if not paid, was to be charged back; that the bank had no security for the amount owed it by Pennington & Co., but that when it was learned that the proceeds of the draft were detained in Denver by reason of said garnishment, Pennington & Co. gave to the bank its promissory note for the amount of the draft, with an understanding that, when the proceeds of the draft were received by the Bank of Zillah, they would be credited upon the note; that Pennington & Co. has at all times since the date of the draft been indebted to said bank.

The cashier of the bank testified to the same effect. This witness also testified that the indebtedness to the bank, when the draft was given, exceeded the amount of the draft; that the bank gave Pennington & Co.

full credit for the draft on the amount of the indebtedness, and gave the same as a consideration for the draft; that the draft had not been charged back, but that the note was taken, as stated by Pennington, with the understanding to which he had testified, and, further, that Pennington & Co. had not yet paid the bank's advances, and was still largely indebted to the bank; that the books of the bank show that the draft was credited on the day succeeding the date of the draft; that the bank was the owner of the draft when forwarded to Denver.

Both parties having moved for a directed verdict, the court directed a verdict for the plaintiff, and entered judgment accordingly. This direction of a verdict is assigned as error.

The legal propositions involved are substantially the same as those in *Union National Bank v. Maines-Hough Motor Co.*, 197 Pac. 753, decided at this term, and in *Manatee County State Bank v. Bruen-Fisher Fruit Co.*, 201 Pac. 560, decided at this term. The evidence is conclusive that the bank purchased the draft and owns the proceeds of it.

The judgment is therefore reversed, with directions to enter judgment for the intervenor.

BAILEY, J., sitting for SCOTT, C. J., and ALLEN, J., concur.

WEST v. BATES et al. (No. 9821.)

(Supreme Court of Colorado. July 5, 1921.
Rehearing Denied Nov. 7, 1921.)

1. Pledges \Leftrightarrow 29—Held to authorize pledgee to dispose of collateral, but to require total amount realized to be credited on pledgor's notes.

Contract whereby W. executed to B. two notes for \$1,250, one secured by mortgage, the other by a collateral note of \$2,500, providing that whatever is realized on the \$2,500 note by B. is to be credited on the two other notes, B. to have the privilege of handling the \$2,500 and collecting it, and whenever it is paid in full or realized on or disposed of by B., B. is to deliver to W. the two other notes and release the mortgage, while authorizing B. to dispose of the \$2,500 note as his judgment should dictate, and so for a \$1,600 note of W. held by a third person, requires him to credit the total amount realized on W.'s notes; so that B.'s agreement with D., to whom he disposed of the \$2,500 note, to credit \$350 thereof on D.'s indebtedness to B., was inoperative against W., even if D. in obtaining the note was acting as W.'s agent; he in obtaining the agreement for individual credit acting in his individual capacity.

2. Mortgage \Leftrightarrow 338—Foreclosure being for more than amount due, issuance of trustee's deed enjoined.

Foreclosure of a trust deed being for more than due, issuance of a trustee's deed will be enjoined and the certificate of sale canceled, but without prejudice to right to foreclose for the proper amount.

Department 8.

Error to District Court, Alamosa County; Jesse C. Willey, Judge.

Action by Ed. F. West against A. M. Bates and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

Albert L. Moses, of Alamosa, for plaintiff in error.

E. M. Sabin, of Denver, for defendants in error.

BURKE, J. Plaintiff in error was plaintiff, and defendants in error defendants, in the trial court. West and Bates consummated a real estate deal evidenced by a written contract, in pursuance of which West executed and delivered to Bates two notes for \$1,250 each, one secured by a trust deed on 80 acres of land in Alamosa county, Colo., and the other secured by a collateral note for \$2,500, known as "the Nuckles note." Concerning the latter the contract provides:

"It is hereby further agreed by the parties hereto that whatever amount is realized on the above-mentioned collateral note, by the said Bates is to be credited on the above-mentioned notes of \$1,250 each, the said Bates to have the privilege of handling the said \$2,500 note and collecting the same, and when the said \$2,500 note is paid in full or realized on or disposed of by the said Bates then the said Bates agrees to deliver to the said West the above-mentioned notes of \$1,250 each and release the above-mentioned trust deed."

Thereafter one Doughty, a real estate agent, being indebted to Bates in the sum of \$350, and having in his possession a note of West for the sum of \$1,600, presumably secured, made a deal with Bates whereby he transferred to him the said \$1,600 note, obtained the cancellation of his \$350 indebtedness, the possession of "the Nuckles note," and the cancellation and delivery to West of the \$1,250 note which was secured by "the Nuckles note."

Upon maturity of the remaining \$1,250 note, and the failure of West to pay the same, Bates caused the trust deed to be foreclosed, and at the sale bought the 80-acre tract covered thereby. Thereupon plaintiff brought this action to cancel the certificate of sale and enjoin the issuance of the trustee's deed, on the ground that Bates' dispo-

sition of "the Nuckles note" to Doughty entitled him (West), under the clause of the written contract above set forth, to a cancellation and surrender of both \$1,250 notes. In answer to this position it was the contention of Bates that Doughty, in procuring from him "the Nuckles note," acted as the agent of West. The court apparently so found, and denied plaintiff the relief sought. To review that judgment plaintiff brings error.

The contentions maintained by the respective parties in the trial court are urged here. The record is somewhat involved, the evidence extensive, covering every phase of this transaction, as well as several others, and involving numerous other persons, and the briefs do not greatly aid us in untangling the skein.

We are of the opinion that no consideration need here be given to any facts other than those above set forth. It seems that a simple construction of the language of the contract above quoted, and the straightening of a single kink in this record, disposes of the entire matter on a question of admitted fact and without the citation of authority.

[1] It is perfectly apparent that under the contract Bates had a right to dispose of "the Nuckles note" as his judgment should dictate. It was contemplated that he might realize therefrom sufficient to pay both the \$1,250 notes, in which event he agreed "to deliver to the said West the above-mentioned notes of \$1,250 each and release the above-mentioned trust deed." It was contemplated also that he might realize from "the Nuckles note" less than the face thereof, in which event said amount was "to be credited on the above-mentioned notes of \$1,250 each."

Bates, acting within the authority conferred upon him by said contract, actually sold "the Nuckles note" for said \$1,600 note, which was thereafter paid in full. Had he obtained but \$1,250, instead of \$1,600, and thereupon canceled and delivered to West the \$1,250 note secured by "the Nuckles

note," the judgment of the trial court would have been correct. But Bates, by contract with West, had bound himself to credit the total amount realized from "the Nuckles note" (\$1,600) on the two \$1,250 notes. His blunder was his contract with Doughty to credit the surplus over and above \$1,250 (\$350) on Doughty's indebtedness to him. Doughty thus secured "the Nuckles note" and cancellation of his \$350 indebtedness to Bates, and left Bates bound to credit the same \$350 on the remaining West note.

It is immaterial whether Doughty, in procuring from Bates "the Nuckles note," was, or was not, the agent of West. If he was, West cannot complain of the transaction. If he was not, West cannot complain, because his contract gave Bates full authority to deal with "the Nuckles note" as he did.

Assuming that Doughty, when he obtained "the Nuckles note" from Bates, was in fact the agent of West, the situation as to the credit of \$350 allowed by Bates to Doughty remains unchanged, as there is no contention that Doughty acted with respect to that matter in any other than his individual capacity.

[2] The foreclosure which the plaintiff, West, seeks to set aside was made for an excessive amount, i. e., the full face of the \$1,250 note and interest. It could only have been made for the balance due after crediting thereon the surplus, realized from Bates' disposition to Doughty of "the Nuckles note," over and above the amount necessary to pay the \$1,250 note of West; i. e., \$350.

The judgment is accordingly reversed, and the cause remanded, with directions to enter judgment enjoining the issuance of a trustee's deed under the sale complained of, and canceling the certificate, without prejudice to the right of Bates to have the trust deed in question foreclosed to enforce the payment of the balance due on the remaining West note after the crediting thereon of the amount above designated.

TELLER, J., acting Chief Justice, and BAILEY, J., concur.

ENYART v. PEOPLE. (No. 10098.)

(Supreme Court of Colorado. July 5, 1921.
Rehearing Denied. Nov. 7, 1921.)

1. Criminal law \S 459—Testimony that witness smelled and tasted liquor, and that it was whisky, held proper.

In a prosecution for selling whisky, a witness, though not shown to be an expert, was properly permitted to testify that he had smelled and tasted the liquor which the defendant had sold, and that it was whisky, such testimony not being expert testimony.

2. Criminal law \S 861—Jury properly permitted to look at and smell liquor alleged to be whisky.

In prosecution for selling whisky, the jury was properly permitted to look at and smell the liquor sold by defendant, to determine its character.

3. Criminal law \S 1048—Points not excepted to not considered.

Points not excepted to will not be considered on writ of error.

4. Criminal law \S 1064(1)—Points not made in motion for new trial not considered on writ of error.

Points not made in motion for new trial will not be considered on writ of error.

Department 2.

Error to Crowley County Court; Charles C. Wooldridge, Judge.

Frank Enyart was convicted of selling whisky, and he brings error, and applies for supersedeas. Supersedeas denied, and judgment affirmed.

J. Glenn Miller, of Ordway, for plaintiff in error.

Victor E. Keyes, Atty. Gen., and Charles H. Sherrick, Asst. Atty. Gen., for the People.

DENISON, J. The defendant was convicted of selling two quarts of whisky to one Vinyard.

[1] A witness was permitted to testify that he had smelled and tasted the liquor which the accused sold, and that it was whisky. It is objected that such evidence was improper. It was proper. It is objected that the witness was not shown to be qualified to judge. Such testimony is not expert testimony any more than that of one who has tasted salt or sugar, and testifies to what it is. Of his qualifications the trial court must decide. *People v. Kinney*, 124 Mich. 486, 83 N. W. 147.

[2] It is objected that the jury was allowed to examine and smell the liquor in court. Such evidence is called real or autoptic evidence. In general it is allowed, and is

usually the most reliable evidence. *Wig. Ev.* \S 1150-1160.

The cases are not in harmony. In *Wadsworth v. Dunnam*, 117 Ala. 661, 23 South. 699, it was said to be improper to allow the jury to take liquor to their room, for the reason that evidence should be in open court. In *State v. Coggins*, 10 Kan. App. 455, 62 Pac. 247, and *State v. Lindgrove*, 1 Kan. App. 51, 41 Pac. 688, it was held improper to allow the jury to examine and smell bottles of whisky. In *Commonwealth v. Brelsford*, 161 Mass. 61, 63, 36 N. E. 677, it was held improper to allow the jury to taste the liquor. In *People v. Kinney*, 124 Mich. 486, 83 N. W. 147, it was held proper for the jury to taste the liquor.

The question of taste is not before us. It is proper, however, we think, to permit the jury to look at and smell the liquor alleged to be intoxicating for the purpose of determining its character. It is like shutting their eyes to the truth to do otherwise.

[3, 4] Some other points are made, but they are either frivolous or not excepted to, or not in the motion for new trial. So we do not notice them here.

Supersedeas denied and judgment affirmed.

TELLER, Acting C. J., and WHITFORD, J., concur.

THOMPSON v. DILWORTH. (No. 10091.)

(Supreme Court of Colorado. July 5, 1921.
Rehearing Denied Nov. 7, 1921.)

1. Malicious prosecution \S 71(2)—Probable cause held question for jury.

In suit for malicious prosecution on a charge of larceny of goods on which defendant claimed to have a lien, on evidence that plaintiff was willing to pay what he owed, but there was a dispute as to amount, that defendant's employees were present and saw plaintiff take the goods after one of them let plaintiff into the shop for such purpose, that there was no attempt at concealment, and that defendant had knowledge thereof, held to make question of probable cause one for the jury.

2. Malicious prosecution \S 71(4)—Disclosure to district attorney held for jury.

In suit for malicious prosecution in which defendant claimed to have acted upon the advice of the district attorney, the question of whether defendant made a full statement of the facts to the district attorney held for the jury.

3. Malicious prosecution \S 21(2)—Advice of counsel without full disclosure no defense.

The advice of counsel is no defense in suit for malicious prosecution where the facts were not fully and fairly stated to the attorney.

(201 P.)

4. Malicious prosecution \S 32—**Finding of malice from want of probable cause justified.**

Facts showing want of probable cause are sometimes enough to justify the jury in finding malice.

5. Malicious prosecution \S 71(3)—**Malice held question for jury.**

In suit for malicious prosecution on a charge of larceny of goods taken by plaintiff while defendant claimed a lien thereon, evidence held sufficient for submission of issue of malice to jury.

Department 2.

Error to District Court, City and County of Denver; Neil F. Graham, Judge.

Suit by J. G. Dilworth against A. R. Thompson. Judgment for plaintiff, and defendant brings error, and asks for a supersedeas. Supersedeas denied, and judgment affirmed.

Edwin H. Park, of Denver, for plaintiff in error.

M. W. Spaulding, of Denver, for defendant in error.

DENISON, J. This was a suit for malicious prosecution on a charge of larceny.

There were three trials, each of which resulted in a verdict for plaintiff. There was a judgment on the third verdict. The defendant brings error and asks for supersedeas.

The only point argued is that the court erred in overruling motion for nonsuit. The grounds amount, in substance, to the following: (1) That the evidence shows probable cause. (2) That defendant acted upon advice of district attorney after full statement to him. (3) That no malice is shown.

[1] 1. Upon the first point—that the evidence shows probable cause—we think that it does not so certainly show it that the verdict cannot stand. Since the facts are not wholly undisputed, it is for the jury to say whether the defendant had reasonable ground to believe the plaintiff guilty.

The defendant had a lien on goods made by him for plaintiff, which the plaintiff took, and that taking in violation of that lien constituted the larceny, if there was any. There was a dispute about how much plaintiff owed for them; there was evidence that plaintiff was ready and willing to pay what he really owed, that some of defendant's employees were present, and at least one saw him take the goods; that one of them opened the door to let him into the shop for that purpose; that defendant was near by, perhaps in the same room; that all was done in the daytime, with no attempt at concealment, all of which defendant knew. If the jury believed this evidence, they might, and we think ought, to find no probable cause.

[2, 3] 2. As to the advice of counsel: Mr.

McGovern, the deputy district attorney, whom defendant consulted, testified that defendant did not inform him that the amount of the indebtedness of Dilworth to Thompson was in dispute between them. This was a material point concerning the bona fides of the taking, and the jury may have believed Mr. McGovern. If they did they could not say the defendant had fully and fairly stated the facts of the case to the attorney, and so the advice of counsel could not shield him.

[4, 5] 3. As to malice: Want of probable cause alone is enough—or, perhaps more correctly, the facts showing want of probable cause are sometimes enough—to justify the jury in finding malice (*Murphy v. Hobbs*, 7 Colo. 541, 553-555, 5 Pac. 119, 49 Am. Rep. 366; *Koch v. Wright*, 67 Colo. 292, 184 Pac. 363); but in this case other facts are shown from which malice might be found. Defendant testified that he told plaintiff he would have to pay the bill presented or face the district attorney; there was evidence that they were very angry at each other, and that even after plaintiff's discharge by the justice of the peace defendant sought to have him indicted or further prosecuted by the district attorney. If the jury believed this evidence, and found, as we have seen they may have rightly found, that there was no probable cause, then there was a prosecution without probable cause, through anger and to collect a debt, which would at least justify an imputation of malice.

Supersedeas denied and judgment affirmed.

TELLER, Acting C. J., and WHITFORD, J., concur.

SLACK v. BROWN. (No. 4444.)

(Supreme Court of Montana. Oct. 10, 1921.)

1. Appeal and error \S 230—**Timely objections necessary for review.**

Where preliminary motions and technical objections which should have been raised and settled in advance of the trial were not made by defendant until before the taking of the testimony on the day of trial, in violation of rules of court, they will receive no consideration on appeal.

2. Sales \S 182(4)—**Whether wheat accepted properly submitted to jury.**

In an action to recover the contract price of wheat sold to defendant, whether defendant was estopped to deny that the wheat was of the quality contracted for by reason of having accepted the same held properly submitted to the jury.

3. Trial \S 419—**Defendant must stand on motion for nonsuit if he desires to predicate error on its denial.**

Where defendant, who moved for nonsuit, proceeded with the defense, he cannot predi-

cate error upon denial of his motion when he himself made a record by his cross-examination of the very matter he contended was not in evidence.

Commissioners' Opinion. Appeal from District Court, Fergus County; Roy E. Ayers, Judge.

Action by H. I. Slack against D. E. Brown. Judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Belden & De Kalb, of Lewistown, for appellant.

Blackford & Huntoon, of Lewistown, for respondent.

JACKSON, C. Complaint by Slack on written contract, later amended to include quantum meruit for sale to Brown of 10,000 bushels No. 2 hard Montana wheat, at contract price and reasonable value of 90 cents per bushel.

Performance by plaintiff under the contract and that no payment had been made by defendant, although demanded, save the sum of \$2,500 paid prior to any delivery, alleged.

Defendant denied performance by plaintiff and alleged affirmative defenses to the effect that \$2,500 had been paid by defendant on the contract contemporaneously with its execution and delivery; that the demand for its return had been refused; that, although he had ordered plaintiff to perform his contract, it was not done; that defendant suffered damages in the sum of \$1,000 because of nonperformance by the plaintiff.

The reply denies the affirmative matters of the amended answer and sets up as further reply the entire transaction in detail, pleading estoppel as to 8,223-30 bushels.

A jury trial was had, the jury returning special findings of fact to the effect that plaintiff delivered the grain mentioned in his complaint under the contract, and that the defendant or his agent received the grain so delivered, and by acts, words, or silence led the plaintiff to believe it was being accepted under the contract. There was also returned a general verdict for practically the entire amount demanded. From the order denying a new trial defendant appeals.

[1] Many preliminary motions and technical objections which should have been raised and settled in advance of the trial were made by defendant before the taking of the testimony, on the day of the trial, that will receive no consideration here. They were in violation of the rules of court, and the complained-of defects were waived by the acquiescence of the defendant.

The testimony as a whole sustaining plaintiff's contention showed:

That on August 12, 1915, the parties entered into the written agreement. That \$2,500 was paid to plaintiff by defendant on the

contract before any delivery. That prior to signing the contract the parties made an investigation of the fields from which the wheat was to be cut to see if the grain was in condition to harvest and market. That defendant shelled and tried the grain, and both thought it fit to cut on August 15th. That on that day, after two loads had been gathered in, Brown and plaintiff concluded it was too soft and green to harvest and postponed harvesting for three days. That on August 15th, 18th, and 19th 2,020 bushels gross were delivered at the elevator of the defendant, in twelve loads, tickets for three of which were marked "green," "soft and green," "establishing no grade, smut," all of the other tickets for all of the grain delivered being without grade mark. That plaintiff, on receiving the ticket marked "soft and green," went to the elevator and interrogated Watts, defendant's agent, as to its meaning. He replied: "I don't know. That is the order of the boss." That thereupon plaintiff decided to wait until the grain was in the shock before further delivery. That on August 23d defendant authorized the following communication to plaintiff:

"Notice: To Henry I. Slack, Acushnet, Montana. You are hereby notified to complete your contract with David Brown, wherein you agreed to deliver ten thousand bushels of 2 hard Montana wheat at his elevator at Acushnet, Montana. And you are further notified that unless you complete the conditions of the said contract, executed and delivered on the 12th day of August, 1915, we will take such proceedings as we deem necessary, in the courts, with the state grain inspection department, and with the railroad over which you may attempt to ship your wheat so contracted for by David E. Brown. Dated August 23, 1915. John Jacob Jewell, attorney for David E. Brown."

That on September 30, 1915, defendant wrote his agent, Watts, as follows:

"Referring to Slack's deal, use good tactics. Talk kindly but profound. 1. First point, convey this idea. If he can't deliver grain of contract he may demand to pay contract price. 2. Shape him to make best out of it. You can pay list for enough to settle bill. His wheat must be a three at least get one and one-half pounds dockage. Use another theory. You can take ten thousand bushels. 3 H. at a 2 H. list price. If he would consent to this, then issue new contract and destroy old one. The list must absolutely demonstrate price upon day of transaction, and notify me at once. Deeply insist on one and one-half pounds dockage, so long as you taking a 3 H. at a 2 H. price. Divide your twenty-five hundred dollars by the list price. Upon day of settlement be sure your list is in for that day. Then add your dockage, that will give gross bushels. List to-day is seventy-four cents, twenty-five hundred divided by seventy-four cents equals the result of the division, will be net bushels, then add your dockage which should be one and one-half pounds, for shrinkage, and allowing one grade. D. E. Brown."

That the balance of the grain was delivered October 11th to 15th, inclusive; that all the grain delivered under the contract was No. 2 hard Montana wheat; that defendant had, without objection, received all of the wheat and sold the same, after mixing it with other wheat, as No. 3 hard Montana, without consulting the plaintiff.

[2] In spite of the pleaded estoppel the court permitted testimony for defendant to show that the wheat was of a lower grade than that demanded by the contract, and properly, under suitable instructions, put the matter into the hands of the jury to determine as a matter of fact if defendant was estopped.

[3] At the close of plaintiff's case defendant moved for a nonsuit, the material ground of which was failure of proof. It is true that under plaintiff's case in chief the only evidence bearing on the performance of the contract as to the grade of the grain was that the wheat was delivered on contract and "to fulfill the terms of my agreement with Mr. Brown." But defendant cured this defect himself, if it was a defect, by supplying the missing evidence in cross-examination of the plaintiff when called on rebuttal, as follows:

"I don't know whether Mr. Watts said he had any authority to accept anything less than No. 2. I don't know whether he said anything about that or not, but of course that was what my contract called for, what I was delivering No. 2. That is what I was supposed to deliver, No. 2. I didn't expect Mr. Brown to take anything short of No. 2."

Had defendant confidence in his motion for nonsuit, he would and could have stood on it. But he proceeded with the defense and certainly cannot predicate error when he himself made a record by his cross-examination of the very matter he contended was not in evidence.

This court has passed on the peril of proceeding after such a motion in *Pure Oil Co. v. C., M. & St. P. Ry. Co.*, 56 Mont. 266, 185 Pac. 150; *Melzner v. C., M. & St. P. Ry. Co.*, 51 Mont. 487, 153 Pac. 1019; *Yergy v. Helena Light & Ry. Co. et al.*, 89 Mont. 213, 102 Pac. 310, 18 Ann. Cas. 1201.

There are many assignments of error, some of which are based on the motions and objections had on the day of the trial, and prior to the taking of testimony. The others are based on the instructions given by the court. There is no merit to any of them. The case was fairly tried, and the jury properly found for plaintiff on the contract.

For the reasons herein stated, we recommend that the order appealed from be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

SMALLHORN v. FREEMAN. (No. 4461.)

(Supreme Court of Montana. Oct. 17, 1921.)

1. Judgment \S 143(3)—No error in refusing to set aside default.

Court did not err in refusing motion to set aside a default on the ground of inadvertence, mistake, or excusable neglect, where several years passed between the time the original complaint was served and time defendant defaulted by failing to answer, though defendant was an old lady residing in another state, and could not get about or quickly recall to her mind occurrences and transactions involved in the action.

2. Pleading \S 34(3)—Implications in pleading.

Under Rev. Codes, \S 6566, that allegations of a pleading are to be liberally construed, whatever is implied therein, or is reasonable to be inferred therefrom, is to be taken as directly averred, but there must be sufficient facts to furnish a basis for the inference.

3. Pleading \S 192(2)—Complaint may be uncertain and demurrable through failure to allege essential matters.

A complaint may be uncertain under Rev. Codes, \S 6534, permitting a demurrer therefor, by reason of its failure to allege matters essential, as well as by the doubtful meaning conveyed by what is alleged, and a complaint, to be proof against a special demurrer, ought to be at least sufficiently definite and certain to be on its face a bar to another suit on the same cause of action, and in suit for purchase price of land, should identify the land.

4. Vendor and purchaser \S 314(1)—Complaint for purchase price of land held insufficient in not alleging reasonable value was consideration.

A complaint, "(1) That at the time hereinafter mentioned the plaintiff was the owner of 320 acres of land in B. county of the reasonable value of \$3,200; (2) that on or about July 1, 1903, at the defendant's request, plaintiff sold and conveyed said lands to the defendant; (3) that the said sum has not been paid, nor any part thereof, although payment has been often demanded by plaintiff"—was deficient in failing to allege that "reasonable value" was the consideration for which transfer was made, and was subject to special demurrer, under Rev. Codes, \S 6534.

Commissioners' Opinion.

Appeal from District Court, Beaverhead County; Jos. C. Smith, Judge.

Action by James Smallhorn against Rebecca Freeman. From a default judgment for plaintiff and an order denying a motion to vacate and set aside the default, defendant appeals. Reversed and remanded.

C. E. Pew, of Helena, for appellant.

W. J. Cushing, of Dillon, and Norris, Hurd & Collins, of Dillon, for respondent.

POORMAN, C. Appeal by defendant from a judgment of default entered against her and from an order made subsequent to judgment.

The original complaint herein was filed on June 9, 1916, and personal service was had upon the defendant at Dillon, Mont., on that day. Subsequently demurrers were filed consecutively to the original complaint and the first, second, and third amended complaints, which demurrers were sustained. A fourth amended complaint was filed, and the demurrer thereto was overruled on November 18, 1918, and defendant given until December 18th to answer. This time was by stipulation extended to January 15, 1919. No answer was filed, and on January 16, 1919, the default of the defendant for want of answer was entered. On January 28, 1919, motion was made to set aside the default, which was denied on February 8, 1919, and judgment was entered on February 13th. Subsequently motion was made to vacate and set aside the default judgment, and for leave to renew the motion to vacate and set aside the default entered prior to the judgment. This motion was accompanied by affidavits and by a proposed answer. The court denied the motion.

[1] Various reasons are alleged in the affidavit why the default should be set aside, among them being:

"That said defendant is a woman of great age, to wit: more than 70 years of age, and that said defendant lives in Triunfo, Cal.; that her residence is on a ranch, or farm, lying at some distance from Los Angeles, Cal., and that it is impossible to get mail to and from her without considerable lapse of time; that because of her age and because of the fact that she is in feeble health, she is and was unable to come to Dillon, Mont., the place where her attorneys reside, for the purpose of furnishing said information; that she could leave California only during the summer season; that all the transactions involved in this action took place many years ago, and that defendant has difficulty in recalling them to mind; that because of her great age she is unable to recall matters with the same distinctness that she formerly could; that it is necessary that she take more time in which to recall to her mind occurrences and transactions involved in this action;" that counsel had written numerous letters to her, but were unable until after the time for answering had expired to "get more than a partial statement of facts in said case."

It is further stated in the affidavits that the defendant at no time had any intention of abandoning the case, and reference is made to the numerous demurrers that had been filed and the legal questions that had been fought out. It does not, however, appear that the then counsel for the defendant had made any effort to inform themselves of the facts in defendant's defense until after the overruling of the demurrer to the

fourth amended complaint. It is true that the record does not disclose any facts tending to show that it was the intention of the defendant to abandon her defense. It is likewise true that there is nothing in the record disclosing any intention on the part of the plaintiff to abandon his case. The counsel for defendant must have known at all times that eventually the defendant would be called upon to meet the facts alleged in the plaintiff's complaint. The fact that the defendant was an old lady residing at a distance would seem to indicate that they should have made some inquiry during the 2 years and 6 months and more that intervened between the service of the original complaint upon the defendant at Dillon, Mont., and the time granted defendant to answer the fourth amended complaint on January 15, 1919. It further appears that all of the attorneys then representing the defendant, Mr. Pew not appearing until after the judgment had been entered, and three of the attorneys representing the plaintiff, resided at Dillon, Mont., and that not any effort was made by the counsel for the defense to obtain, either by order or stipulation, any extension of time in which to file an answer. The other reasons assigned by counsel as to why the default should be set aside and as showing inadvertence or excusable neglect have been examined, and we are unable to find that the position of the defendant is sustained by the record, and that therefore the court did not err in refusing to grant the motion to set aside the default, on the ground of inadvertence, mistake, or excusable neglect.

The fourth amended complaint consists, as therein stated, of seven causes of action. Defendant demurred to each of these causes of action, except the first, both generally and specially. On examination, however, we reach the conclusion that the demurrer was properly overruled as to the first six causes of action. The seventh cause of action alleged in the complaint is as follows:

"(1) That at the time hereinafter mentioned the plaintiff was the owner of 320 acres of land in Beaverhead county, Mont., of the reasonable value of \$3,200; (2) that on or about July 1, 1903, at the defendant's request, plaintiff sold and conveyed said lands to the defendant; (3) that the said sum has not been paid, nor any part thereof, although payment has been often demanded by plaintiff."

[2] The demurrer to this cause of action is that the same does not state facts sufficient to constitute a cause of action; that it is ambiguous stating the reasons therefor; that it is uncertain; that it is unintelligible.

It is apparent from the complaint that the only description of the land alleged to have been sold to defendant is "320 acres of land in Beaverhead county, Mont." It is maintained by respondent that the answer of de-

defendant tendered cures any defect that may exist in the allegations of the complaint. The answer tendered contains denials, admissions, and allegations respecting each of the several causes of action, and for the most part sets up the affirmative defense of a contract with the plaintiff, entered into since the filing of the complaint respecting the subject-matter of this action; but this answer tendered is as general in its allegations respecting a description of the land as is the complaint; that is, it does not describe the land at all, except as to quantity.

If this default judgment is permitted to stand, and plaintiff should bring another action against defendant for the purchase price of a specific tract of land, the record here would furnish no defense whatsoever, although the latter tract might in fact be the same, or a part of the same, 320 acres referred to in this complaint. The burden would then be upon the defendant to show affirmatively that the demand then made was for the purchase price of the undescribed 320 acres of land referred to herein.

"Under the Code, it is a rule that the allegations of a pleading are to be liberally construed, with a view to substantial justice between the parties. Section 6566, Rev. Codes. 'Under favor of this rule, whatever is * * * implied in, or is reasonably to be inferred from, an allegation is to be taken as directly averred.'" *County of Silver Bow v. Davies et al.*, 40 Mont. 418, 424, 107 Pac. 81, 83.

But there must be sufficient facts stated to furnish a basis for the implication or inference. It is a familiar rule "that in declarations, certainty, at least to a common intent, is necessary."

[3] The statute (section 6534, Rev. Codes) authorizes a demurrer to be filed for the reasons stated in the demurrer filed herein. A complaint may be uncertain by reason of its failure to allege matters essential, as well as by the doubtful meaning conveyed by what is alleged. A complaint, to be proof against a special demurrer, ought at least to be sufficiently definite and certain to be on its face a bar to another suit on the same cause of action. The land herein should have been described in some manner so that the particular tract could have been identified. See opinion of Justice Sharswood in *Hester v. McNeille*, 6 Phila. (Pa.) 263.

[4] Neither does the complaint allege that the "reasonable value" was the consideration for which transfer was made, nor are there any facts stated or circumstances given from which such fact may be implied, inferred, or presumed. Aside from facts and circum-

stances that would call into requisition the doctrine of estoppel, the equity power of a court, or in cases of fraud or in the settlement of estates or in matters of trust, the title to real estate may be transferred only by a definite written instrument, supported by a lawful consideration. Is a court to presume, imply, or infer, without any statement of facts except the reasonable value of the land at the time of the conveyance, that the owner deliberately executed, acknowledged, and delivered a deed and surrendered possession of his land without some definite understanding as to the consideration he was to receive therefor? May a court of its own motion presume the parties left the consideration to the uncertainty of future ascertainment of value? If the "reasonable value" was the consideration, although undetermined at the time, why not so allege; why leave to conjecture that which may be made certain in a transaction of such importance as the conveyance of real estate?

Conceding that title may be transferred without agreement as to specific consideration, and that the reasonable value of the land might control, yet the fact remains that the parties must have contracted with reference to some consideration, and some fact should be alleged which shows the relation between the purchaser and the consideration for which judgment is demanded against him.

The date of this real estate transaction is stated in the complaint as July 1, 1903, but plaintiff demanded and was granted interest from June 1, 1903. No reason appears why plaintiff was awarded interest for this extra month. This alone, however, if error, would be insufficient to justify a reversal, for the error could be cured.

We believe the special demurrer to the seventh cause of action alleged in the fourth amended complaint should have been sustained. It is assumed by the respondent that the default should be set aside if the respondent has failed to state a cause of action in either of the seven counts set out in his fourth amended complaint. We do not stop to consider whether this assumption is correctly made. We adopt it as counsel's theory of the case and dispose of it accordingly.

We recommend that the judgment and order appealed from be reversed, and the cause remanded for further proceedings.

PER OURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded for further proceedings.

WORTMAN et al. v. LUNA PARK AMUSEMENT CO. (No. 4436.)

(Supreme Court of Montana. Oct. 10, 1921.)

1. Ejectment §9(3)—Plaintiffs must prevail upon integrity of own title.

In ejectment, plaintiffs must prevail, if at all, upon the integrity of their own title, and not the infirmity of the defendant's.

2. Appeal and error §1048(6)—Improper cross-examination mere technical violation, and not reversible.

In ejectment, error in permitting defendant to cross-examine plaintiffs' witness for the purpose of showing, not only that plaintiffs had no title to the property in question, but that title to the property reposed in defendant, was nothing more than a technical violation of the rule of cross-examination, assuming that plaintiffs did not open the door sufficiently to justify such cross-examination, and therefore not reversible error.

3. Corporations §404(1), 439—When corporation or directors may sell all of its assets.

At common law a solvent and prosperous corporation could sell all of its assets only by unanimous consent of its stockholders, but if insolvent and unable to execute the purposes of its creation, the directors, if the best interests of the stockholders demand it, could sell all of the assets; and, regardless of solvency, directors in the proper pursuit of its business and within the purposes of its creation could sell any or all assets, even against the dissent of a minority or perhaps a majority of the stockholders.

4. Corporations §404(1)—Statute concerning sale of assets of corporation held not to prevent a sale of part of assets by directors alone.

Rev. Codes, § 3897, only relates to a sale of all, rather than a part, of corporate property, and was not intended to limit or restrict the powers given directors to sell property under sections 3833 and 3889.

5. Corporations §409—Directors held authorized by statute to sell lease of park.

Directors of a corporation leasing a park for entertainment purposes held entitled to sell such lease, where such sale did not terminate the existence of the corporation, under Rev. Codes, §§ 3833, 3889, 3897.

Commissioners' Opinion. Appeal from District Court, Silver Bow County; John V. Dwyer, Judge.

Action by George H. Wortman and Louis Frank, a copartnership doing business under the firm name and style of the George H. Wortman Company, against the Luna Park Amusement Company. From a judgment for defendant and an order denying a motion for new trial, plaintiffs appeal. Affirmed.

Earle N. Genzberger and W. D. Kyle, both of Butte, for appellants.

J. L. Templeman, Sydney Sanner, and Fred J. Furman, all of Butte, for respondent.

SPENCER, O. Action in ejectment. The complaint herein contains the usual allegations of ownership in the plaintiff of certain real property, particularly described as "certain portions of sections 29 and 32, township 3, north of range 7 west, as follows: Lake Avoka situated in the northeast quarter of section 29, township 3, north of range 7 west," together with certain improvements situated thereon—possession thereof by defendant, demand and refusal to deliver possession, and claim for damages. The answer tenders the general issue. At the close of plaintiff's case, motion for nonsuit was granted, and judgment entered accordingly. Motion for a new trial was denied, and appeal is from the order denying the motion and from the judgment.

The evidence discloses that on May 22, 1911, Tidewater Investment Company, a corporation (hereinafter referred to as Tidewater Company) made and entered into an agreement with Clearmont Amusement Company, a corporation (hereinafter referred to as Clearmont Company) by the terms of which the Tidewater Company leased and let unto the Clearmont Company certain real property situated in Silver Bow County, Mont., a short distance south of the city of Butte, for a period of 15 years, ending March 31, 1926, and commonly known as Lake Avoka, together with certain privileges to be exercised and enjoyed in connection with the use thereof. On April 16, 1912, the Tidewater Company assigned by indorsement thereon all its right, title, and interest in the lease to the defendant, and on the same date deeded to defendant certain lands, which included the lands embraced within the terms of the lease. The lease, among other things, provided in substance that the Clearmont Company should have the right to erect a "dancing pavilion or other improvements designed for public amusement" upon the leased premises, but that such right should be exercised on or before April 1, 1912, and the work to make such improvements diligently prosecuted and completed within a reasonable time thereafter, and that if not so done and prosecuted such right could be declared forfeited by the Tidewater Company, lessor. It was further provided in the lease that if the Clearmont Company did not exercise its right to so construct other and additional improvements the Tidewater Company then had the option for a period of one year from and after April 1, 1913, to purchase "the improvements, equipment, fixtures, and all property of the party of the second part [Clearmont Company] had or enjoyed in connection with the premises aforesaid, excluding therefrom only the stock of merchandise of

(201 P.)

the party of the second part then on hand, for the sum of \$10,000 cash." The evidence further discloses that on November 19, 1913, the defendant notified the Clearmont Company that as assignee of the Tidewater Company it elected to exercise its option to purchase, and tendered \$10,000 cash, and that on November 15, 1913, at a special meeting of the board of directors of the Clearmont Company, the cash tender by the defendant was accepted, and the president and secretary authorized to execute the necessary instruments to consummate the sale. Pursuant to such authority a bill of sale was thereupon made, executed, and delivered to the defendant company, which then went into possession. On May 4, 1914, at the annual meeting of the stockholders of the Clearmont Company, all the acts of the directors, stockholders, and officers of the company from the earliest time to that date were ratified, confirmed, and approved in every particular. On May 4, 1916, appellants herein obtained a verdict in an action wherein they were plaintiffs and Clearmont Amusement Company was defendant, and judgment was subsequently made and entered thereon. On June 23, 1916, execution was issued, and thereafter the sheriff of Silver Bow County, under authority thereof, pretended to sell to appellants the leasehold interest of the Clearmont Company, as evidenced by the lease hereinabove mentioned, together with all improvements situated thereon, for the sum of \$7,500, and on July 22, 1916, executed certificate of sale thereof to these appellants. On July 26, 1917, the then sheriff of Silver Bow county made, executed, and delivered to the appellants a deed for the property mentioned in his return of sale under the execution. It is further shown that the reasonable rental value of the property involved herein is \$1,500 per annum.

Appellants have specified 13 assignments of error, but all are comprehended in the solution of two questions: First, did the Clearmont Company have title to the property levied upon and sold under execution in June, 1916, at the time of such levy and sale? and, second, was it error to permit defendant to cross-examine plaintiff's witness for the purpose of showing, not only that plaintiff had no title to the property in question when this action was commenced, but affirmatively showing that title to the property reposed in defendant?

[1, 2] Discussing these questions in inverse order, it is sufficient to say of the latter that appellants must prevail, if at all, upon the integrity of their own title, and not the infirmity of their adversary's (*McKinstry v. Clark et al.*, 4 Mont. 370, 1 Pac. 759; *City of Helena v. Albertose et al.*, 8 Mont. 499, 20 Pac. 817, and hence, at the time of the levy of the writ of execution and the pretended sale by the sheriff of Silver Bow county un-

der the writ, if the Clearmont Company had no title to the property levied upon, the sale was an empty proceeding, the appellants obtained no title, and a nonsuit was inevitable. We think that the appellants in direct examination of their own witness opened the door sufficiently to justify the cross-examination complained of, but, if not, it cannot be said the error was more than a technical violation of the rule of cross-examination upon a vital issue in the case, and therefore not reversible error. *Hanson Sheep Co. v. Farmers' and Traders' State Bank*, 53 Mont. 324, 163 Pac. 1151.

[3-5] The remaining question worthy of consideration in the determination of these appeals involves the applicability of section 3897, R. C., invoked by appellants in opposition to the validity of the sale of the property involved herein by the Clearmont Company to the respondent. In the absence of other objection, if the provisions of section 3897, R. C., do not sustain the contention of appellants in this regard, clearly they were without title upon which to base their action. Prior to the enactment of section 3897, *supra*, this court had occasion to construe the various statutes pertaining to the sale of all or a portion of its property by corporations generally (*Forrester et al. v. B. & M. Mining Co.*, 21 Mont. 544, 55 Pac. 229, 353), and in an elaborate and exhaustive opinion by Mr. Justice Pigott laid down both the statutory and common-law rules governing the powers of directors upon such sales. Section 3897, *supra*, was thereafter enacted as a curative measure to obviate what appeared to be patent incongruities in the then existing law, and to prevent small minority stockholders from thwarting the will of the majority in making a sale otherwise valid under common law and for the best interest of the corporation. To summarize some of the rules of common law so far as applicable to the instant case, a solvent and prosperous corporation could sell all of its assets only by unanimous consent of its stockholders; if insolvent and unable to execute the purposes of its creation, by the directors if the best interests of the stockholders demanded; in the proper pursuit of its business, and within the purposes of its creation, sell any or all assets even against the dissent of a minority or perhaps a majority of its stockholders. *Forrester v. B. & M. Mg. Co.*, *supra*. In this case, it is not suggested in the record that the sale in question was of all the assets of the corporation, nor that the corporation was insolvent, but the record affirmatively shows that subsequent to the sale a new board of directors was elected, and the Clearmont Company continued to live as a corporate entity. The proceedings leading up to and the consummation of the sale of the property to respondent were not in harmony with the general scope and meaning of section 3897,

supra, which comprehends a sale of all rather than a part of the corporate property, but rather in consonance with the proviso contained therein, reserving to the corporation and the board of directors the powers granted to them by the common law, and enunciated in a general way in sections 3833 and 3889 of the Revised Codes. Nor can it be said that section 3897, R. C., intended to limit or restrict those powers, for the title of the act itself declares its purpose to be "to enlarge the powers of corporations as to disposing of, or selling their property," etc., so that its general intent was to grant the corporation more power rather than to limit or restrict, and as further emphasis of this general intent reserved the common-law powers by a special proviso contained therein. Sections 3889 and 3833, R. C., in substance and so far as applicable here, declare that corporations have power to purchase, hold, and convey real and personal property, and that they shall conduct the affairs of the corporation through a board of directors. By failing, either specifically or by fair implication, to alter the common-law rules the common law must still remain the rule of decision (*Forrester v. B. & M. Mg. Co.*, supra, and citations), and in the instant case the board of directors of the Clearmont Company, acting under power granted by both the common law and statute, were clearly within their rights, and hence it is of no importance whether respondent assumed to acquire its title by virtue of an option reserved in the lease or otherwise, for the undisputed record is that an offer of \$10,000, accompanied by tender, was made by respondent, accepted by the Clearmont Company, and the property delivered, which is all the law required to make a valid sale. We conclude, therefore, that the Clearmont Company made a valid sale of the property in question to the respondent prior to the levy of execution upon the same property, on behalf of appellants, and that appellants were therefore without title upon which to base their action.

We find no error in the record, and therefore recommend that the judgment and order appealed from be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment and order appealed from be affirmed.

HEFFRON v. THOMAS et al. (No. 4867.)
(Supreme Court of Montana. Oct. 3, 1921.)

1. Attachment \Leftrightarrow 4—Pleading \Leftrightarrow 49—Nature of action determined from complaint.

The nature of an action is to be determined from the complaint alone, and an inquiry into

its sufficiency to sustain an attachment may not go further than to ascertain whether the action is upon a contract, express or implied, for the direct payment of money, under Rev. Codes, §§ 5105, 6656.

2. Attachment \Leftrightarrow 4—Action held not one authorizing attachment.

Where plaintiff purchased automobile and paid therefor, and a third person recovered the same in claim and delivery, a complaint, alleging that defendants assumed to have the lawful right to sell and transfer the title and ownership of the automobile, when in fact they did not have title to it, and that plaintiff was damaged in the sum paid for the automobile, and praying for the purchase price and interest from the date of sale, would not support an attachment, under Rev. Codes, §§ 5105, 6656.

Appeal from District Court, Silver Bow County; Jos. R. Jackson, Judge.

Action by Fred Heffron against George V. Thomas and others. From an order dissolving a writ of attachment, plaintiff appeals. Affirmed.

Frank L. Riley, of Butte, for appellant.
Harry Meyer, of Butte, for respondents.

COOPER, J. This appeal is from an order of the district court of Silver Bow county, dissolving a writ of attachment. From the allegations of the complaint it appears that on the 3d day of December, 1920, the plaintiff purchased of defendants a seven-passenger Dodge automobile, took it into his immediate possession, and paid therefor the agreed price of \$900. On the 18th day of January, 1921, in an action brought by one Bertha Brosinke in claim and delivery, against the plaintiff, it was taken from his possession by the sheriff of Silver Bow county under process in that action. It is alleged that the defendants assumed to have the lawful right to sell and to transfer the title and ownership of the automobile, when in fact they did not have title thereto; and that the plaintiff has been damaged in the sum named. The prayer is for the purchase price and interest from the date of sale. A writ of attachment was issued and levied upon the accounts of the defendants, deposited with the First National Bank of Butte.

[1, 2] Appellant insists in argument that the suit was brought to rescind the executed sale and to recover the purchase price because of a breach of warranty of title. The nature of the action is to be determined upon the complaint alone. *Kyle v. Chester*, 42 Mont. 518, 113 Pac. 749, 37 L. R. A. (N. S.) 230. By the same token the inquiry into its sufficiency to sustain the attachment "may not go further than to ascertain whether the action is upon a contract, express or implied, for the direct payment of money." *Union Bank & Trust Co. v. Himmelbauer*, 56 Mont. 82, 181 Pac. 332. From the com-

plaint it is plain that the transaction involved nothing more than a sale at a stipulated sum, payment and delivery of possession. The warranty implied by law was that the title of the defendants was then good and unincumbered. Rev. Codes, § 5105. For a breach of warranty of title to personal property, section 6060 of the Revised Code fixes the damages which may be recovered as "the value thereof to the buyer when he is deprived of its possession, together with any costs which he has become liable to pay in an action brought for the property by the true owner." To this the plaintiff is limited. As set forth in the complaint, the transaction was not an agreement by which was acknowledged an unconditional obligation to repay to plaintiff the purchase price of the machine, with interest from date of sale—in other words, a contract, express or implied, for the direct payment of money upon which an attachment is authorized by the provisions of section 6656 of the Revised Codes. *Ancient Order of Hibernians v. Sparrow*, 29 Mont. 132, 74 Pac. 197, 64 L. R. A. 128, 101 Am. St. Rep. 563, 1 Ann. Cas. 144; *Beartooth Stock Co. v. Grosscup*, 57 Mont. 595, 189 Pac. 773; *Carter v. Bankers' Ins. Co.*, 58 Mont. 319, 192 Pac. 827.

The order appealed from is affirmed.

BRANTLY, C. J., and REYNOLDS, HOLLOWAY, and GALEN, JJ., concur.

ROBINSON v. GORDON. (No. 4473.)

(Supreme Court of Montana. Oct. 17, 1921.)

1. Judgment \S 949(1)—Jurisdiction of court should be pleaded in pleading judgment on which a right is founded.

In pleading a judgment or determination of the court upon which a right is founded, it is necessary, under Rev. Codes, § 6571, that the jurisdiction of the court be set forth or that it be alleged that the judgment or determination was duly given or made or that equivalent words be used.

2. Malicious prosecution \S 51—Pleading order dismissing complaint held sufficient.

In a suit for malicious prosecution, the allegation that the justice of the peace, "in due manner, in due course of law, made an order dismissing the complaint" against plaintiff, held sufficient, without an allegation that the order "was duly given or made," as Rev. Codes, § 6571, provides, since the right of action is not founded upon the validity of the order.

3. Malicious prosecution \S 72(2)—Instruction on probable cause held properly refused.

In suit for malicious prosecution, where the justice of the peace dismissed the complaint without holding plaintiff for trial upon a different charge under Rev. Codes, § 8090, the

court properly refused defendant's instruction that the discharge of one accused of crime because he was not guilty of the offense charged will not show want of probable cause, if he was actually guilty of a different offense for which he should have been prosecuted.

Appeal from District Court, Silver Bow County; J. J. Lynch, Judge.

Action by E. S. Robinson against Mike Gordon. From judgment for plaintiff and from order overruling motion for new trial, defendant appeals. Affirmed.

William Meyer, of Butte, for appellant.

A. B. Melzner and Ed. Fitzpatrick, both of Butte, for respondent.

REYNOLDS, J. Action was brought to recover damages for alleged malicious prosecution. Verdict was rendered in favor of plaintiff, and judgment entered in accordance therewith. A motion for new trial was overruled. Defendant has appealed from the judgment and from the order overruling the motion.

Several assignments of error are made, but appellant has expressly waived all but two of them. One of these assignments is that the complaint fails to state facts sufficient to constitute a cause of action. The alleged defect in the complaint is the insufficiency of the statement as to the order of the justice court dismissing plaintiff on preliminary examination on a charge of grand larceny that had been lodged against him by defendant. The allegation of the complaint in this respect is as follows:

"The said justice of the peace, in due manner, in due course of law, made an order dismissing the complaint and releasing said plaintiff from further prosecution under said complaint."

Defendant urges that this allegation is insufficient for the reason that it is not alleged in *hæc verba* that the order of the justice of the peace was "duly given or made." This contention is based upon section 6571 of the Revised Codes, which reads as follows:

"In pleading a judgment, or other determination of a court, officer, or board, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made."

Defendant cites the following four cases heretofore decided by this court in support of his argument as to the proper interpretation of this statute: *Harmon v. Comstock H. & C. Co.*, 9 Mont. 243, 23 Pac. 470; *Weaver v. English*, 11 Mont. 84, 27 Pac. 396; *Walter v. Mitchell*, 25 Mont. 385, 65 Pac. 6; *State v. Lagoni*, 30 Mont. 472, 76 Pac. 1045.

It is to be noted that in each of these cases the judgment pleaded was the basis of the right upon which the action was founded.

In *Harmon v. Comstock*, *supra*, plaintiff's right of action depended upon the validity of an attachment, and of course the validity of the attachment depended upon the jurisdiction of the court. In *Weaver v. English*, *supra*, defendant pleaded a judgment as *res adjudicata*; his right depended on the validity of the judgment. The plea was held insufficient because it failed to show the jurisdiction of the court rendering the judgment pleaded, nor was it alleged that the judgment was duly given or made. In *Walter v. Mitchell*, *supra*, the right of action was based upon the obligation of defendant, as contractor in charge of the Insane Asylum at Warm Springs, to receive an insane person upon order of a court; this obligation was dependent upon the validity of the order of commitment. It was held that the pleading failed to establish the jurisdiction of the court or that the order of commitment was duly given or made. In *State v. Lagoni*, *supra*, the right of action depended upon the validity of a bail bond given upon the order of a justice of the peace to assure the appearance of defendant who had been released from custody. If the order was without jurisdiction, the bond was *nudum pactum*, and therefore not enforceable. It was held that the pleading was insufficient because it neither showed jurisdiction of the court requiring the bond, nor that the order requiring the bond was duly given or made.

Prior to the enactment of this statute it was necessary, in all cases where the right of action depended upon the validity of a judgment, to allege facts showing that the court rendering the judgment had jurisdiction so to do. The statute was evidently enacted to simplify the pleading of a judgment or order, and provide that such judgment or order may be stated to have been duly given or made as being sufficient to establish the jurisdiction of the court and validity of the judgment or determination.

"Of course, stating that an order was 'duly given or made' is no more than the statement of a conclusion of law, but it is made sufficient by statute, and is for the purpose of obviating the necessity of pleading the jurisdictional facts as the common law requires." *State v. Lagoni*, *supra*.

[1, 2] From the foregoing it is clear that in pleading a judgment or determination of the court upon which a right is founded, it is necessary that the jurisdiction of the court be set forth, or that it be alleged that the judgment or determination was duly given or made or that equivalent words be used. In this case we do not deem it necessary to decide whether or not the words used in the complaint are equivalent to the words set forth in the statute for the reason that in this case the right of action does not depend upon the jurisdiction of the court and the validity of the order dismissing the charges

against defendant and releasing him from further prosecution. In a case of this kind the importance of pleading the action of the court in dismissing the charges and releasing the defendant rests in the fact that it must appear that the proceedings which were commenced against the plaintiff terminated favorably to him. Plaintiff is not predicating his action upon the validity of the order in question, but upon the fact that the action was brought against him maliciously, without probable cause, and was terminated in his favor. This view of the case is sustained by the decision of this court in *Stephens v. Conley*, 48 Mont. 352, 138 Pac. 189, Ann. Cas. 1915D, 958. In that case one of the three causes of action was for malicious prosecution. The allegation was that—

"Stephens was, by an order of the district court, discharged from custody and from prosecution on said charge."

This was held to be sufficient because it disclosed the fact that the proceedings had terminated favorably to Stephens. In this case the complaint clearly shows such favorable termination of the proceedings against plaintiff, and is therefore sufficient in this regard.

[3] The other assignment of error relied upon is the refusal of the court to give to the jury defendant's offered instruction, reading as follows:

"The discharge of one accused of crime because he was not guilty of the offense charged will not, if he was actually guilty of an offense different from that under which the prosecution was instituted, and under which he should have been prosecuted, show want of probable cause so as to sustain an action for malicious prosecution."

We think this instruction was too broad. The effect of the instruction would have been to advise the jury that, if it found that plaintiff was actually guilty of any offense regardless of what it was and whether or not it related to the facts involved in the criminal charge preferred against plaintiff by defendant, and regardless of whether or not there was any judicial determination of the matter, then plaintiff's discharge on the accusation of defendant would not show want of probable cause so as to sustain an action for malicious prosecution. Under the statute of this state, on preliminary examination before a justice of the peace, the justice, if the evidence warrants it, may hold the accused for trial upon a different charge than that for which complaint was filed. Section 9300, Rev. Codes. If upon the preliminary hearing the justice of the peace had held plaintiff for trial upon any charge whatever, which at the time of the trial of this action was still pending or upon which plaintiff had been convicted, a different question might be presented to this court, but such was not the case. At the time of trial there was not any judi-

cial determination in force against plaintiff holding him for trial on any criminal charge, nor had he been convicted of any offense. It certainly was not within the province of the jury to indulge in an independent investigation on its own account, in a civil case, to determine whether or not plaintiff perchance was guilty of some offense against the laws of the state or nation different from that involved in the prosecution which had been instituted by defendant. The court was right in refusing to give this offered instruction.

For these reasons the judgment and order overruling the motion for new trial are affirmed.

Affirmed.

BRANTLY, C. J., and COOPER and HOLLOWAY, JJ., concur.

CAMERON v. JUDITH MERCANTILE & CATTLE CO. (No. 4469.)

(Supreme Court of Montana. Oct. 17, 1921.)

1. Master and servant ¶205(1)—Risk assumed by servant.

A servant assumes a hazard which is incident to the employment, but the doctrine presupposes that the employer has discharged his primary duty to exercise ordinary diligence to provide a reasonably safe place and appliances, and a sufficient number of reasonably competent fellow employees.

2. Master and servant ¶217(10)—Risk assumed by servant continuing work with knowledge of danger.

The defense of assumption of risk is available when injury has resulted from a hazard brought about by employer's failure to discharge his primary duty to provide a reasonably safe place and appliances and a sufficient number of reasonably competent fellow employees, provided the employee is aware of the increased hazard or it is so obvious that an ordinarily prudent person should have known and appreciated it, and yet continues in the employment without protest.

3. Master and servant ¶217(18)—Farm worker injured by unguarded saw held to have assumed risk.

An experienced farm worker familiar with circular saws who knew that employer's saw was not guarded and appreciated the danger incident to working with it on ground covered with snow and who voluntarily acted as sawyer, held to have assumed risk precluding recovery for injury sustained when he slipped while assisting in moving a stick of unusual size causing arm to strike and be cut by saw.

Appeal from District Court, Fergus County; Jack Briscoe, Judge.

Action by E. J. Cameron against the Judith Mercantile & Cattle Company, a corporation. Judgment of nonsuit, and plaintiff appeals. Affirmed.

E. K. Cheadle, of Lewistown, for appellant. Belden & De Kalb and Merle C. Groene, all of Lewistown, for respondent.

BRANTLY, C. J. Plaintiff brought this action to recover damages for an injury to his right forearm through the alleged negligence of the defendant. At the trial the court sustained defendant's motion for nonsuit. Judgment was entered accordingly. Plaintiff has appealed.

On December 12, 1917, plaintiff and four or five others, employees of the defendant, were by direction of John Hughes, defendant's manager and foreman, engaged in sawing its yearly supply of stove wood. They were using a circular saw, mounted on a frame and propelled by a gasoline engine. The foreman was not present at the time, and had given these employees general directions to saw up a pile of wood which had been hauled in, consisting of sticks of different sizes and lengths, varying from 5 to 14 inches in diameter and from 5 to 20 feet in length. In giving his directions, the foreman did not assign to each of the employees his particular part of the work. When work began, the plaintiff chose to perform the duty of sawyer. The sticks were passed from left to right by the others, who placed them upon a swinging table or carrier attached to the saw frame, and assisted the plaintiff to pass them along the carrier and to hold them in place while he moved them against the saw. The sticks were cut into 14-inch blocks, one of the other employees carrying them away as they were cut off. The saw was about 30 inches in diameter. Some of the sticks were so large that it would not cut them entirely through, and it was necessary to turn them over and saw them on the other side. The saw and engine stood in the yard, and were not under shelter of any kind to protect them from snow or rain. Some time before the day of the accident snow had fallen; it had partly melted and again frozen. During the previous night other snow had fallen so that the ground where it was necessary for plaintiff to stand while operating the saw, was covered with snow, partly that which was frozen and partly that which had fallen on the previous night. While he and his associates were engaged in placing a large stick—about 14 inches in diameter—on the saw frame and moving it to the right far enough to allow the proper length to be cut, the plaintiff's feet slipped, and, in an effort to save himself from falling, he struck his right forearm against the saw, which cut and lacerated the muscles and tendons near the wrist. The saw frame was not fitted with

any guard or safety appliance to prevent the sawyer from accidentally coming in contact with the saw.

The complaint alleges that the defendant was negligent in not having the saw frame equipped with a guard or other safety appliance, in not providing a shelter to protect it and the ground from snow and ice, and in requiring plaintiff to cut sticks of the length and size of those he was required to cut, in that the saw was designed only for the cutting of cordwood, and in that, though it knew, or in the exercise of ordinary care and diligence should have known, of all these conditions, the plaintiff did not know and had no means of knowing the danger to which he was exposed.

One of the grounds of nonsuit was that the evidence introduced by the plaintiff disclosed, as a matter of law, that he assumed the risk of the danger incident to the work in hand. Whether he did or not is the only question submitted for decision.

[1, 2] The rule is well established in this jurisdiction that the defense of assumption of risk may be interposed by the employer as a bar to an action for a personal injury to, or the death of, an employee caused by a hazard which is incident to the particular employment. It presupposes primarily that the employer has discharged his full duty to exercise ordinary diligence to provide a reasonably safe place for the work, reasonably safe and suitable appliances, and a sufficient number of reasonably competent fellow employees to enable him to perform his work with reasonable safety. The rule is also well established that the defense is available when the injury has resulted from a hazard brought about by the failure of the employer to discharge his primary duty in any of the particulars referred to above, provided the employee is aware of the increased hazard, or it is so obvious that an ordinarily prudent person, placed in the same circumstances, should have known and appreciated it and yet continues in the employment without complaining or protesting. *Sorenson v. Northern Pac. Ry. Co.*, 53 Mont. 268, 163 Pac. 560, and cases cited. For a somewhat extended discussion of all the phases of this subject, reference is made to the case of *Choctaw, etc., R. Co. v. Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837, 7 Ann. Cas. 430, and notes to this case in 7 Ann. Cas. 430.

[3] The plaintiff was the only witness who testified to the circumstances surrounding the accident. He was then about 26 years of age and had been employed in doing farm work for about 13 years. For the three years preceding the accident he had been in the employment of the defendant, and was familiar with the different kinds of work persons so employed are required to do. It was customary for those employed on farms in this com-

munity to saw the yearly supply of wood during the winter. The saw and engine were in the yard near the farmhouse and had been there in the same position throughout the 3 years of plaintiff's employment where every one could see them. Theretofore plaintiff had assisted in using them to saw wood. On these occasions he had not acted in the capacity of sawyer, but had assisted in bringing up the wood and placing it on the carrier, the other employees alternately acting as sawyers. He was familiar with the machinery, however, and understood its operation. He was not directed by the manager to act as sawyer, but voluntarily chose to act in that capacity. The pile of wood was lying near by. Whether he took part in cutting and hauling it, the evidence does not show. He began work knowing what was required of him. He knew that the saw was not guarded. He knew of the depth of the snow and the condition of the ground where he was obliged to stand. He had observed two other machines which were in use on neighboring farms which were equipped with guards, and knew the purpose of this equipment. There is no suggestion in his testimony that he did not understand and fully appreciate the dangers incident to the work.

The undisputed evidence does not furnish the basis for any other conclusion than that the plaintiff assumed the risk. Independent of a statutory requirement, it is not negligence per se for an employer to leave his machinery uncovered or otherwise unguarded. Whether this constitutes negligence depends upon the circumstances of each particular case, the nature of the work, the degree of exposure, and the knowledge which it appears the employee had of the existing conditions. 28 Cyc. 1133, 1134. Being a mature man and having had ample opportunity to observe, the plaintiff knew that the danger was greater than it would have been if the machine had been provided with a guard. He knew that snow and ice were on the ground, and, having lived in Montana where there is much snowfall, he is presumed, to have known that his footing was rendered less secure by it. The pile of wood was in plain view when he went to work, and if, in fact, the machine was not suited to sawing sticks of the size he was required to saw, he had ample opportunity to know what additional risk there was in sawing it. Under these circumstances, with full knowledge of the increased hazard, he voluntarily entered upon the work, assuming the most hazardous part of the employment, and thus the increased risk.

The judgment is affirmed.
Affirmed.

REYNOLDS, COOPER, and HOLLOWAY,
JJ., concur.

McEWEN v. NEW YORK LIFE INS. CO.
(L. A. 6533.)(Supreme Court of California. Sept 27, 1921.
On Application for Rehearing, Oct. 27, 1921.)**1. Insurance** \S 291(7)—Answer omitting mention of accidents held answer that no accidents were sustained.

Answer of applicant for insurance in medical examination to the question, "What illnesses, diseases, or accidents have you had since childhood?" which omitted all mention of accidents was in effect an answer that no accidents had been sustained, and, if applicant had been seriously injured in an accident, such answer was false.

2. Appeal and error \S 195(1)—Statement of law on appeal law of case.

A statement of law by District Court of Appeal on second appeal became law of case, and was binding on trial court on third trial.

3. Evidence \S 377—Witnesses \S 255(1), 258—Memorandum held not admissible, nor proper to be used in refreshing memory.

A witness cannot refresh his memory or testify from a memorandum, unless it is made to appear that it complies with the qualifications specified in Code Civ. Proc. \S 2047, and court did not err in sustaining objections to the offer of a memorandum in evidence, or the use of such memorandum to refresh memory of witness who had no independent recollection of the fact, where the only fact disclosed in connection with the memorandum was that it was signed by the witness; there being no showing that the witness wrote or dictated it, or that it was written at a time when it was fresh in his memory, or that he knew the fact was correctly stated therein, especially where it was dated nine years after the happening of the event.

4. Evidence \S 77(6)—No presumption against insurance company failing to call physician as witness.

In action on life policy, defended on ground that insured made false statements in medical examination, no presumption arose that the examining physician's testimony would have been adverse to defendant from the fact that defendant failed to call the physician as a witness, and objected to plaintiff's counsel questioning the physician, under Code Civ. Proc. \S 1963, subds. 5, 6, particularly in view of the fact that physician was unable to recall the medical examination, and it did not appear that there was any legally competent memorandum which he might use to aid him in testifying.

On Application for Rehearing.

5. Tender \S 26—Directed verdict held not to deny plaintiff's right to recover fund deposited by defendant in court.

In an action by beneficiary on life policy, where defendant set up fraud on the part of the insured and deposited the amount of premiums paid in court, on the theory that de-

fendant had a right to rescind, a directed verdict and judgment for defendant held not to deprive plaintiff of a right to the money deposited in court; the verdict and judgment necessarily carrying the implication that such money should be given to the party entitled thereto.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Rachel A. McEwen against the New York Life Insurance Company. Judgment for defendant, and plaintiff appeals. Affirmed.

See, also, 183 Pac. 373.

Murphey & Poplin, of Los Angeles, for appellant.

Meserve & Meserve and Paul H. McPherrin, all of Los Angeles, for respondent.

LENNON, J. This action was instituted for the recovery of the amount of a life insurance policy issued by the defendant, New York Life Insurance Company, in July, 1910, to plaintiff's son, Charles B. McEwen, who died in November, 1910. Defendant resists payment of the policy upon the ground that the decedent procured the issuance of the policy by means of fraud, concealment and misrepresentations in answering written questions propounded to him by defendant's medical examiner on June 29, 1910, and that defendant accepted the application and issued the policy in reliance upon the truth of these answers. The present litigation has been pending for over 9 years, and this is the third appeal which has been taken. The first trial resulted in a verdict in favor of plaintiff, but judgment thereon was reversed by the District Court of Appeal upon the ground that the trial judge had submitted to the jury the issue of the materiality of the questions claimed to have been falsely answered (McEwen v. N. Y. Life Ins. Co., 23 Cal. App. 694, 139 Pac. 242); likewise a judgment entered upon a verdict rendered in plaintiff's favor upon the second trial was reversed by the District Court of Appeal (McEwen v. N. Y. Life Ins. Co. [App.] 183 Pac. 373). On the third trial the judge directed a verdict for the defendant, and plaintiff appeals, claiming that a directed verdict was unwarranted by the facts of the case.

[1] The only answer of decedent in the medical examination which is of importance for the purposes of this appeal is the following:

"What illnesses, diseases, or accidents have you had since childhood? (The examiner should satisfy himself that the applicant gives full and careful answers to this question.) Name of disease: Typhoid pneumonia. Number of attacks: One. Date: 1891. Duration.

Severity: Severe. Results: Complete recovery."

The above-quoted question was asked for the purpose of ascertaining information concerning the condition of decedent's health in certain particulars deemed deserving of especial consideration in connection with the issuance of a life insurance policy. The question is neither ambiguous nor misleading. It calls for facts in regard to accidents suffered since childhood, as well as illnesses and diseases, and an answer which omits all mention of accidents is, in effect, an answer that no accidents have been sustained. *Malicki v. Chicago Guar. Fund Life Soc.*, 119 Mich. 151, 77 N. W. 600. At the close of the written questions and answers the insured certified:

"That I have carefully read each and all of the above answers, that they are each written as made by me, that each of them is full, complete and true."

It was proven by the defendant company, and is conceded by plaintiff, that in July, 1909, just a year prior to the application for the policy, the decedent Charles B. McEwen was injured by being struck or kicked in the chest by the foot of a mule, as a result of which his chest was injured, his back strained and one rib broken; owing to temporary total disability caused by the injury he received from an accident insurance company the sum of \$25 per week for a period of 16 weeks, amounting in all to \$400. The injury received for the time being rendered him unfit for any business whatsoever and seriously impaired his health. Notwithstanding the serious consequences ensuing from the accident sustained by decedent in July 1909, which disabled him for a period of nearly 4 months, he failed to set forth the accident in his answers to the questions asked by the defendant company in an examination held on June 29, 1910. Inasmuch as decedent made no mention of accidents in answer to a question calling for disclosures of accidents, and since, on the third trial, it was conceded that decedent has sustained the above-described accident less than a year before answering the said question, the conclusion is inescapable that the question was falsely answered.

[2] Upon the second appeal of this case the District Court of Appeal held that it was error for the trial judge to submit to the jury the question whether or not the accident tended to affect the longevity of the decedent, that the only question to be passed upon by the jury was the truth or falsity of decedent's answers, and that a determination of this point would settle the rights of the parties. This statement of the law by the District Court of Appeal became the law of the case and was binding upon the trial court upon the third trial.

"The doctrine [of the law of the case] means simply this: That the court having once decided the law, and the cause having gone back to the lower court for further proceedings in accordance with the law as thus established, and the parties and the lower court having acted in reliance upon that law, this court will not, upon a second appeal, again enter into a consideration of the question, but, if the facts and circumstances are substantially the same, will treat it as settled law, regardless of its accuracy." *Brett v. S. H. Frank & Co.*, 162 Cal. 735, 739, 124 Pac. 437, 439.

Since the evidence conclusively shows the answer to the question concerning "illnesses, diseases, and accidents" was untrue and, according to the law laid down for the guidance of the trial court, the truth or falsity of the answers was the determining factor and the only question to be submitted to the jury, it was proper for the judge to direct a verdict for defendant upon the theory that a material question had been falsely answered by decedent. *Wilson v. Alcatraz Asphalt Co.*, 142 Cal. 182, 75 Pac. 787; *Estate of Baldwin*, 162 Cal. 471, 123 Pac. 267.

[3] It is claimed that, on the third and last trial, the court erroneously sustained objections to certain evidence offered by plaintiff. This evidence, plaintiff contends, tended to show that decedent informed defendant's medical examiner of the said accident, and that the examiner thought the accident unimportant, and for that reason did not include it in the written answer. We may assume, without deciding, that, had that been shown to be the fact, the company, and not decedent, would have been responsible for the failure to mention the accident in the written answers to the medical examination, and therefore that it would have been error to exclude competent evidence on this point. We are of the opinion that no competent evidence in support of this contention was proffered by the plaintiff. The only evidence sought to be introduced on this point was the testimony of the physician who examined decedent on June 29, 1910. The physician testified that he had no independent recollection whatever of his examination of the decedent. It appears that the witness was seriously ill in September, 1919, and that the trial at which he testified took place in November, 1919. Plaintiff's attorney sought to have the witness refresh his memory from, or testify from, a written memorandum. Defendant's counsel objected to the witness testifying from this memorandum, and the court sustained the objection. Section 2047 of the Code of Civil Procedure provides that a witness may refresh his memory respecting a fact from a written memorandum or "may testify from such a writing, though he retain no recollection of the particular facts." A witness cannot, however, refresh his memory or testify from such a memorandum un-

less it is made to appear that the memorandum complies with certain qualifications specified in said section 2047 of the Code of Civil Procedure.

In the present case the only fact disclosed in connection with the memorandum, aside from the fact that it was dated July 19, 1919, nine years after the medical examination, is the fact that it was signed by the witness; there was no showing that the witness wrote or dictated the memorandum, or that it was written at a time when the fact was fresh in his memory, or that he knew the fact was correctly stated therein. It would, therefore, have been improper for the court to have permitted the witness to testify from the memorandum in question. *Morris v. Lachman*, 68 Cal. 109, 112, 8 Pac. 799; *Stone v. S. F. Brick Co.*, 13 Cal. App. 203, 109 Pac. 103. Furthermore, the memorandum itself, which is set forth in the bill of exceptions, furnishes evidence of its own unreliability. It purports to have been made 9 years after the happening of the event, and states that the physician examined decedent in 1908, and found no evidence of injury from the accident; whereas, the examination with which the parties are concerned in the instant case is one held in 1910, and the accident occurred in 1909.

[4] Counsel for plaintiff further contends that, since defendant objected to plaintiff's counsel questioning the physician who examined decedent for the defendant and itself failed to call the physician, the presumption arises that the physician's testimony would have been adverse to defendant. Code Civ. Proc. § 1963, subds. 5 and 6. However, defendant was under no obligation to call the physician as its own witness or to permit him to testify for plaintiff, particularly in view of the fact that the physician was unable to recall the medical examination at all, and it does not appear that there was any legally competent memorandum which he might use to aid him in testifying.

Defendant, by its answer, alleged a cancellation of the policy and deposited in court the sum of \$347.10, the amount of premium paid on the policy. It is claimed that plaintiff is entitled to this sum and that she was deprived of it by the directed general verdict in favor of defendant. The testimony of plaintiff in the case shows that the money necessary for the payment of this premium was advanced by plaintiff to decedent as a loan, and thereafter repaid by him to her. It is evident, therefore, that plaintiff is not entitled to receive the returned premium in her own name and as her own property, but

that the money is the property of the decedent's estate. Nor does it appear that there has ever been an administrator of the estate of said Charles B. McEwen, or any other legal representative to whom payment could be made. In the absence of any such showing, there is no person to whom such payment could be made, even in the event that the plaintiff expressed a willingness to accept the same and rescind the contract.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LAW-
LOR, J.; SLOANE, J.; WILBUR, J.

On Application for Rehearing.

PER OURIAM. The opinion heretofore rendered in the above-entitled cause is hereby modified as follows: By striking out the last paragraph thereof, and in lieu thereof inserting the following:

[5] Defendant, by its answer, alleged the cancellation of the policy and deposited in court \$347.10, the amount of premium paid on the policy. It is claimed that plaintiff is entitled to this sum, and that she was deprived of it by the directed general verdict in favor of defendant. We are entirely satisfied that such is not the effect of the verdict or judgment given. The request of the defendant for an instruction directing a verdict in favor of defendant was based on its claim that the policy was voidable on the ground of fraud on the part of the insured in obtaining the policy, and that therefore the defendant had a right to rescind. This was the position of the trial court in directing a verdict for the defendant, and this result carried with it necessarily the implication that the money paid into court should be restored to the party entitled thereto. There was uncontradicted evidence sufficient to support a finding of a gift of the policy by the insured to the plaintiff, and the directed general verdict in favor of the defendant necessarily implied that the plaintiff was entitled to the premium money paid into court by the defendant for the purpose of effecting a rescission. The judgment given in this case upon the directed verdict does not preclude the plaintiff from recovering this money. Neither does our affirmance of such judgment have any such effect.

The application for rehearing is denied.

ANGELLOTTI, C. J., and LENNON,
SHURTLEFF, LAWLOR, WILBUR, and
SLOANE, JJ., concur.

PARSONS v. SEGNO. (L. A. 8256.)

(Supreme Court of California. Oct. 14, 1921.)

1. **Contracts** ¶111—Contract to pay attorney percentage of property received from defendant husband in divorce action held void as against public policy.

A contract to pay an attorney a percentage of all the property received by plaintiff in a divorce action, under a property settlement with her husband, is void as against public policy, being a contract for a contingent fee in a divorce action.

2. **Appeal and error** ¶931(4)—Assumed in favor of judgment for plaintiff that court decided defendant did not misunderstand purport of plaintiff's statement of account.

In an action on an account stated, it must be assumed in favor of a judgment for plaintiff that the court decided from the evidence, if sufficient to support such a conclusion, that defendant did not misunderstand the import of statements of account and letters sent her by plaintiff, and that she realized he was demanding the amount of the balance shown by the statement sued on, to which she made no objection.

3. **Account stated** ¶19(3)—Evidence held sufficient to show account stated.

In an action on an account stated, evidence held sufficient to support a finding that an account was rendered, consented to, and became an account stated.

4. **Account stated** ¶18(2)—To falsify for fraud or mistake, facts must be pleaded, reopening asked for, and proof confined to allegations.

To surcharge and falsify an account stated on the ground of fraud or mistake, such facts must be pleaded, a reopening of the account asked for, and the proof confined to such allegations.

5. **Account stated** ¶18(1)—Defendant's allegations of fraud held insufficient.

In an action on an account stated, allegations of a counterclaim and cross-complaint that the original agreement was void, and praying for recovery of an amount paid plaintiff thereunder, held insufficient to allege fraud or facts on which a finding thereof could be predicated.

6. **Account stated** ¶19(3)—Evidence held to show repudiation of void contract and substitution of new contract.

In an action on an account stated, evidence held to show that the original contract between the parties, which was void, was repudiated by them, and a second contract substituted.

7. **Appeal and error** ¶728(3)—Assignment to exclusion of evidence insufficient where no particular evidence referred to nor any offer to prove stated.

On appeal from a judgment for plaintiff in an action on an account stated, an assignment of error in not allowing defendant to prove an amount paid to plaintiff was the basis of all the accounts rendered, and was included in the ac-

count stated, was insufficient, where no particular evidence was referred to as having been improperly excluded, and no offer of proof stated.

8. **Appeal and error** ¶757(3)—Assignments not considered where rulings not printed in briefs nor errors shown.

Under Code Civ. Proc. § 953c, assignments of error to findings "on the ground that the court would not allow any evidence on those issues," merely referring to the transcript for certain rulings on the admission and rejection of testimony, without printing the same in the briefs, or showing wherein the errors lie, and a contention that "there are other questions involved in this appeal particularly set forth in the assignment of errors to which we beg leave to refer without reprinting," cannot be considered.

In Bank.

Appeal from Superior Court, Los Angeles County; Dana R. Weller, Judge.

Action by S. J. Parsons against Annie Dell Segno. Judgment for plaintiff, and defendant appeals. Affirmed.

Alfred E. Putnam, and Will D. Gould, of Los Angeles, for appellant.

S. J. Parsons, of Los Angeles, for respondent.

LAWLOR, J. This is an appeal by the defendant from a judgment in favor of the plaintiff for \$3,509.11 and costs, being the full amount demanded in an action in three counts to recover the sum of \$250, with interest, on each of two promissory notes signed by the defendant, as maker, and the sum of \$2,160.61, with interest, on an alleged account stated.

[1] In June, 1911, appellant retained respondent as her attorney for the purpose of bringing an action for divorce against her husband, A. Victor Segno, effecting a property settlement with him, and looking after other legal business for her. The divorce was granted and the property divided. In the course of handling her affairs, aside from the divorce action and the property settlement, respondent appeared as her attorney in the trial of certain other cases, organized a corporation for her, and otherwise assisted in the conduct of her affairs. At the time appellant retained respondent, they entered into an agreement in writing whereby appellant agreed to give respondent 7 per cent. of all the property she received from her husband under the settlement. According to the evidence, the value of this property was never definitely ascertained. It is not disputed that this contract was void as against public policy, being a contract for a contingent fee in a divorce action (*Newman v. Freitas*, 129 Cal. 283, 61 Pac. 907, 50 L. R. A. 548), but both parties testified they were unaware of the illegality of the contract at the time. Re-

spondent testified that this contract was repudiated, and a new agreement arrived at after the divorce was granted, whereby he was to receive \$5,600, or 7 per cent. on \$80,000, which he asserted they both agreed should be assumed to be the value of the property received from the husband. Appellant testified respondent made an offer to her of such a proposition, but that she never agreed to it. It is this asserted second contract which respondent contends is the basis of his claim.

Respondent charged appellant additional sums for the services he performed for her after the divorce was granted and the property settlement concluded. From time to time she paid him varying amounts of money to apply on the total bill. In June, 1913, she gave him the two notes for \$250 each, one payable to respondent, and one to his wife, to apply on the account, on which notes it was agreed respondent was to borrow money.

Respondent sent appellant several statements of account and letters asking her to make him payments. On November 1, 1913, he sent her a statement of account, the first item of which was: "Bill as per agreement, \$5,600.00"—and according to the account the total amount due on that date was \$1,286.21. This balance was never objected to by appellant prior to the trial. Ten months later, September 1, 1914, he sent her another account which he insists constituted an account stated. The first item of this account was the balance of \$1,286.21 shown by the account of November 1, 1913. Then followed charges and payments showing a balance of \$2,160.61 due on September 1, 1914. To this statement of account respondent received no reply, although he wrote appellant on December 19, 1914, inclosing a copy thereof, and on February 1 and 12, 1915, concerning it.

In 1915 respondent assigned the notes referred to, and the account as represented by the statement of September 1, 1914, to one Fred O. Ricketts, who commenced suit on them. According to the testimony of Nell S. McCarthy, respondent's attorney in that action, while the suit was pending appellant promised to pay the amount demanded, and to give her note for it. A demurrer was interposed and sustained. On June 30, 1915, on motion of plaintiff, the case was dismissed. After the dismissal the notes were re-assigned to respondent by Ricketts, and this action followed. The notes constitute the causes of action in the first two counts, and the statement of account of September 1, 1914, alleged to be an account stated the cause of action in the third count.

As defenses to the notes, appellant pleaded the statute of limitations; that the action brought by Ricketts was a bar to this one; that the notes were for the purpose of enabling respondent to borrow money, which he failed to do; that as a result of such failure appellant was not liable on them; and that

there was no consideration for the note given to respondent's wife. As a defense to the alleged account stated, appellant pleaded the statute of limitations, the action by Ricketts as a bar, and specifically denied the allegations of the complaint that the account was stated. In a cross-complaint appellant alleged respondent had received \$3,318.86 for the use of appellant and in trust for her, and prayed judgment for that amount. In a counterclaim appellant alleged that the agreement between herself and respondent was void, and set it out in *hæc verba*. She also alleged that she had paid respondent \$4,512.36, \$3,318.86 of which was paid under the void agreement before she knew it was void, and prayed judgment for the latter amount.

The court found in favor of respondent on all three counts, that the allegations of the answer, counterclaim and cross-complaint were untrue, and that the amounts respondent demanded were due and owing to him.

Appellant states:

"If this court should hold that the plaintiff rendered an account stated and thereby bound his client, we shall not expect a reversal of the judgment, however harsh and unjust it may be. * * * Mrs. Segno, the defendant, is not learned in the law, and was not informed by the plaintiff that he was presenting to her an account stated, and she was not informed of her rights and privileges in the matter; and we think sufficient objection was made to the account when presented."

It is also stated:

"In this case the attorney cannot bind his client by giving to her an account stated of which she had no knowledge as to its legal effect or as to any formal requirements of objections."

Respondent insists there was a valid account stated, that the evidence supports the finding to that effect, and that there was no error in the rulings of the court.

1. We shall first consider the question of whether there was an account stated. In support of his position that respondent could not bind appellant by an account stated, appellant cites no authority.

In *Auzerais v. Naglee*, 74 Cal. 63, 15 Pac. 372, it was said:

"A stated account is an agreement between both parties that all the items are true; but this agreement may be implied from circumstances, as where merchants reside in different places, and one sends an account to the other, who makes no objection to it within a reasonable time. *Stebbins v. Niles*, 25 Miss. 287; 1 *Wait's Actions and Defenses*, 191-198.

"In such cases, the action is based upon the agreement, which has all the force of a contract. The original account becomes the consideration for the agreement, and it is not necessary to prove the items of such account; nor can they be inquired into or surcharged except for some fraud, error, or mistake, and such grounds must be, according to the weight of au-

thority, set forth in the pleadings. [Citing cases.] * * *

"The term 'stated account' is but an expression to convey the idea of a contract, having an account for its consideration, and is no more an account than is a promissory note, or other contract, having a like consideration for its support."

In *Terry v. Sickles*, 13 Cal. 427, the court declared:

"In support of an action upon an account stated, it is necessary to show that there was a demand in favor of the plaintiff, which was acceded to by the defendant. But the admission of the correctness of the demand need not be expressed and in terms. If the account be sent to the debtor and he do not object to it within a reasonable time, his acquiescence will be taken as an admission that the account is truly stated. * * * The evidence in relation to the amount of the account was properly excluded. It is not alleged in the answer that there was any fraud or mistake in the original accounting."

In *Crane v. Stansbury*, 173 Cal. 631, 161 Pac. 7, the plaintiff sued as the assignee of an attorney upon an account based on charges for professional services rendered. It was contended by the defendant that the fees of an attorney could not be the subject of an account stated. The court said:

"The bill of an attorney for services, like any other bill, may under proper circumstances and conditions be the subject of an account stated."

The court continued:

"The court instructed the jury that when an account was rendered it became the duty of the recipient to make his objections thereto within a reasonable time, and that, if he did not do so, the account became an account stated and the foundation of an independent cause of action based upon the account stated; also that silence and nonobjection under the circumstances of this case for six months would constitute an unreasonable time. Exception is taken to these instructions. But the complaints made against them are not well founded. They are unimpeachable in point of law."

It was also held that—

"While all questions of fraud and mistake in combating the force of an account stated are questions of fact for the jury, where assent is based upon acquiescence arising from a failure to object, the length of time which must pass before an account rendered becomes, by virtue of the recipient's failure to object, an account stated, is one of law for the court."

In *Lane & Bodley Co. v. Taylor*, 80 Ark. 469, 97 S. W. 441, 7 L. R. A. (N. S.) 924, an attorney sought to reopen an account stated. The court declared:

"When an attorney makes a charge for services, and the same is accepted by the client, it becomes an account stated between them, and may be sued upon as such by him. *Wilcox v. Boothe*, 19 Ark. 684; *Pulliam v. Booth*, 21 Ark. 421."

See, also, 1 C. J. 696, 703; *Bennett v. Potter*, 180 Cal. 736, 183 Pac. 156; *Crawford v. Hutchinson*, 38 Or. 578, 65 Pac. 84; *Beals v. Wagener*, 47 Minn. 489, 50 N. W. 535; *Gruby v. Smith*, 13 Ill. App. 43.

According to the evidence, after the account of November 1, 1913, was rendered, appellant paid respondent several amounts, for which he gave her credit; that following this the account of September 1, 1914, was mailed to her, the first item of which was the balance shown by the statement of account of November 1, and that to this statement of account of September 1 appellant made no objection. When appellant was under cross-examination by respondent, she testified:

"After that [referring to the divorce action and the property settlement] you had some seven or eight actions for me, and that account included what you did for me for a number of years. I didn't dispute the correctness of the bill; I thought the contract was high, Mr. Parsons."

Neil S. McCarthy testified:

"Mrs. Segno came to the office, introduced herself, and to the best of my recollection said you [respondent] had sent her in there. This was after the suit was filed. She said she couldn't pay up at that time, but would give a promissory note for it for the entire amount. I told her that if she would give some security for the promissory note that it would be satisfactory to you. I do not recall what answer she made. However, she never gave the note to me, nor the security, nor anything else."

The evidence also shows that the relationship of attorney and client had existed between the parties from 1911 to 1915—the year the Ricketts action was brought; that during that period they discussed his compensation and had some correspondence concerning it; that they agreed he should receive for his services in the divorce action and property settlement \$5,600; that he reported to her the various expenses he incurred for filing fees, traveling expenses, and the like, and charges for services; that she made no objection; that the statements of account of November 1, 1913, and September 1, 1914, and the two letters of February 1 and February 12, 1915, were clear and explicit as to his claim; that between the rendering of the two statements of account she made payments without in any way questioning the correctness of the account; that appellant had a great deal of experience in business; that she conducted an enterprise—the "American Institute of Mentalism"—which yielded at one time, according to her own testimony, "anywhere from five to twenty-five hundred gross per month"; and that she had figured in litigation besides the divorce action and the case at bar.

[2, 3] We must assume in favor of the judgment that the court decided from the evidence, which is amply sufficient to support

such a conclusion, that appellant did not misunderstand the import of the statements of account and respondent's letters, and that she realized he was demanding the amount of the balance shown by the statement of account of September 1, 1914. As shown by the evidence there was a lapse of several months after this statement of account was rendered, during which time respondent received no word from appellant; that she never disputed the correctness of the account, and that after the amount claimed to be due was demanded she said she would settle and offered to give her note for it. In our opinion it cannot be maintained that there was not evidence from which the court could have found that an account was rendered, assented to, and became an account stated.

[4] 2. Appellant next contends:

"We submit that an attorney cannot receive money in a divorce case, on a void agreement against public policy, and keep the money in fraud of his client, and cover his tracks by presenting an account stated to his client for further demands, and in this case, plead an account stated and thereby bind his client."

In *Gruby v. Smith*, supra, the court held:

"The fact that the relation of attorney and client subsisted between the parties, at the time of this alleged assent to a grossly exorbitant bill and promise to pay such a balance, should have had an important, if not controlling, effect upon * * * the point of permitting an investigation by him into the merits of the several items of that bill."

It was said in *Beals v. Wagener*, supra, that—

"The court would probably scrutinize such an agreement [an account stated between an attorney and his client] closely, to see that there was no overreaching, and that the client acted with as full and candid information as the attorney can give him."

But in order to surcharge and falsify an account stated on the ground of fraud or mistake the facts constituting the fraud or mistake must be pleaded, a reopening of the account asked for, and the proof must be confined to the allegations of fraud or mistake. *Auzerais v. Naglee*, supra; *Terry v. Sickles*, supra; *Branger v. Chevalier*, 9 Cal. 353; 1 Encyc. of Evidence, 147.

[5] The answer here is a general denial, and neither mistake, fraud, nor any other ground touching the account stated is alleged. The counterclaim merely alleged that the original agreement was void; that the sum of \$3,318.86 was paid thereunder; and prayed for a recovery of that amount. The cross-complaint alleged only that said amount had been paid by appellant to respondent to his use and for his benefit, and prayed for judgment accordingly. It is clear, therefore, that there is no direct allegation of fraud, nor

are any facts pleaded upon which a finding of fraud could be predicated.

[6] However, assuming that the asserted fraud was pleaded, that the reopening of the account stated was asked for, and that evidence was offered to support such a charge, still there is ample evidence from which the court could have concluded that the void contract was repudiated by the parties, and the second contract for compensation substituted. No claim is made that the latter contract was invalid. Appellant testified:

"I had conversation with him after this matter was concluded in regard to his compensation for the work he had done. He asked me what I thought would be fair as a settlement, and I said, 'Mr. Parsons, I don't know.' He asked me if I thought 7 per cent. on a value of \$80,000 would be equitable, and I said I didn't know, because I could get no basis of value on the properties that I received; it was left open that way."

On the other hand, respondent testified:

"Q. The account you rendered included what this contract called for up to the point that it was paid for, did it not? A. No, that is not true.

"Q. Does not the account on its face show— A. After the settlement with her husband in which she obtained, as she claimed, \$150,000 or \$200,000 worth of property, she repudiated that contract, and said that she would not settle on the terms of it, but that she would—I finally asked her what she would pay me, and she said that she would give me seven per cent. on \$80,000 and that she was perfectly satisfied to call the amount for that particular service \$5,600, and we settled on those terms. She repudiated the contract entirely."

At the trial the following colloquy occurred:

"Mr. Putnam: When you were first sued on the assignment made here to Mr. Ricketts, *Ricketts v. Segno*, they sued on the contract, didn't they; the same contract?

"Mr. Parsons: I object to that as calling for a conclusion, if your honor please; the record is the best evidence.

"The Court: You repudiated it then, didn't you? A. No, your honor.

"Mr. Putnam: The court found it void.

"The Court: She pleaded the invalidity of it. It just goes to show how much effect you get out of testimony that a thing is or is not repudiated. Now, the witness has testified that she never repudiated that contract. I find that she did, because she pleaded its invalidity."

The first item in the account is the charge of \$5,600 for the original service, and this is the amount respondent testified was agreed upon for such service after the original contract was repudiated. The fact that this sum was included in the statement of account of November 1, 1913, suggests that the court, as indicated by the remark it made during the above colloquy, concluded that the original contract was repudiated by appellant. In

other words, such a finding is to be implied from the finding that an account was stated. That the second contract was a new agreement and that the old one was repudiated by both parties is further borne out by the fact that appellant testified that Mr. Segno, in the trial of another action, stated that the property appellant received from him was actually worth from \$150,000 to \$200,000. As already pointed out, appellant's only assignment of fraud is the alleged inclusion by respondent in the account stated of the demand based upon the void contract. Since this was the only assignment of fraud, and there was evidence from which the court could have found the void contract was repudiated by the parties, and a new one entered into in lieu thereof, appellant's claim of fraud cannot be sustained.

[7] 3. Appellant further contends that—

"The court erred in not allowing defendant to show that \$4,512.36 paid to the plaintiff was the basis of all accounts rendered, and was included in the purported account stated, and in finding (finding 3) that the defendant became indebted upon an open account, etc., while the evidence shows that there was a written agreement which was against public policy and void."

No particular evidence is referred to under the first point as having been improperly excluded, and it is not stated that appellant made any offer to prove that the said sum formed the basis of all the accounts upon which the balance shown by the account stated was struck. Concerning the asserted error in finding 3, we have already stated there was evidence from which the trial court could have found the original contract to have been repudiated and another substituted. The evidence shows the account to have been open and current, for items were added and credits given from time to time.

Error is assigned to finding 7 upon the ground that it is not supported by the evidence. This finding is to the effect that the sum of \$2,660.61, with interest and costs, is owing to respondent. As heretofore stated, the evidence on the subject of the account stated was sufficient to support the findings, and upon this hypothesis the amount of \$2,160.61 is correct. Appellant does not object to the findings as to the promissory notes, which make up the other \$500. These notes were admitted in evidence, thus supporting the finding of the court as to the amount due thereon. Error is assigned to the conclusions of law, which are to the effect that the said amount of \$2,660.61, with interest and costs, was owing to respondent, but from what we have already said it follows there is no merit in this contention.

[8] Appellant assigns error to findings 4, 5, and 6 "on the ground that the court would not allow any evidence on those issues." On this assignment of error we are merely re-

ferred to the transcript on appeal for certain rulings of the court on the admission and rejection of testimony, but no attempt has been made to print in the briefs these portions of the record, or to show wherein the errors, if any, lie. Such an assignment of error does not conform to the requirements of section 953c of the Code of Civil Procedure, and hence does not call for consideration. The same disposition is to be made of appellant's further contention that—

"There are other questions involved in this appeal, particularly set forth in the assignment of error to which we beg leave to refer without reprinting."

This has reference to some 17 specifications of error in appellant's motion for a new trial. Judgment affirmed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SLOANE, J.; LENNON, J.; SHURTLEFF, J.

SMITH et al. v. BLODGET et al. (L. A. 6628-6631.)

(Supreme Court of California. Oct. 14, 1921.)

1. Vendor and purchaser ⇨3(3)—Intention controls as to whether contract is an agency or an option.

Whether an agreement giving "an option on our land" to another to "handle and sell" created the relation of principal and agent or that of vendor and purchaser depended on the intention of the parties; the words "handle and sell" not conclusively showing agency.

2. Contracts ⇨170(1)—Parties' construction may be considered.

Where the intention of the parties is imperfectly expressed and the language employed by them is ambiguous, and requires interpretation, it is permissible to take into consideration a construction placed thereon by the persons concerned.

3. Vendor and purchaser ⇨44—Evidence held to show contract was intended as an option, and not an agency.

Evidence held sufficient to show that a contract granting to plaintiffs an option on the land of another to handle and sell was intended as an option, and not merely an agency to sell.

4. Estoppel ⇨78(6)—Party held estopped to deny validity of contract under which he had acted.

Where defendants had treated a contract by landowners giving an option to plaintiff as a valid contract, and had procured an assignment thereof to plaintiff, and had made a sale thereunder, they were estopped to deny that it was a valid contract because not signed by a trustee for some of the owners.

5. Account ¶7—Will lie for fraud.

Action for accounting is within the jurisdiction of equity in cases of fraud, as well as where there is a fiduciary relation between the parties and the facts are peculiarly within the knowledge of one, as the court, having assumed jurisdiction, will retain it to grant the relief demanded by the situation.

6. Principal and agent ¶78(2½)—Third person conspiring with agent to defraud principal may be held jointly liable in an accounting.

Where plaintiff obtained an option on the lands of another and employed one of the defendants as his agent to dispose of the lands, and the other defendants joined the first in a scheme to obtain an assignment of the option from plaintiff to themselves and complete a sale thereunder, in fraud of the plaintiff, plaintiff might bring an action against all for an accounting and recover a joint judgment, as those fraudulently aiding in the attempt of fiduciaries to obtain profits may be held liable regardless of sharing in the profits.

7. Appeal and error ¶1011(1)—Finding of trial court on conflicting evidence conclusive.

Though the trial court might have drawn a different inference from conflicting evidence, it being possible to draw conflicting inferences therefrom, the appellate court will not disturb the conclusion.

8. Principal and agent ¶78(6)—Evidence held sufficient to show certain defendant conspired with agent to defraud principal.

In an action by principal against agent and others for an accounting for profits from a fraudulent conspiracy, evidence held sufficient to show that a certain defendant joined therein.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Frank H. Smith, Jr., and another against R. B. Blodget and others. On judgment for plaintiffs, defendants appeal. Affirmed.

Charles J. Kelly, D. A. Stuart, Blodget & Blodget, N. P. Moerdyke, John C. Stick, Rosecrans & Emme, and E. F. Crawford, all of Los Angeles, for appellants.

Fred N. Arnoldy, of Los Angeles, for respondents.

LENNON, J. From the following facts the present litigation arose: Plaintiffs were the owners of certain land in Kern county, Cal., and desired to dispose of the same. In June, 1918, plaintiff Frank H. Smith, Sr., held a conversation with defendants R. B. Blodget and T. E. Commins, dealers in real estate, wherein defendant Blodget stated that the Associated Oil Company was interested in purchasing 1,000 contiguous acres in said county at \$150 an acre, and that plaintiffs' land was in the contemplated area. The necessity of securing united action on the part

of the several owners of the land in the tract under consideration was discussed, and plaintiff Smith, Sr., stated that his son, Frank H. Smith, Jr., could obtain a written option on 160 acres thereof which was owned by several persons jointly, to wit, C. H. Plummer, Emelle H. Smith, and certain others represented by Leslie S. Smith as trustee. The subsequent dealings concerning this particular parcel of land, called the "Plummer quarter section," gave rise to the present controversy. Pursuant to the above conversation, Smith, Jr., obtained a written instrument reading:

"Los Angeles, July 15th, 1918.

"This agreement witnesseth that we herewith give to Frank H. Smith, Jr., an option on our land S. W. ¼ section 18, T. 11 N., R. 22 W., S. B. M., to handle and sell for us at a net price to us of \$100.00 per acre. This option good for 60 days from date except that it may be revocable by a 10 days' notice to him or to his last P. O. address. C. H. Plummer. Emelle H. Smith."

This authorization plaintiffs immediately intrusted to defendant Blodget, under an agreement that Blodget should act as their agent in finding a purchaser for the said land at \$150 per acre, in which event Blodget was to receive a commission of \$2,000. Later, on August 10, 1918, plaintiffs agreed that Blodget's commission should be raised to \$2,500. In the meantime defendant Blodget had discussed the proposed sale with defendants Potter and Fickelssen, each of whom owned a quarter section in the 1,000-acre tract. After learning of the contemplated deal, defendant Potter engaged Smith, Jr., in a conversation and discovered that he was about to leave town on a 30-day vacation. Shortly thereafter defendant Potter succeeded in inducing the owners of the Plummer quarter section to give plaintiffs a 10 days' notice of the cancellation of their option, to take effect on August 27, and to give defendant Potter an option on the same property commencing on the day on which the plaintiffs' option expired. Smith, Sr., who was not on friendly terms with the owners of the Plummer property, received the notice of cancellation on August 17, during the absence of his son on a vacation at a point where it would be difficult to reach him by mail or telegraph.

About the same time that the notice of cancellation was delivered word was received that the Associated Oil Company was not interested in the purchase of the lands. Defendant Blodget then assured plaintiff Smith, Sr., that he would be able to dispose of the Plummer property to other purchasers prior to the expiration of the plaintiffs' option. In these representations he was joined by defendants Commins and Fickelssen, the latter having met Smith in the meantime.

All three defendants mentioned one Patterson and Graham as prospective purchasers of the land. As a matter of fact, Patterson and Graham never had any intention of buying the property, and were never considered by any of the defendants to be likely purchasers. Finally, on August 26, the last day of the life of plaintiffs' option, a meeting was held at the office of defendant Commins at which defendants Commins, Blodget, and Fickelissen met plaintiff Smith, Sr., by appointment. Defendants then stated that, as the option was about to expire, it would be necessary to furnish the sum of \$250 to be paid to the grantors of the option in order to secure a 30-day extension. The sum was advanced by the three defendants present, defendant Fickelissen making a statement to the effect that, as she was putting up half the money, she wanted half the proceeds. This money was paid to the grantors as a deposit on the exercise of the option and to apply on the payment of the purchase price, and the parties were thereupon given 30 days in which to complete the purchase.

At the time this payment was made, defendants Blodget, Commins, and Fickelissen represented to Smith, Sr., that they had found a purchaser by the name of Gross, an old friend of defendant Fickelissen, who resided in St. Louis, Mo., and was taking a trip to California. Later, on September 3, defendant Blodget induced Smith, Jr., who had then returned, to execute and deliver to said Blodget an assignment of the plaintiffs' option. This assignment was procured without consideration upon the representation that it constituted a mere agency authorization, and that its sole purpose was to afford written evidence of Blodget's authority to represent plaintiffs in selling the land to Gross. Defendants dated this assignment "August 9, 1918." Various representations were made by the said defendants to plaintiffs from time to time to the effect that Gross had been communicated with, had arrived in town, and that a sale to him was under way. However, on September 23, Smith, Sr., discovered that the dealings with Gross were purely mythical. If any such person existed, defendants never communicated with him, and he was never a prospective purchaser of the land in question. Upon this revelation, plaintiffs demanded the return of their option, but defendant Blodget had delivered it to defendant Fickelissen, who refused to surrender it. The evidence reveals that on September 18, without plaintiffs' knowledge, Blodget had executed an option to purchase the property in question in favor of one Graham, and on the following day Graham executed a similar option to defendant Potter. A few days later, as a result, and by means of the assignment to defendant Blodget of plaintiffs' option and Blodget's option to Graham and the

latter's option to Potter, a sale of the land was consummated by defendant Potter to the Chanslor Canfield Midway Oil Company for the price of \$125 an acre, or over \$20,000. Previous to this sale, defendant Potter had effected sales to said Chanslor Canfield Company of at least three other quarter sections in the vicinity of the Plummer property, including the quarter sections belonging to himself, defendant Fickelissen, and a third person not involved in this controversy. The four defendants retained the proceeds of this sale of the Plummer land over and above the sum paid to the owners of the property (about \$18,000) and incidental expenses amounting to a few hundred dollars. Plaintiffs instituted the present action for the sum thus retained, and the trial court rendered a judgment against all the defendants jointly for the sum of \$3,945.50. The four defendants have appealed separately, but since each appeals on the same grounds as the others they have joined in the preparation of briefs, and the briefs filed by each are identical in content.

According to defendants' theory, the written instrument executed by C. H. Plummer and Emelie Smith in favor of Smith, Jr., is not an option to purchase, but merely an authorization to sell the property as agent of the owners. If this be so, defendants affirm that the said instrument was inadmissible under the issues raised by the pleadings, and that defendants' objection to its introduction in evidence should have been sustained, for the reason that in the present suit plaintiffs seek to recover the portion of the proceeds of the sale retained by defendants, not as agents and on behalf of the vendors of the land, but as owners of the said funds by virtue of rights arising under an option to purchase the land.

[1] The fact that the agreement conferred the option to "handle and sell" the property for a certain sum, rather than to "purchase," does not, as defendants contend, necessitate the conclusion that the contract is merely one of agency. Whether an agreement permitting a person "to sell" land on certain terms creates the relation of principal and agent or that of vendor and purchaser under a contract of sale depends upon the intention of the parties. James, *Law of Option Contracts*, § 114. Where there was a revocable authorization to a firm of real estate agents to sell land for \$10,000 net to the owners, with an agreement to pay "a commission of all over said sum of \$10,000 net, for which they may sell said property with our consent," it was held in this state that a sale by the firm under this agreement was effected in the capacity of vendor on its own account, and not as agent of the owners of the land. *Robinson v. Easton, Eldridge & Co.*, 93 Cal. 80, 28 Pac. 796, 27 Am. St. Rep. 167. The determining factor in that case was the di-

rect interest in and right to a part of the proceeds of the sale which was granted to the persons making the sale. The written instrument in the case at bar contains no express provision that plaintiffs shall retain that portion of the purchase price which exceeds the specified selling price. However, Smith, Jr., is given the right to sell "at a net price to us [the owners] of \$100 per acre." Had the contract stated that Smith was authorized to sell the property for not less than \$100 per acre net to the owners, it might be held that the provision was purely one of limitation, and that the intent was fairly clear, that the person bringing about the sale should have no interest in the proceeds as such. *Allen v. Clopton* (Tex. Civ. App.) 135 S. W. 242. But the broad and unrestricted provision giving Smith the right to effect a sale at a net price to the owners of \$100 per acre is susceptible of sundry interpretations. It may mean that all net proceeds above the specified price belong to him, the owners of the property agreeing to part with all interest in the property, whatever the price may be, provided they receive the sum of \$100 per acre free from all deductions, in which case Smith would be in the position of a vendor selling on his own account; it may mean that the owners of the property are entitled to receive all of the net proceeds of the sale and that Smith cannot look to them for any compensation for services unless he obtains for them a net price in excess of \$100 per acre, and in that case he would be a mere agent. *Ford v. Brown*, 120 Cal. 551, 52 Pac. 817; *Wolverton v. Tuttle*, 51 Or. 501, 94 Pac. 961, 963.

[2] The provisions of the contract are not clear in this respect. If this were a case where the parties had plainly failed to make any provision for compensation, a simple agreement to pay the reasonable value for the services of an agent would be implied (*Ford v. Brown*, supra; *Kennedy v. Merickel*, 8 Cal. App. 378, 383, 97 Pac. 81), but the case here presented is one where the intention of the parties is imperfectly expressed and the language employed by them is ambiguous and requires interpretation. It was therefore permissible for the court to take into consideration the construction placed upon the instrument by the various persons concerned. *Mitau v. Roddan*, 149 Cal. 2, 14, 84 Pac. 145, 6 L. R. A. (N. S.) 275.

[3] Taking into consideration the dealings previously set forth, the various assignments of the option and the manner in which the sale was conducted by all the persons involved, the evidence must be held sufficient to support the finding of the trial court "that the said instrument was acted upon and construed by the grantors thereof and all the parties to this action as an option, and not as a mere agency authorization." It follows, therefore, that the plaintiffs were en-

titled to that portion of the net proceeds in excess of \$100 per acre.

[4] On this appeal, defendants raise the objection for the first time that the instrument in question was not signed by Leslie Smith, trustee for some of the owners of the land sold. This objection is of no avail to defendants in this case in view of the fact that a sale of the land was consummated by defendants under the said option and the terms of the option were observed and complied with without question by all of the owners of the land. Whether or not the written instrument was of value at the time it was first acquired by plaintiffs, it subsequently attained value, and defendants cannot now attack it upon this ground after having assumed a fiduciary relation to plaintiffs in regard to it and realized financial profit by means of it.

[5, 6] The complaint sets forth two causes of action, one for money had and received and one for an accounting. The case was tried and decided under the latter count. Defendants claim that the action was in reality an equitable action for an accounting against defendant Blodget for failure to carry out his agency agreement, and not one for damages for fraud, and therefore that it was error for the trial court to render a judgment against all four defendants jointly for the amount found to be due from defendant Blodget.

An action for an accounting lies within the jurisdiction of equity, among other instances, in cases of fraud as well as where there is a fiduciary relation between the parties and the facts are peculiarly within the knowledge of one. *Pomeroy's Equity Jurisprudence*, vol. 2, § 910; vol. 4, § 1421. Having once taken jurisdiction, the court will grant further relief demanded by the situation and necessary to complete justice. If through fraud and conspiracy other defendants assisted the defendant Blodget in violating his obligation to his principal by effecting a sale without plaintiffs' knowledge and retaining the proceeds, they, as well as the agent Blodget, are equally liable for all the consequences of the conspiracy, regardless of the extent of their participation or the share of the profits obtained by them. It is the civil wrong, not the conspiracy, which constitutes the cause of action, and therefore the plaintiff may bring his suit along any lines which he deems most likely to afford him redress for the particular injury which he has sustained, and, if successful in proving an injury of the nature claimed, may recover judgment in that action against all those who have united or co-operated in inflicting that injury. *Revert v. Hesse*, 193 Pac. 943. And where, after the violation of a fiduciary obligation, an accounting is had and an amount found to be due from the agent or trustee, judgment for the same amount may also be

rendered against those proven to have fraudulently aided in the attempt of the fiduciary to obtain secret profits, although they themselves are not fiduciaries and receive no share of the profits. *Lomita Land & Water Co. v. Robinson*, 154 Cal. 36, 97 Pac. 10, 18 L. R. A. (N. S.) 1106.

It is not, and, in view of the evidence, cannot, be argued that defendants Blodget, Commins, and Fickelissen did not enter into and succeed in a conspiracy to effect a sale under plaintiffs' option without plaintiffs' knowledge, and to retain the proceeds thereof. It is, however, contended that there is no evidence to sustain the finding that defendant Potter was involved in these dealings.

[7, 8] The trial court might have drawn the inference from the evidence before it that defendant Potter did not act in conjunction with the other defendants in this matter. However, the conclusion reached was that said defendant was implicated in the conspiracy, and, in view of the fact that the evidence was conflicting, and that it was possible to draw conflicting inferences from that part of the evidence which was not itself conflicting, the conclusion cannot be disturbed on appeal. Defendant Potter's participation in the conspiracy was more veiled than that of the other defendants, and it is difficult to ascertain the exact point of time at which he came within the orbit of the conspiracy. However:

"The law recognizes the intrinsic difficulty of proving a conspiracy. * * * The conspiracy may sometimes be inferred from the nature of the acts done, the relation of the parties, the interests of the alleged conspirators and other circumstances." *Revert v. Hesse*, supra; *Woodruff v. Hughes*, 2 Ga. App. 361, 58 S. E. 551.

When we consider that the climax in which the conspiracy culminated was an act consummated by defendant Potter, namely, the sale of the property to the Chanslor Canfield Oil Company; that during the negotiations herein set forth the said defendant was actively engaged in selling to the same company other land in the vicinity; that Patterson, Graham, and defendant Fickelissen, all of whom seem responsible for considerable and effective negotiating between the various parties, were close friends or former business associates of defendant Potter—we believe the circumstances proven were such as to support the conclusion of the trial court that defendant Potter, if not the instigating and moving force behind the whole transaction, was at least implicated in the conspiracy. Defendants claim that it is absurd to hold that defendant Potter had any part in keeping alive plaintiffs' option by paying \$250 on deposit on August 26, and that it would have been to defendant Potter's interest to have permitted the option to expire

and proceed under his own option, which he had obtained from the owners of the property. However, it may very well be that his own option was less favorable in its terms than plaintiffs' option, and that defendant Potter's only object in procuring it was to enable the other defendants to more easily get control of plaintiffs' option by curtailing the life of the latter option. But, even assuming that defendants Blodget, Fickelissen, and Commins were acting adversely to defendant Potter in extending the plaintiffs' option on August 26, by raising the sum of \$250, nevertheless "it was not essential to liability on his part that he should have been a party to the scheme from its inception." *Lomita Land & Water Co. v. Robinson*, supra. The evidence is sufficient to warrant the inference that, subsequent to that time, Potter did wrongfully aid and abet in securing and withholding the profits from the plaintiffs, and, the trial court having drawn that inference, he is equally liable with the other defendants.

Defendants contend that on August 26, at the time defendants advanced the \$250 to be paid as a deposit on the option, Smith, Sr., entered into an agreement with the said defendants as to the division of profits, and therefore plaintiffs cannot now claim all of the profits from the sale. However, any agreement which said plaintiff Smith, Sr., might have made at that time was not freely made, but was induced by the fraudulent representations and conduct of the defendants, and the agreement is thereby vitiated and not binding against the plaintiffs.

The judgment is affirmed.

We concur: SLOANE, J.; SHURTLEFF, J.; LAWLOR, J.

CHAMBERS, State Controller, v. MUMFORD et al.. (L. A. 6616.)

(Supreme Court of California. Oct. 14, 1921.)

1. Taxation \S 878(1)—Heir to whose trustee was distributed part of proceeds of note in settlement of claim against estate, acquired interest, not as heir, but as beneficiary under contract with trustee.

Where the proceeds of a note were assigned and distributed by agreement of certain heirs of an estate to the trustees of other heirs, in settlement of their claim against the estate, the interest thereby created passed to the latter, not as heirs, but as beneficiaries under the contract with their trustees.

2. Courts \S 95(2), 97(6)—Decisions of foreign state courts and United States Supreme Court, construing foreign statutes, not controlling in determining what property subject to inheritance tax.

The decisions of the courts of other states, and of the United States Supreme Court, com-

struing the statutes of other states, are not controlling in determining what constitutes property subject to inheritance tax in California.

3. Taxation §=867(1)—Choses in action subject to inheritance tax at creditor's domicile; "property."

All tangible personal assets of nonresidents are subject to inheritance tax in the state where located at the time of succession, but since in view of Const. art. 13, § 1; Pol. Code, § 3607, subjecting "all property in this state" to taxation for revenue, there is no distinction in the definition of "property" as used in the Inheritance Tax Act of 1913 and the general property tax laws, an interest in the proceeds of a promissory note, being a mere chose in action, attends the person of the creditor and is taxable at his domicile.

[Ed. Note.—For other definitions, see Words and Phrases. First and Second Series. Property.]

In Bank.

Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Action by John S. Chambers, as Controller of the State of California, against Rose Skeel Mumford and another. Judgment for plaintiff, and the named defendant appeals. Reversed.

Newlin & Ashburn, of Los Angeles, for appellant.

John W. Carrigan and E. H. Pennock, both of Los Angeles, for respondent.

SLOANE, J. This appeal involves the liability to an inheritance tax in the state of California of certain property interests passing to the defendant and appellant, Rose Skeel Mumford, under the last will of her deceased husband. Both the decedent and the appellant were at the time of the former's death nonresidents of the state of California, having their domicile in New Jersey. The property interest involved consisted of a contractual interest held for the testator by trustees, also nonresidents of California, in the proceeds of a promissory note executed by a resident of California to the defendant, Title Insurance & Trust Company of Los Angeles, in its capacity as administrator of the estate of one Arcadia B. De Baker, deceased. The Trust Company is a California corporation, and the note at all times was held, owing, and payable in the state of California, and was secured by a mortgage on California real estate.

The interest of testator, appellant's husband, in the proceeds of this note arose under the following conditions: He with other persons claiming to be interested as heirs in the De Baker estate, in order to prosecute their claims advantageously, assigned their respective interests growing out of such claims to trustees, who were empow-

ered to act for them. These trustees have likewise at all times involved in this proceeding been nonresidents of the state of California.

These claims of heirship were litigated in the superior court in the county of Los Angeles, but met with an adverse ruling from which an appeal was taken to this court. During the pendency of this appeal a contract of settlement was entered into with the De Baker heirs, or most of them, whereby these heirs agreed to procure a complete assignment of this note and a distribution thereof from the De Baker estate to these trustees. Such was the status of the transaction at the time respondent succeeded to her husband's interests at the time of his death. This contract was thereafter carried out, and the note was distributed to these nonresident trustees, and subsequently the amount of the note was collected by the Title Insurance Company, which continued to hold the note after distribution, as the agents of the nonresident trustees. The principal sum of the note was \$704,439.50, of which amount Mumford's interest was an undivided one-sixth. At the time of the commencement of this action the note had been collected, and sufficient of the amount due the respondent from her husband's share remained in the hands of the defendant Title Insurance Company to satisfy the inheritance tax demanded. No question is raised as to the amount of or liability for this tax, if it is a proper charge against the interest which passed to respondent under her husband's will.

[1] In determining the liability of this interest under the inheritance tax laws of California, the matter may be simplified without at all changing the legal aspect of the case by eliminating from consideration all facts involving the nonresident trusteeship, and the De Baker estate. The contract with the trustees was for the sole use and benefit of the beneficiaries of that trust, and the interest thereby created did not pass to them as heirs of the De Baker estate, but by virtue of the contract in settlement of the litigated claim.

The fact that the property interest in question was acquired by assignment from the De Baker heirs and afterwards vested in the assignees by virtue of a decree in the De Baker estate presents no different condition than if the rights had been created by contract and assignment from the original payee of the note. Neither is there any different situation created by the fact that the Mumford interest was held by a trustee than if the entire transaction had been carried on directly with Mumford in person.

The note was executed by a resident of California to a resident of California, and secured by mortgage on California real es-

tate. The note itself was at all times retained in California in the hands of the payee, who afterwards became the agent of the assignee, and who collected the money due on the note, and retains it in the state of California for the benefit of the appellant.

[2, 3] There is no dispute as to the facts, and the sole question involved is whether or not the interest of the nonresident testator acquired under the contract to assign constituted "property within this state," under sections 1 and 2 of the California Inheritance Tax Act of 1913 (Stats. 1913, p. 1066). It is conceded that the succession to the property is subject to the inheritance tax only in the event that the interest passing to appellant is property within the state of California. There has been in several of the states in the matter of fixing the situs of personalty for purposes of taxation under the inheritance tax laws a far departure from the common law rule, and commonly accepted rule that such property follows the domicile of the owner. It is impracticable to trace the modification of this rule through all its ramifications, but it may be said that as to all tangible personal assets it has become the settled law that they are subject to inheritance tax in the state where they are located at the time of the succession, under statutes imposing such tax upon property of a nonresident owner situated within the state. *Blakemore v. Bancroft*, Inher. Taxes, p. 143; *Blackstone v. Miller*, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439; *McDougald v. Lallenthal*, 174 Cal. 698, 164 Pac. 387, L. R. A. 1917F. 267; *State v. Dalrymple*, 70 Md. 294, 17 Atl. 82, 3 L. R. A. 372; *In re Rogers*, 149 Mich. 305, 112 N. W. 931, 11 L. R. A. (N. S.) 1134, 119 Am. St. Rep. 677. Some of the authorities may be said to have gone further, and for the purposes of such taxation to have fixed the situs of intangible property interests such as contract debts and other mere choses in action, within the jurisdiction where the debtor resides and to which the creditor must come to enforce his claim.

The rule supported by these authorities, as applying to choses in action against nonresidents of the state where the inheritance tax is claimed, is that if the owner must invoke the laws of that state to reduce his claim to possession, or secure the beneficial enjoyment thereof, and particularly if the security and evidences of indebtedness are in that state, the property interest is one within the state and subject to the local tax. *State v. Probate Court*, 128 Minn. 371, 150 N. W. 1094, L. R. A. 1916A, 901; *Blackstone v. Miller*, *supra*; *People v. Griffith*, 245 Ill. 532, 92 N. E. 313; *Greves v. Shaw*, 173 Mass. 205, 53 N. E. 372; *State ex rel. v. District Court*, 41 Mont. 357, 109 Pac. 438; *Matter of Houdayer*, 150 N. Y. 37, 44 N. E. 718, 34 L. R. A. 235, 55 Am. St. Rep. 642; *In re Rogers*, *supra*; *State v. St. Louis*, etc.,

Ct., 128 Minn. 371, 150 N. W. 1098, L. R. A. 1916A, 901; *State v. Ramsey County Prob. Ct.*, 124 Minn. 508, 145 N. W. 390, 50 L. R. A. (N. S.) 262, Ann. Cas. 1915B, 861.

In re Blackstone's Estate is a leading case arising in the New York courts, and affirmed by the Supreme Court of the United States (69 App. Div. 127, 74 N. Y. Supp. 508, affirmed, 171 N. Y. 682, 64 N. E. 1118, affirmed, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439). In that case the decedent was a resident of the state of Illinois. At his death he left deposits of money in a trust company in the city of New York, and also in a New York bank. The deposits were subject to payment on demand of the Illinois creditor. They constituted choses in action, as the relation between the bank and its depositors is merely one of debtor and creditor. These claims were held on contested hearing in the Supreme Court of New York to be property in that state. This decision was affirmed by the Court of Appeals in a memorandum opinion, and again by the Supreme Court of the United States on writ of error to that court.

It may be said, however, for these decisions holding that bank deposits are property in the state where the bank account is created, that they rest to some extent upon the popular fiction that the bank deposit represents actual money in specie. It would require a further and somewhat advanced step to apply this construction to any ordinary contract debt.

It may be admitted that there is much reason and perhaps sound policy for accepting a rule which recognizes as the situs of contract debts the place where the debtor resides, and to which the creditor must come to enforce his claim. It may be said with truth that everything which gives value to such a claim exists at the domicile of the debtor. The adopting of such a rule in California, however, would be a reversal of the common-law doctrine of *mobilia sequuntur personam* which has prevailed in this state, and which has been followed by our courts in determining the situs of choses in action. The decisions of the courts of other states, and of the Supreme Court of the United States construing the statutes of other states, may be suggestive, but are not controlling in determining what constitutes property within the state of California.

No distinction is apparent in the use of the word "property" in our inheritance tax law to differentiate it from the same term in the laws governing the levy and collection of an ordinary property tax. Under section 1, article 13, of the Constitution, and section 3607 of the Political Code, "all property in this state" subject to certain exemptions is made subject to taxation for revenue. The term under consideration in the inheritance tax law is "property within this state." There seems to be no room under our stat-

utes for the distinction as to definitions of property which exists in many jurisdictions between the property tax and the tax upon succession to property.

The California rule as to property taxes is stated in *Estate of Fair*, 128 Cal 612, 61 Pac. 186, as follows:

"As to corporeal chattels such as live animals, manufactured goods, and the like, it is doubtless the rule that they are taxable in the state where they have local situation, though the owner may reside elsewhere. * * * The general rule is that debts attend the person of the creditor, and are taxable at his domicile." *San Francisco v. Lux*, 64 Cal. 481, 483, 2 Pac. 254; *Mackay v. San Francisco*, 113 Cal. 398, 399, 45 Pac. 696; *People v. Park*, 23 Cal. 139.

In *Mackay v. San Francisco*, 128 Cal. 681, 61 Pac. 382, it is said:

"The weight of authority is that a debt so due or to become due should be taxed at the place of residence of the creditor or owner, and that the situs of the debt is that of its owner, and that it is not property in the state of the debtor."

A concession has been made under the decisions of this court in the right to modify the application of the maxim, *mobilia sequuntur personam*, in the matter of certificates of stock in a domestic corporation. It has been held for purposes of the inheritance tax law the situs of stock in a corporation is in the state of the incorporation. *McDougald v. Low*, 164 Cal. 107, 110, 127 Pac. 1027; *Murphy v. Crouse*, 135 Cal. 19, 66 Pac. 971, 87 Am. St. Rep. 90; *McDougald v. Lillenthal*, supra, 174 Cal. 701, 164 Pac. 387, L. R. A. 1917F, 267. A reason for making a distinction between certificates of stock, and ordinary choses in action is in the fact that the former represent an interest in and derive their value from the tangible assets of the corporation. Beyond this the California decisions have shown no disposition to limit or modify the common-law rule that the situs of mere choses in action follows the domicile of the owner.

The nearest adjudication of this point as applied to the inheritance tax law we have in California is in the *Estate of Hodges*, 170 Cal. 492, 150 Pac. 344, L. R. A. 1916A, 837, where it was held that certain bonds and securities, deposits in bank and other chattels, held in the state of Massachusetts, but owned by a resident of California, were subject to an inheritance tax in this state. Discussing the application of the maxim, *mobilia sequuntur personam*, Mr. Justice Lorigan, writing the opinion, says:

"That maxim, universally applied in the jurisdictions of all civilized nations, is that the personal estate of a decedent, wherever it may in fact be located, is, for the purposes of succession and distribution, deemed to have no other locality than the domicile of the decedent. As a

general rule, the domicile of the decedent draws to it in contemplation of law all the personal property of the decedent no matter where its actual situs may be at the time of his death, and the distribution of it is governed and controlled by the laws of succession existing at the place of the domicile of the decedent. The courts of the various states have had frequent occasion to pass upon the power of a state having jurisdiction through its courts over the estate of a domiciled decedent to impose an inheritance tax upon the personal property of such decedent located outside of the state, and the authorities are uniform in holding that though personal property may be actually located in another state than that of the residence of the decedent at the time of his death, its situs for the purpose of imposing an inheritance tax upon it is in the state which was the domicile of the decedent, and where the primary administration of his estate is being had. *Roos on Inheritance Taxation*, pp. 221, 229; *Blakemore and Bancroft on Inheritance Taxes*, §§ 207, 225; *Dos Passos on Inheritance Tax Law* (2d Ed.) § 29; *Estate of Swift*, 137 N. Y. 77, 18 L. R. A. 709, 32 N. E. 1096; *Frothingham v. Shaw*, 175 Mass. 59, 78 Am. St. Rep. 475, 55 N. E. 623; *People v. Union Trust Co.*, 255 Ill. 168, Ann. Cas. 1913D, 514, 99 N. E. 377; *In re Bullen's Estate*, 143 Wis. 512, 139 Am. St. Rep. 1114, 128 N. W. 109; *Mann v. State Treasurer*, 74 N. H. 345, 15 L. R. A. (N. S.) 150, 68 Atl. 130; *In re Dingam's Estate*, 66 App. Div. 228, 72 N. Y. Supp. 694; *In re Hartman*, 70 N. J. Eq. 664, 62 Atl. 560; *State v. Probate Court*, 124 Minn. 508, 50 L. R. A. (N. S.) 262, 145 N. W. 390; *Commonwealth v. Williams*, 102 Va. 778, 1 Ann. Cas. 434, 47 S. E. 867; *Estate of Bittinger*, 129 Pa. St. 338, 18 Atl. 132.

"All of these cases were decided in favor of the right of the state having control of the primary administration of the estate through the application of the maxim *mobilia sequuntur personam*; the well-established general rule that the personal property of a decedent wherever situated is governed by the law of the domicile of the owner both as to distribution and the right to succession."

Such application of this rule has been established by a line of decisions antedating the inheritance tax, and as there is nothing in the enactments creating the inheritance tax to limit or change such application of the rule, it must be held under familiar rules of construction that in the use of the term "property in this state" the Legislature intended it to have the same meaning as had already been given to practically the same expression in the laws governing property taxes.

This rule of construction has been in force so long and has been so consistently followed that if it is to be changed or modified it should be by the Legislature and not by the courts.

The judgment is reversed.

We concur: ANGELLOTTI, C. J.; WILBUR, J.; LENNON, J.; LAWLOR, J.; SHURTLEFF, J.

McNUTT v. CITY OF LOS ANGELES (two cases). (L. A. 6579, 6577.)

(Supreme Court of California. Oct. 14, 1921.)

1. Municipal corporations \S 269(3)—Could change grade of streets under Street Improvement Act of 1913 to conform to previously established grades; "Improvement."

A city, under Street Improvement Act 1913, \S 1, 2, 5, could change the grade of a public street to make it conform to previously established grade, it being unnecessary that the grade be concurrently established, in view of section 46, defining term "improvement" to include "establishment, change or modification of grade, if any," and the legislative history of the act, notwithstanding section 1 of the amendatory act of 1915.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Improvement.]

2. Municipal corporations \S 269(3)—City authorized to establish grade for tunnel to be used as public thoroughfare.

Street Improvement Act 1913, \S 1, providing for improvement of public street by establishment, change, or modification of the grade of the street, *held* to authorize the city to establish a grade for a tunnel to be used as a public thoroughfare.

3. Municipal corporations \S 293(2)—Resolution of intention held to sufficiently designate work to be done.

Resolution of intention providing that grade of streets shall be altered as shown on various plans and specifications on file in city engineer's office, referred to for more particular description, *held* sufficient under Street Improvement Act of 1913, requiring the resolution to designate the proposed grade, in absence of a showing that all the data required to be shown was not contained in the plans and specifications referred to.

4. Municipal corporations \S 294(8)—Requirement that city clerk make and file affidavit as to mailing notice of passage of resolution of intention to property owners mandatory.

Street Improvement Act 1913, \S 3, requiring city clerk, immediately on passage of resolution of intention, to mail notice thereof to proper owners, and to file affidavit that he has mailed notices, *held* mandatory, the making and filing of affidavit being a jurisdictional fact.

5. Municipal corporations \S 294(8)—City clerk's affidavit as to notice to property owners must show notice in compliance with statute.

City clerk's affidavit that he has mailed postal cards notifying property owners of passage of resolution of intention under Street Improvement Act 1913, \S 3, must show that the notice was mailed in compliance with requirements of the statute, to give city council jurisdiction to proceed with the work.

6. Municipal corporations \S 294(8)—City clerk's affidavit conclusive evidence that notice was properly directed, mailed, and delivered to property owners.

City clerk's affidavit that he mailed postal cards giving notice of passage of resolution of intention to property owners under Street Improvement Act 1913, \S 3, in compliance with the statute, is conclusive evidence that the notice was properly directed, mailed, and delivered.

7. Municipal corporations \S 294(4)—City clerk's notice of passage of resolution of intention held insufficient for failure to designate the improvement.

City clerk's notice to property owners under Street Improvement Act 1913, \S 3, of the passage of the resolution of intention "for the improvement of B. tunnel," giving ordinance number thereof, *held* insufficient to give city council jurisdiction to proceed with an improvement other than B. tunnel, provided for in the resolution of intention, the reference to the resolution of intention being insufficient, in view of section 44.

8. Eminent domain \S 283—Owner held not estopped from claiming damages for change in grade of street by attempted proceedings under Street Improvement Act.

Owner of lot abutting on street was not estopped from claiming damages for change in grade because of attempted proceedings by city under Street Improvement Act of 1913 where city council had no jurisdiction to proceed with the improvement because of insufficiency of city clerk's notice to property owners of passage of resolution of intention under section 3.

9. Judgment \S 256(7)—Plaintiff not entitled to interest though order directed judgment in accordance with prayer of complaint claiming interest, where findings showed plaintiff not entitled thereto.

Order granting plaintiff's motion under Code Civ. Proc. \S 863, to vacate judgment for defendant, and directing entry of judgment for plaintiff upon the court's findings of fact, in accordance with the prayer of complaint, did not entitle plaintiff to amount claimed under complaint with interest, though complaint demanded such amount with interest from specified date, where, under the findings, plaintiff was not as matter of law entitled to interest on such amount.

10. Appeal and error \S 1071(2)—Erroneous conclusion of law no ground for reversal if judgment is right.

An erroneous conclusion of law does not constitute a cause of reversal if the judgment is right.

11. Eminent domain \S 302—Plaintiff suing for damages for change in grade of street not entitled to interest.

Owner of land abutting on street suing city for damages for change in grade of street could not recover interest before judgment, the claim being unliquidated.

12. Interest \S 19(1)—Not recoverable before judgment on unliquidated claim.

Plaintiff suing on an unliquidated claim cannot recover interest on amount claimed before judgment, even as against an individual defendant.

13. Municipal corporations \S 1002—States \S 171—Interest not recoverable against state or municipality in absence of statute.

As against the state or a municipality, interest cannot be recovered except under special statutory authorization.

In Bank.

Appeal from Superior Court, Los Angeles County; Lewis R. Works, Judge.

Action by Harry W. McNutt, substituted in the place and stead of J. H. Smith, against the City of Los Angeles, a municipal corporation. Judgment for plaintiff for less than amount claimed, and both parties appeal. **Affirmed.**

Charles S. Burnell, W. P. Mealey, and J. H. O'Connor, all of Los Angeles, for appellant.

J. C. Cross, Chas. S. Conner and Herbert Cutler Brown, all of Los Angeles (Delphin M. Delmas, of Los Angeles, of counsel), for respondent.

SLOANE, J. The plaintiff in this action recovered judgment against the city of Los Angeles, the defendant, in the sum of \$5,000 for damages resulting from changing and lowering the grade of streets bordering on plaintiff's lot. Both parties have appealed from the judgment.

The defendant appeals on the ground that the street work complained of was done in conformity with the Street Improvement Act of 1913, and that plaintiff, having failed in such proceedings to make his claim for damages as required by the act, was not entitled to recover in this action.

The plaintiff appeals on the ground that he was entitled to interest upon the amount of his recovery, which was not included in the judgment.

The appeals will be considered together in this opinion.

It is conceded by the defendant that the plaintiff was entitled to recover damages unless the city of Los Angeles had jurisdiction to carry on the work complained of under the Street Improvement Act of 1913 (St. 1913, p. 954).

The plaintiff was the owner of a city lot at the northwest corner of the intersection of California street and Broadway. A tunnel for street purposes had been constructed on Broadway in the year 1908 through a steep hill lying northerly from the intersection of the streets named. The southerly opening of the cut to the entrance of this tunnel, as originally established and constructed, appears

to have been approximately upon the grade of plaintiff's lot.

The change for which damages are claimed consisted of cutting down the grade at the southern entrance of the tunnel and along plaintiff's land to a depth of upwards of 18 feet. This tunnel was originally constructed under an act of the Legislature approved March 19, 1889, and acts amendatory thereto, and in accordance with plans and specifications adopted by the legislative body of the city, and was accepted and thereafter used as a public way by the city for many years. There seems to have been no formal establishment of the grade for the floor of the tunnel at the time it was constructed.

It is alleged in the third amended complaint, the averments of which are stipulated and held by the findings to be true, that "on the 9th of July, 1912, the council of the city duly adopted an ordinance changing and establishing the grade of California street and of North Broadway," and that the grades thus established are the grades to which Atkinson (the contractor with the city) reduced these streets by the work hereinabove mentioned. The complaint also alleges that on the 25th of March, 1913, the council adopted an ordinance establishing the grade of the Broadway tunnel, in conformity to the grade thereafter used and conformed to by said contractor.

At any rate, if any authority existed for changing the physical grade of the streets and tunnel adjacent to plaintiff's lot under the proceedings thereafter had, it was by action of the city council taken prior to and independently of the proceedings under the act of 1913.

Plaintiff states his grounds of objection to the work complained of as follows:

"1. (a) The legislative body of the city of Los Angeles had no power under the Street Improvement Act of 1913 to order the grading and improvement of California Street, or North Broadway tunnel, because the official grade of these streets, highways or thoroughfares had already been established before the passage of the ordinance of intention to order such grading and improvement (passed October 9, 1913), and, as appears upon the face of said ordinance, the grading and improvement of said streets, highways, or thoroughfares was ordered to conform to the official grade thus theretofore established.

"2. The ordinance adopted by the legislative body of the city of Los Angeles on March 25, 1913, purporting to establish the grade of the Broadway tunnel, was illegal and void. Thus, for the following reasons:

"(a) There was, at that time, no law of this state, and no provision of the charter of the city, which authorized that body to establish the grade of a tunnel used for purposes of public travel.

"(b) As appears by the facts found, the grade of the Broadway tunnel had been officially es-

established in the year of 1898. In accordance with the official grade thus established the tunnel had been constructed, and upon that grade the public travel had passed for 12 years and more. No ordinance changing that grade could legally be adopted under the pretense of originally establishing an official grade, even if it were assumed that power existed either to establish or change the grade of such tunnel.

"3. The Street Improvement Act of 1913 has no application to such underground tunnels as was the Broadway tunnel; and, therefore, all the proceedings set forth in the findings of fact, so far as they affect that tunnel, are illegal and void.

"4. Were it conceded that under the Street Improvement Act of 1913 the legislative body of the city of Los Angeles was invested with the power to order done the improvements described in its ordinance of intention adopted on the 8th day of October, 1913, that body had no power, under the facts here found, to pass the ordinance ordering said work to be done. And this for the following reasons:

"(a) The city clerk never made or filed the affidavit required by section 3 of said act.

"(b) The affidavit which the clerk did make shows upon its face that the notices which he mailed did not conform to the requirements of said act."

[1] A debatable question arises under the first objection above stated. Does, or does not, the Street Improvement Act as adopted in 1913 authorize the physical improvement and change of grade of a public street independently of a concurrent establishment, change or modification of the official or paper grade in the same proceeding?

The language of such act as it stood when the work here was undertaken, so far as it has any bearing on this point, and eliminating for the sake of clarity portions of the text which have no relation to the point at issue, is as follows (Stats. 1913, p. 954 et seq.):

Section 1. "Whenever the public interest or convenience may require, the legislative body of any city is hereby empowered to *establish or change or modify the grade of any public street, lane, alley, court, place, or right of way in said city, * * * and * * * to order the whole, or any part, * * * of such public street * * * to be improved to conform to such official grade.*"

Section 2. "Before ordering any establishment, change or modification of grade or any improvement described in section one herein, the said legislative body shall pass an ordinance or resolution, declaring its intention so to do, * * * *designating the proposed grade*, describing the proposed improvement, fixing a time and place for the hearing of protests * * * and specifying the exterior boundaries of the district of land to be benefited by said improvement."

Section 5. "If no protests are filed, * * * or if protests are filed, and after hearing are denied, * * * the legislative body shall have jurisdiction to order the establishment, change or modification of grade and the improvement described in the ordinance or resolution of intention. Having acquired such jurisdiction, it

shall by ordinance or resolution order the establishment, change or modification of grade and such improvement to be made."

Section 46. "The term 'improvement' includes the establishment, change or modification of grade, if any, and all of the improvements mentioned in section one of this act."

The title to this act declares it:

"An act to provide for the establishment and change of grade of public streets, * * * and providing for the improvement thereof, in cases where any damage to private property would result from such improvement."

The italics used in the foregoing quotations are supplied to emphasize the construction contended for by plaintiff.

In defining the scope and purpose of this act it is apparent that all references to change of grade and improvement work are made conjunctively. The only constructive basis for a different interpretation is the use of the term "if any," in section 46, referring to the preceding words "establishment, change, or modification of grade."

Counsel for the appellant argue that, if a concurrent establishment or change of grade was an essential and prerequisite condition in every instance to any physical improvement of a street, under this act, the expression "if any" could find no place or significance in the application there given to the word "improvement." There is force in the suggestion. The word "improvement," as used in the act, is defined to cover proceedings which authorize the physical grading of the street, and a concurrent change of the official grade, "if any."

But a more potent reason for such construction comes from a consideration of the history of this act. The Legislature of 1909 enacted two separate measures for street improvement, one known as the Change of Grade Act (Stats. 1909, p. 1018), which provides a procedure for changing the official or paper grades of streets, without any concurrent physical work thereon, and the other known as the Hammond Act (Stats. 1909, p. 1042), which established a proceeding for actual street work where the grades were already established. But no provision was made in either act for a condition where it might be desirable to change or establish a grade and authorize the work of improvement concurrently.

Construed as appellant contends for, the Street Improvement Act of 1913 here under consideration very sensibly remedies this omission by permitting in the same proceeding the governing body of a city to take proceedings for the physical grading and improvement of a street, and at the same time where there is no official grade, or a change of grade was desired, to establish such grade.

The act of 1913, it will be seen by comparison, while it repeals the Hammond Act of 1909, is a substantial re-enactment thereof,

with the incorporation of the provision for establishing or changing the grade concurrently where such need exists; and the manner in which the amendment of the statute is made and the obvious reasons therefor, would indicate that it was not intended to change the operation of the law in cases where grades were already established, but merely to supplement the former provision by allowing concurrent changes of grade where required, without the necessity of a separate and independent proceeding.

It is true that the act of 1913 is at least open to the criticism of being ambiguous and uncertain as to its interpretation in this respect. The Legislature has apparently fallen into the error so common in legal parlance of using the conjunctive article "and" where the disjunctive "or" is intended. But this can be disregarded if the obvious purpose of the act and the intention indicated by other phraseology justify it.

It is strongly insisted by respondent that the subsequent amendments to section 1 of this act show the legislative interpretation to have been that the statute did not in its original form authorize actual grading work, except where the official grade was changed or established in the same proceeding.

Section 1 of the act of 1913 was amended in 1915 (Stats. 1915, p. 1217) by adding a proviso:

"That wherever the official grade of any such public street * * * has been theretofore established, changed or modified in any manner authorized by law, the legislative body of said city may order * * * such public street * * * to be improved under the provisions of this act."

The conclusion urged by respondent does not necessarily follow. It is often the function of an amendment to remove just such uncertainty and ambiguity as it is claimed exists here, by expressing the point involved in obscurity in language that cannot be misunderstood (Independent School District v. Kelley, 120 Iowa, 119, 94 N. W. 284; Alexander v. Mayor of Alexandria, 5 Cranch, 1, 3 L. Ed. 19).

It is obviously the part of reason and common sense that the Legislature should have intended by the original enactment of the act of 1913, to supplement the law as announced in the Hammond Act of 1909, by extending its scope to apply to the improvement of streets where an establishment of grade has not already been made, by providing a concurrent procedure for that purpose where needed, rather than to limit its application alone to streets where such concurrent change of grade is required, that every intentment of the statute should be applied to the broader construction.

We are of the opinion, therefore, that the city council had jurisdiction to proceed under

this statute with a view to contracting for the work complained of in conformity to previously established grades.

There is no sufficient justification for the collateral attack in this action upon the regularity and validity of the proceedings under which the official grades of the Broadway Tunnel and California street and North Broadway were established. The complaint itself alleges that the grades on California street and North Broadway to which the contractor conformed were duly adopted by an ordinance of the council on the 9th of July, 1912. As we gather from the record, no part of the tunnel proper was upon or contiguous to the property of plaintiff. That part of the street lying along the North Broadway side of plaintiff's lot, as we understand, was occupied by the cut complained of leading to the southerly opening of the tunnel.

So far as damage to plaintiff's land is concerned, the change of grade of the tunnel is not material. It is only as the right to lower the floor of the tunnel affects the jurisdiction of the city to proceed in the matter that it becomes significant. The complaint also alleges the adoption of an ordinance on the 25th of March, 1913, establishing the grade to which the contractor later lowered the floor of the tunnel, and also sets out such ordinance as Exhibit C of the complaint.

Nothing appears in the complaint attacking the regularity or validity of the proceeding for the adoption of these ordinances.

[2] The objection that there was no authority under the Street Improvement Act of 1913 to establish a grade for a tunnel to be used as a public thoroughfare is not pressed in respondent's brief. In any event, we think the act sufficiently authorizes tunnel work. Section 1, in authorizing streets to be improved to established grades, includes as part of the authorized work the construction of "culverts," "bridges," and "tunnels." The construction of a bridge over a chasm, or the boring of a tunnel through an obstructing hillside, would be integral parts of the actual highway improvement, and not a mere accessory structure. Bailey v. Hermosa Beach, 192 Pac. 712. In the case of Thompson v. Hance, 174 Cal. 572, 163 Pac. 1021, which held that tunnel construction was not authorized under the Vrooman Act as amended in 1911, the court was considering a statute which only mentioned tunnels as obviously intended for drainage purposes in connection with the street, the reference being to tunnels, sewers, ditches, * * * conduits, and channels for sanitary and drainage purposes."

[3] Plaintiff further attacks the jurisdiction for this procedure on the ground that the resolution of intention did not designate the grade upon which the work on the tunnel was to be done. The act of 1913 provides that before ordering any street work under

such act the legislative body of the city "shall pass an ordinance or resolution declaring its intention to do so, * * * designating the proposed grade." It may be questioned if the requirement to designate "the proposed grade" applies where the grade is already established, but rather refers to proceedings where an establishment or change of grade is contemplated concurrently with the physical improvement of the street. The Hammond Act of 1909, upon which we have seen the present act is based, and which only dealt with street improvements where the grades were already established, did not direct any reference to the grade in the resolution of intention. In other words, in this proceeding there was no "proposed grade," the grade having previously been established. This resolution does, however, provide that the work shall be constructed as shown on various plans and specifications referred to for more particular description, and on file in the city engineer's office.

It is not alleged in the complaint, does not affirmatively appear from the resolution itself, and is not found by the court, that all the data required to be shown was not contained in the plans and specifications referred to. If this reference makes the specifications a part of the resolution of intention, we cannot infer that all the information required was not contained in such specifications.

In *Chase v. Trout*, 146 Cal. 350, 368, 80 Pac. 81, Mr. Justice Shaw writing the opinion, it is held that a reference to plans and specifications on file will serve to make sufficient the description of the work in a resolution of this character where by the terms of the description in the resolution itself it would be void, and that it is not required that such plans and specifications should be published as part of the resolution.

In the case before us counsel for plaintiff recite in their notice of motion for judgment in plaintiff's favor on the findings that it appears upon the face of the ordinance that "the grading and improvement of said streets and highways or thoroughfares was ordered to conform to the official grade thus theretofore established."

Another and more serious objection to the validity of these proceedings under the Street Improvement Act of 1913 is the alleged failure of the city clerk to make an affidavit before the work was ordered that he had mailed postal cards to the property owners within the assessment district containing the notice required by the statute of the proposed improvement. Section 3 of the act requires that the city clerk shall, immediately upon the passage of the resolution of intention, mail to each of such property owners a postal card giving notice of the passage of the resolution of intention, "the name of street to be improved, and between what streets located." It is then further provided as follows:

"The city clerk shall immediately upon the completion of the mailing of said cards file in the office of the superintendent of streets an affidavit setting forth the time and manner of his compliance with this requirement; provided, that the failure of the city clerk to address said cards or any of them to the true owners of said property, or to mail said cards, or the failure of the property owners to receive the same, shall in no wise affect the validity of the proceedings or prevent the legislative body from acquiring jurisdiction to order the work; provided, however, that the legislative body shall not pass any ordinance or resolution ordering the work until such affidavit is made and filed as herein prescribed."

[4] The making and filing of this affidavit is mandatory and jurisdictional as affecting the power of the city council to pass an ordinance ordering the performance of the work. The reservation made in the proviso, that failure in fact in properly addressing or mailing or delivering said cards shall in no wise affect the validity of the proceedings, is clearly intended to avoid the uncertainty and complication that would inevitably arise if the proceeding could be attacked for failure to reach any one or several of the interested property owners with such cards by making the affidavit conclusive evidence of the facts alleged; but the negative provision contained, that such failure in the actual making and delivery would not invalidate the proceedings, or destroy jurisdiction, coupled with the final proviso, that the legislative body "shall not pass any ordinance or resolution ordering the work until such affidavit is made and filed as herein prescribed" emphasizes the intention of the Legislature to make such affidavit a condition of jurisdiction to take further action.

[5, 6] There was an affidavit made and filed in this instance. The vital question is, Did it meet the substantial requirements of the statute? Obviously, an affidavit by the clerk that he had mailed notice of intention to pave the Applan way would not suffice in this case. In order to conform to the requirement of the statute the affidavit must show that the notice mailed was in compliance with the requirements of the law. When this is done the affidavit becomes conclusive evidence that such notice was properly directed, mailed, and delivered, but the notice itself must, of course, conform to the statute.

[7] The notice which the clerk did make affidavit that he had mailed was as follows:

"Los Angeles, Cal., Oct. 22, 1913.

"You are hereby notified that on the 9th day of October, 1913, the legislative body of the city of Los Angeles, California, by virtue of the street improvement act of 1913, passed an ordinance (resolution) of intention numbered 28,413 (new series) for the improvement of Broadway tunnel. Protests will be heard on the 19th day of November, 1913, at the hour of 9 o'clock a. m. in the council chamber of said city.

"Your property is in the district to be assessed for this improvement.

"Chas. L. Wilde, City Clerk."

Three distinct improvements were included in the resolution of intention—Broadway tunnel between Temple street and Sunset boulevard, California street between North Broadway and Hill street, North Broadway between Temple street and California street. In the notice certified to by the affidavit the only reference to the location of the work proposed is in the words, "for the improvement of Broadway tunnel." Is this the notice called for by the statute and required to be certified to in the affidavit?

The change in the streets for which plaintiff claimed damages was not in the Broadway tunnel, but on North Broadway and California street. He may have been indifferent to improvements to be made in the tunnel and willing to bear his portion of the assessment therefor without further investigation. The law required specific notice of the work proposed on these other streets. There was nothing in the notice certified to that can be said to have put a property owner on inquiry as to the inclusion of any other work than the improvement of the tunnel, and there was nothing on the face of the notice to suggest that the proposed improvement would extend to property in the other localities. If there had been it might well be said that the property owner was put on inquiry, and should have gone to the records for particulars.

That it was not the legislative purpose to make reference to the resolution of intention help out the notice in question is indicated by the provision of section 44 of the act that in "all resolutions, notices, orders and determinations subsequent to the 'notice of street work' a description of the work by reference to the ordinance or resolution of intention shall be sufficient." This notice was not subsequent, but prior to, or at least concurrent with, the notice of street work.

The decision of the Court of Appeal, *Beale v. City of Santa Barbara*, 32 Cal. App. 235, 243, 162 Pac. 657, cited by counsel for appellant, does not apply here, for the reason that such affidavit of mailing postal notices there involved was not made a condition precedent to ordering the work, under the Vrooman Act as then in force, which was under consideration in that case. Neither is there room for application of the rule referred to in *Bailey v. Hermosa Beach*, 192 Pac. 712, that jurisdiction does not depend upon record evidence or affidavit of notice, but upon the fact of notice. In this case the statute makes the affidavit of mailing the exclusive and conclusive proof of the fact of notice, and there is no allegation or offer of other proof that the law was complied with. In fact, the affidavit itself contains the proof

that the notice mailed was not the notice required by the statute.

[8] We see no escape from the conclusion that in this absence of a substantial compliance with the law relating to the mailing of such notice there was a failure of jurisdiction to order the street improvements from which plaintiff's claim for damages arose. It follows that plaintiff was not estopped by such attempted proceedings from pursuing his relief in this action.

In view of the conclusion thus reached upon the merits of this proceeding, it is perhaps unnecessary to pass upon plaintiff's objection that the appeal was not properly taken.

We have not heretofore referred to the fact that judgment in this action was originally for the defendant, and that such judgment was vacated and a judgment on the findings entered for plaintiff, in pursuance of a motion under section 663 of the Code of Civil Procedure. The appeal is from this final judgment, and it is the contention of plaintiff that it should have been from the order directing the new judgment. Without discussing the merits of the question thus raised, it is sufficient for the purposes of this decision that a motion to dismiss this appeal on the grounds stated was heretofore presented to this court and denied. The circumstances attending the rendition of the new judgment, however, become material in the consideration of the appeal taken by plaintiff.

[9] The prayer of the third amended complaint was that plaintiff recover judgment for \$5,000 damages, with interest thereon from the 1st day of September, 1915. In granting the motion vacating the first judgment for defendant and directing judgment for the plaintiff, the order of the court recites as follows:

"The plaintiff's motion to set aside and vacate the judgment (based upon findings of fact made by the court) heretofore rendered against him and entered on the 24th day of December, 1919, and to enter upon said findings a judgment in the plaintiff's favor in accordance with the prayer of his third amended complaint, filed here on the 24th of November, 1919, came on regularly to be heard on the 20th day of January, 1920, the parties appearing by their respective counsel, whereupon, after argument heard from both sides, the court being duly advised, grants said motion and orders that judgment be entered accordingly."

The judgment thereafter made and entered, after reciting the foregoing order, decrees as follows:

"Wherefore, it is now ordered, adjudged and decreed that the conclusions of law heretofore announced be amended and corrected by striking out said conclusions as the same now appear in the findings of fact and conclusions of law and substituting in lieu thereof the following: As conclusions of law from these facts the court

decides that the plaintiff is entitled to judgment according to the prayer of his third amended complaint. And it is further ordered, adjudged, and decreed that the judgment heretofore entered herein on the 24th day of December, 1919, be and the same is hereby set aside and vacated, and that the plaintiff do have and recover from the defendant the sum of \$5,000, together with his costs."

Thereafter, on the 9th day of April, 1920, judgment was entered for the plaintiff for \$5,000 damages, but without interest. Plaintiff at the time objected to the entry of a judgment without interest as not being in accord with the order of the court directing such judgment, but the court overruled the objection and caused the judgment to be entered without interest, to which ruling plaintiff excepted.

No question is raised by the defendant as to the regularity of the proceedings on the motion under section 663, Code of Civil Procedure. The new judgment is therefore to be considered precisely as though it were founded on original findings of fact and conclusions of law. Plaintiff's rights in the premises are to be measured by the findings of fact rather than the conclusions of law, and if the facts do not entitle him to interest he is not prejudiced by the judgment.

[10] The trial court, under section 663, Code of Civil Procedure, still had jurisdiction to further amend its conclusions of law if they did not conform to the findings of fact. This, perhaps, would have been the consistent course, but if under the findings of fact plaintiff is not entitled to recover interest he would not be entitled to relief on this appeal. An erroneous conclusion of law does not constitute a cause of reversal if the judgment is right. *Spencer v. Duncan*, 107 Cal. 423, 40 Pac. 549; *Helm v. Duncan*, 3 Cal. 454; *Bleven v. Freer*, 10 Cal. 172.

[11, 12] As has already been shown by the record, this judgment was for damages arising from the unlawful changing of the street grade in front of plaintiff's premises by the city of Los Angeles. The claim sued on was unliquidated, and could not draw interest before judgment even as against an individual defendant. *Perkins v. Blauth*, 163 Cal. 782, 127 Pac. 50; *Cox v. McLaughlin*, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164.

[13] As against the state or a municipality thereof, interest cannot be recovered except under special statutory authorization. *Engelbreton v. City of San Diego*, 197 Pac. 651; *Savings Society v. San Francisco*, 131 Cal. 356, 363, 63 Pac. 665.

The appeal by plaintiff is therefore also without merit.

The judgment is affirmed.

We concur: ANGELLOTTI, C. J.; LENNON, J.; LAWLOR, J.; SHURTLEFF, J.

RABE v. LLOYD et al. (L. A. 7069.)

(Supreme Court of California. Oct. 20, 1921.)

Appeal and error §422—Failure of notice of appeal to specify court to which taken held not ground for dismissal.

Under Code Civ. Proc. § 941b, relating to appeals by alternative method, and requiring the notice to state to which court the party appeals, failure of such notice to specify the court in an appeal, where the Supreme Court was the only court to which such appeal would lie, was not ground for reversal, especially in view of Const. art. 6, § 4, forbidding appeal to be dismissed when not taken to the proper court, but to be transferred.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by J. W. Rabe against Mae Lloyd and others. From a judgment for defendants, plaintiff appeals. On motion to dismiss appeal. Denied.

Morganstern & Smith, of San Diego, for appellant.

Sherman Lacey, of San Diego, for respondents.

PER CURIAM. Motion to dismiss appeal; the ground of motion being that the notice of appeal is fatally defective, in that it does not state to what court the appeal is taken. The notice is most specific in all other respects, describing with the utmost particularity the judgment from which the appeal was attempted to be taken.

Under the provisions of our Constitution the only court to which the appeal in this case would lie is this court. Section 941b, Code of Civil Procedure, relative to appeals taken by the alternative method, provides that the notice of appeal shall state, among other things, that the party does hereby appeal "to the Supreme or District Court of Appeal, as the case may be," from the judgment or order, identifying the thing appealed from with reasonable certainty. Technical compliance with the provisions of this section would include a statement of the court to which the appeal is taken; but we are of opinion that failure in this regard should not be held to invalidate the notice of appeal. As we have noted, any appeal in this case could properly be taken only to this court. In every case there is only one court to which an appeal may properly be taken, this court or one of the three District Courts of Appeal, the respective appellate jurisdiction of the Supreme Court and District Courts of Appeal being specified in the Constitution. It is further expressly provided in the Constitution (section 4, art. 6) that—

"No appeal taken to the Supreme Court or to a District Court of Appeal shall be dismissed for the reason only that the same was not taken to the proper court, but the cause shall be transferred to the proper court upon such terms as to costs or otherwise as may be just, and shall be proceeded with therein as if regularly appealed thereto."

In view of the fact that the only court in which an appeal in any case can be heard is determined by constitutional provision, and in view of the further constitutional provision which we have just quoted, we are of the opinion that this notice which does state an appeal from a judgment described with absolute certainty should be held sufficient to sustain the appeal.

The motion to dismiss the appeal is denied.

ANGELLOTTI, C. J., and WILBUR, SLOANE, LAWLOR, LENNON, and SHURTLEFF, JJ., concur.

STARR v. LOS ANGELES RY. CORPORATION. (L. A. 6177.)

(Supreme Court of California. Oct. 19, 1921.)

1. Pleading \S 127(1)—Specific denial of allegation of negligence in starting car held not to admit negligence in general operation.

Where a complaint specifically counts on the negligent starting of a street car after stopping it, an answer, specifically denying this allegation, does not admit negligence in the general operation of the car.

2. Pleading \S 93(1)—On denial of negligence other count, alleging contributory negligence, does not admit negligence.

Where the first count of answer denied negligence and the second count alleged contributory negligence, failure to deny negligence in that count, since defendant had a right to make inconsistent defenses, was not an admission of negligence.

3. Trial \S 191(9)—Instruction, assuming that street car conductor had duty to be in a certain place, held erroneous.

In action for injuring plaintiff by giving the car a sudden jerk or lurch and throwing plaintiff off, an instruction that, if the conductor of a pay-as-you-enter car knew that plaintiff was about to alight, and that the alighting place was dangerous, and, because the car was traveling at a fast rate of speed, would necessarily give a lurch upon reaching a certain place, and the conductor was not in his place, he was negligent, was erroneous in assuming that a conductor under such circumstances had a duty to be at a certain place in the car, and in view of the fact that the conductor's position was not the proximate cause of the injury.

4. Trial \S 296(3)—Instruction, omitting to charge that defendant's negligence must be the proximate cause of injury, cannot be cured by other instructions on proximate cause.

In action for injuries caused by negligence of a street railway, an instruction for plaintiff, omitting the questions of proximate cause and contributory negligence, is not cured by instructions asked by defendant, and containing these questions.

5. Trial \S 253(7) — An instruction directing verdict for plaintiff if certain facts are found must embrace all things necessary to show liability.

Where an instruction directs a verdict for plaintiff if the jury finds certain facts to be true, it must embrace all things necessary to show the liability.

6. Trial \S 251(8), 253(9)—An instruction on negligence, referring to three rates of speed, held erroneous as ignoring contributory negligence and authorizing recovery for negligence not pleaded.

In an action for negligently causing a jerk or lurch, throwing plaintiff from a car and causing injuries, an instruction that defendant may be justified under certain circumstances in running its cars at a very fast or the fastest rate of speed, while under other circumstances to run its cars at a high rate of speed might be negligence is erroneous, as allowing a verdict for plaintiff if the rate might be negligent, in failing to mention the question of contributory negligence, and in permitting the verdict for injuries on account of a high rate of speed when plaintiff relied on a negligent jerk or lurch.

7. Appeal and error \S 1064(1)—Trial \S 243—Where instructions are flatly contradictory, they are erroneous and prejudicial.

Instructions are to be construed together, but where they are flatly contradictory, as where the jury is instructed upon a specific state of facts to bring in a verdict for plaintiff or defendant, and is elsewhere instructed in general terms not to do so, the instructions are erroneous and prejudicial.

8. Carriers \S 347(3)—Evidence of previous conduct and habit of conductor in sitting down and talking to passengers held incompetent.

In action for injuries because of causing a jerk or lurch throwing plaintiff from a street car, evidence as to the previous conduct and habit of the conductor in sitting down and talking to passengers was incompetent.

9. Witnesses \S 77—On cross-examination of a 10 year old boy, a question as to conflict with his written statement should have been permitted.

On cross-examination of a boy 10 years old, a question as to conflict between his oral testimony and a prior written statement should have been permitted, since his answer would aid the jury in weighing and considering his degree of intelligence.

In Bank.

Appeal from Superior Court, Los Angeles County; Howard A. Peairs, Judge.

Action by Laura Starr against the Los Angeles Railway Corporation. From judgment for plaintiff, defendant appeals. Reversed.

Gibson, Dunn & Crutcher and Norman S. Sterry, all of Los Angeles, for appellant.

Ernest E. Rogers, of Los Angeles, for respondent.

WILBUR, J. The plaintiff recovered judgment for personal injuries received by her by reason of being thrown from a car of the defendant railway company while she was a passenger thereon. The complaint alleges that the car was so negligently operated that it started with a sudden jerk while the plaintiff was standing on the platform of the car, thereby throwing her with great force and violence to the pavement. The defendant denied this act of negligence and by way of affirmative and separate defense alleged that the plaintiff contributed to her own injuries by negligently attempting to alight from the car while it was still in motion. It appeared from the evidence that the car was operated westerly on West First street in Los Angeles and was descending a steep hill from Figueroa to Fremont street about 9 p. m., November 17, 1917. The hill ends at the easterly line of Fremont street. The intersection of First and Fremont streets is level; and in order to stop on the level it is customary to cross Fremont street before stopping. The plaintiff knew of this custom. The evidence as to where the plaintiff struck the pavement on leaving the car varied from 15 to 75 feet east of the east line of Fremont street. Thus, according to the witnesses which place the point of accident nearest to the usual stopping place of the car, it was the entire width of Fremont street, plus 15 feet from the point where the rear end of the car usually stopped.

The plaintiff testified that after the conductor gave the signal to stop the car he took a seat in the rear of the car with a lady passenger; that plaintiff walked to the rear platform of the car, and stood there, holding an upright stanchion with one hand and the handhold of the rear seat with the other. While so standing on the rear platform the car came to a stop; that she did not attempt to alight, but that the car suddenly started forward with a jerk that threw her from the platform; that she alighted on the stone pavement on her head, and was rendered unconscious. Jefferson Owens, a boy of 10 years, was watching the car from the window of his residence, opposite the scene of the accident. He saw the plaintiff fall from the car, and noticed at the time that the conductor was seated at the time, talking to a lady passenger; that the car was slowing down on the hill from 20 miles per hour to 10; that at 10 miles the car either suddenly accelerated, or decreased its speed 2 miles per hour (he testified both ways) with a jerk that

threw plaintiff from the platform to the pavement. The conductor was in France with the A. E. F. and his testimony could not be secured. The only other witness who saw the accident testified that the plaintiff walked down the steps from the rear platform, and either stepped off the car backwards or fell off from the lower step while the car was still in motion; that there was no jerk or lurch or unusual motion of the car. Ten witnesses called by the defendant testified that there was no jerk or lurch of the car, and that the car did not stop before reaching its usual stopping place.

[1, 2] Before passing to a consideration of the main points of the case, one or two preliminary matters may be briefly disposed of. The respondent claims that the plaintiff alleges negligence and carelessness in the operation of the car, and that the answer by failure to deny this allegation, admitted the same. The plaintiff is in error in that regard. As already stated, the complaint specifically counts on the negligent starting of the car, after stopping, and this allegation is specifically denied. The respondent also claims that by reason of the fact that the defendant raised the issue of contributory negligence, its own negligence was thereby admitted. In the first count of the answer, negligence was specifically denied. The second count alleges the contributory negligence of the plaintiff and by failure to deny its own negligence in that count, thereby, for the purpose of that count, admitted negligence. The defendant had a right to make inconsistent defenses and did so.

The evidence in the case was conflicting, and would have justified the jury in the conclusion that the car never stopped until it had passed beyond the point where the plaintiff was thrown to the pavement; that the car stopped at the point where plaintiff was thrown to the pavement, and suddenly started with a jerk, thereby causing her fall; that the plaintiff heedlessly attempted to alight while the car was moving with considerable speed and fell, either because, she heedlessly walked off the car backward, or fell off while attempting to alight, or was thrown off by a sudden jerk or lurch of the car while she was on its steps, attempting to alight, or while standing on the platform, either holding on with both hands, as she testified, or while standing without holding on; that at the time of the accident the conductor was forward in the car; or that at the time of the injury he was seated, engaged in conversation with a lady passenger.

[3] The car was a "pay-as-you-enter" car and the usual station of the conductor in such a car is at the rear entrance, where passengers enter the car and from which some of them make their exit, others going to the forward exit. In this state of the evidence the court gave the following instruction:

"You are further instructed that if you find from the facts in this case that the conductor was not attending to his duties, in this, that he had knowledge that this plaintiff was about to alight, and that said place was a dangerous place, in this, that the car was traveling at a fast rate of speed, and would necessarily give a lurch or jerk upon reaching Fremont street, then and in this case I charge you that the acts of the conductor, consisting in his failure to be at his post, constitutes negligence on the part of this defendant, and in that case, if you so find, you are instructed to bring in a verdict for this plaintiff."

Appellant contends that this instruction should not have been given, for the reason that there is no issue in the case as to negligence arising from the position of the conductor; that it instructs the jury upon a question of fact; and that it is prejudicially erroneous because it fails to take into account the alleged contributory negligence of the plaintiff and also the fact that the negligence of the conductor, if any, must be the proximate cause of the injury in order to justify recovery based upon such negligence. Each of the points is well taken. The instruction advances the proposition that—

If the conductor knew that the plaintiff was about to alight, and that the alighting place was dangerous because the car was traveling at a fast rate of speed and would necessarily give a lurch upon reaching Fremont street, and was not in his place, "then and in this case I charge you that the acts of the conductor * * * constitutes negligence, * * * and in that case, if you so find, you are instructed to bring in a verdict for this plaintiff."

The instruction thus assumes as a matter of law that it is the duty of the conductor under such circumstances to be at a certain place at the rear end of the car. This is purely a question of fact. The place of duty of the conductor depended upon the terms of his employment, while the duty of the defendant to the plaintiff arose out of the relationship of passenger and carrier. The law fixes no particular place for the performance of the duties of the employees of the carrier, it merely fixes the obligation of the carrier to the passenger. A conductor has various duties to perform. *Cary v. L. A. Ry. Co.*, 157 Cal. 599, 604, 108 Pac. 682, 27 L. R. A. (N. S.) 764, 21 Ann. Cas. 1829.

It is argued that in the "pay-as-you-enter" car it is the duty of the conductor to be at the rear end of the car and that decisions recognizing the fact that the conductor might be called to other parts of the car, such as *Cary v. L. A. Ry. Co.*, supra, are not applicable for that reason. This contention merely emphasizes the vice of the instruction, for it concedes that, in the old-fashioned car, where the conductor went about the car collecting fares, his position might be at any point in the car where his duties called him, but that in the "pay-as-you-enter" car, he

must remain upon the rear platform, and from this it is apparent that the place of duty of a conductor varies with different circumstances; in other words, it is a question of fact and not of law. The instruction is also erroneous because it entirely overlooks the principle that the negligence must be a proximate cause of the injury in order to justify recovery. This is manifest from the fact that the lurch or jerk referred to in the instruction is the necessary lurch or jerk of the car upon reaching Fremont street. According to some of the witnesses, in this case the plaintiff was thrown to the ground 75 feet before reaching Fremont street, and thus the fact that the conductor had reason to anticipate such a jerk at Fremont, if it be a fact, would having nothing whatever to do with the injuries to the plaintiff, if she in fact was thrown from the car before the point indicated was reached, for, in that view of the case, the jerk or lurch that caused the accident was not the one the conductor had reason to anticipate, and hence his conduct could not be the proximate cause of the accident. If we accept the testimony of the plaintiff herself, the instruction has no application to the facts, for the instruction is predicated upon a sudden jerk necessarily resulting from the descent of the hill at a fast speed, while her evidence involves a jerk upon starting from a standstill. If we accept the testimony of her only other witness to the accident, the boy of 10 years, the instruction has no applicability, because the jerk was caused by the increase or decrease of the speed at 10 miles per hour, which the jury could have hardly considered "fast" as the car had been running 20 miles per hour, according to this witness. If we accept the testimony of the defendant's sole witness to the accident, there was no jerk or lurch of the car, and the plaintiff was on the lower step. On any of these theories as to the injury to the plaintiff, we fail to see how it could be said that the position of the conductor was a proximate cause of the injury. According to the plaintiff and her witness, the proximate cause of her fall was a sudden and unexpected jerk of the car, with which the position of the conductor had nothing whatever to do, and the instruction introduced an entirely false quantity. We are not considering, let it be observed, what the duty of the conductor or of the defendant was with relation to a usual and expected lurch or jerk of the car; we are merely illustrating the fact that his position could not be the proximate cause of the injury. If there was negligence in failing to warn the plaintiff of such a usual and anticipated shock as described in the instruction, it was not alleged, or counted upon by plaintiff, and such contention is wholly at variance with her complaint and testimony. The proximate cause of the injury would be the shock or jar in any such an event, and not the position of the conductor. The instruction then

is faulty, not only because it permitted the jury to find a verdict upon conduct of the conductor which could not be a proximate cause of the injury, but also because it in effect required them to find a verdict for the plaintiff if she was injured by a jerk or lurch of the car, necessarily incident to its operation over the intersection of First street at fast speed, and if the conductor was not in his place.

[4] The respondent justifies the giving of the instruction for the reason that, while such negligence is not specifically alleged, it is claimed that the complaint alleges negligence in general terms, and that evidence was given as to the whereabouts of the conductor. The complaint, as already stated, counts upon the negligence of the company in suddenly starting the car with a jerk while the plaintiff was alighting. There is no general allegation of negligence, and evidence of the whereabouts of the conductor was introduced by the plaintiff over the defendant's objections. However that may be, the instruction was so erroneous and prejudicial that it should not have been given in any event. Respondent's contention that this instruction was cured because of other instructions on the subject of proximate cause and contributory negligence cannot be maintained. The jury were elsewhere instructed, at defendant's request, that unless the plaintiff proved the negligence of the railroad company, and that such negligence proximately contributed to the injuries sustained, there could be no recovery; that the defendant was not responsible for the negligence of its employees unless it contributed directly or proximately to the injuries of the plaintiff; that, if the plaintiff voluntarily undertook to step from the car while it was in motion and before it reached its usual stopping place, and fell as a direct and proximate result of so attempting to leave the car, plaintiff could not recover.

[5] The difficulty is that when the court specifically instructed the jury that in a certain state of facts they must bring in a verdict for the plaintiff, the jury has the right to assume that the court in that instance is determining as a matter of law that such negligence was the proximate cause of the injury, and that there was no contributory negligence. Furthermore, as already pointed out, the position of the conductor was not in any possible view of facts a proximate cause of plaintiff's injuries. The rule is that where an instruction directs a verdict for plaintiff if the jury finds certain facts to be true, it must embrace all the things necessary to show the legal liability of the defendant and to warrant the direction or conclusion that the plaintiff is entitled to a verdict. *Pierce v. United Gas & Electric Co.*, 161 Cal. 176, 184, 118 Pac. 700, citing *Killelea v. Cal., etc., Co.*, 140 Cal. 602, 74 Pac. 157.

[6] Appellant assigns as error the giving of instruction No. 4, as follows:

"The court instructs the jury that the defendant Los Angeles Railway Corporation may be justified under certain circumstances in running its cars at a very fast, or the fastest rate of speed, while under other circumstances to run its cars at a high rate of speed might be negligence. If you find in this case that the defendant company operated its car at such a rate of speed while approaching West First and Fremont streets, and that said speed contributed to or was the proximate cause of this accident, then I charge you that your verdict in this case shall be for the plaintiff."

The instruction is ambiguous because it does not appear therefrom what rate of speed was considered by the court in the last sentence of the instruction. The jury were told in the first sentence of the instruction that the defendant might be justified in running its cars at a very fast or the fastest rate of speed and under other circumstances that a high rate of speed might be negligent. Three rates of speed are dealt with in this sentence, "very fast," the "fastest rate," and a "high" rate. The first two might be justified and the last negligent. The instruction is plainly susceptible of the construction that if the defendant's car was approaching Fremont street at justifiable rate of speed, and that such speed contributed to or was the proximate cause of the accident, the verdict should be for the plaintiff, which would be clearly erroneous. Assuming, however, that the speed referred to in the last sentence is the high rate of speed which "might be negligence," the concluding clause of the sentence should be interpreted as follows:

"If you find in this case that the defendant company operated its car at such a rate of speed (as might be negligent) while approaching West First street and Fremont street, and said speed contributed to or was the proximate cause of the accident, then I charge you that your verdict in this case shall be for the plaintiff."

This instruction is still erroneous for several reasons. In the first place, it allows the jury to bring in a verdict for the plaintiff if the rate of speed "might be negligent." In order that the plaintiff should recover because of the speed alone, it is essential that the speed should have been negligent under the circumstances. Furthermore, the complaint does not count upon a high and excessive rate of speed as a basis of recovery. On the contrary, it counts on the shock due to a sudden starting of the car. A more serious objection to the instruction, if possible, is the fact that the jury were instructed that if the speed contributed to or was the proximate cause of the accident, their verdict should be for the plaintiff. The court may have intended to have used the words "contributed to" and "proximately caused" as synonymous. But, as pointed out by the appel-

lant, a certain amount of lurching and jerking of a car may be attendant upon the speed at which it is usually operated, and such lurching and jerking is to be anticipated by the passenger. Under this instruction, the defendant would be liable even though the lurching and jerking of the car was usual upon the customary motion of the car. The instruction also ignores the question of contributory negligence by the plaintiff justifying a verdict if defendant's conduct contributed to the accident. The jury is specifically instructed that if the high rate of speed of the defendant might have been negligence and contributed to her injuries she was entitled to a verdict. The instruction was erroneous.

[7] It is true, as respondent points out, that the instructions are to be construed together, but where the instructions are flatly contradictory, as is the case where the jury is instructed upon a specific state of facts to bring in a verdict in favor of the plaintiff or defendant and is elsewhere instructed in general terms not to do so, the instructions must be held to be conflicting and prejudicial, because it cannot be ascertained upon what theory the verdict was returned. The theory of the plaintiff and defendant were diametrically opposed, and the evidence, as well as the instructions, was sharply conflicting. Under this condition it cannot be said that there is no miscarriage of justice when it cannot be ascertained from the record upon what theory the jury was authorized by the instructions of the court to render its verdict, or upon what state of facts shown in evidence the verdict was reached.

Because of the foregoing erroneous instructions, it will be necessary to reverse the case, and in view of a new trial it is proper to pass upon some of the other questions presented by the record.

The appellant complains of the refusal to give certain instructions offered on its behalf, one to the effect that if the conductor was seated in the rear open section of the car it was not negligence on his part and could not be made a basis of a verdict against the defendant. Another, that if the conductor was not in his usual position, but was seated and talking to a lady, it could not be considered as negligence, and could not be considered except in determining how the accident occurred. In view of the discussion of the subject herein, it is sufficient to say that the refusal of these instructions emphasizes the error in instruction No. 3.

Instruction C, asked by the defendant, was a correct exposition of the doctrine of proximate cause as applied to the seating of the conductor and the accident; it also pointed out that the plaintiff must be free from contributory negligence in order to recover. Respondent points out no error in this instruction and we observe none. It is, however,

unnecessary to say more than that this refusal emphasizes the error in giving instruction No. 3, in which these two elements of proximate cause and contributory negligence are omitted. The court did not specifically point out the necessary connection between the misconduct of the conductor and the accident, when requested to do so by the defendant, and it is not likely that the jury would have been more able or willing to do so, under a very general direction as to the necessary causal connection between the accident and the conduct of the conductor.

[8] Evidence as to the previous conduct and habit of the conductor as to sitting down and talking to passengers was improperly received, not only because of the fact that the matter was not in issue, but also because of the fact that his habit was not competent (*Langford v. San Diego Electric Ry. Co.*, 174 Cal. 729, 732, 733, 164 Pac. 398; *Steinberger v. Cal. Elec., etc., Co.*, 176 Cal. 386, 168 Pac. 570) to establish the condition at the time of the accident. We need not here consider the effect of the exception to this general rule considered in *Wallis v. S. P. R. Co.*, 195 Pac. 408, where circumstantial evidence only is relied upon, and there are no eyewitnesses.

[9] On cross-examination, the boy, Jefferson Owens, having testified on direct examination that the conductor was seated talking with a woman passenger at the time of the accident, was asked concerning his statement in writing theretofore made to the defendant's representative. The question and answer in the statement are as follows:

"Where was the conductor at the time of the accident? Answer: When the lady fell he ran to the door."

After his attention was called thereto, he was asked:

"Why didn't you say there that you saw him sitting talking to her?"

The objection offered and sustained was as follows:

"That is objected to as asking this witness, a youth of tender years, for a conclusion that a grown person could not make."

Cross-examination as to conflicting statements is one of the most important rights of the adverse party. If it was true that the boy could not explain or understand the question, he should have been permitted to say so in response to the question, and thus the jury could weigh and consider his degree of intelligence.

Judgment reversed.

We concur: SHURTLEFF, J.; LENNON, J.; SLOANE, J.

CAPUTO v. FUSCO. (Civ. 3883.)

(District Court of Appeal, First District, Division 1. California. Sept. 10, 1921.)

1. Husband and wife ⇨270(7)—Presumption that note to wife was separate property rebutted by allegation that it was community property.

From the pleaded fact in complaint, in action by husband on note, that the note was executed to the wife of plaintiff, merely a disputable presumption arose that it was her separate property, and a further allegation that it was in fact community property rebutted the presumption and rendered the complaint immune from attack on the general ground of want of facts to state a cause of action.

2. Husband and wife ⇨270(1)—Wife not proper party plaintiff in action to recover community property.

Wife was not proper party plaintiff in an action on a note executed to her in return for money loaned from community property, and action was properly brought by husband alone.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Giovanni Caputo against F. S. Fusco. Judgment for plaintiff, and defendant appeals. Affirmed.

Carl A. Day, and Dévoto, Richardson & Devoto, all of San Francisco, for appellant. Hoefler, Cook & Snyder, and William E. Billings, all of San Francisco, for respondent.

WASTE, P. J. The plaintiff in his own name brought an ordinary action to recover upon a promissory note made, executed, and delivered to his wife, Elisa Caputo, by the defendant, in the sum of \$1,500. It was alleged that the money so loaned to the defendant was the community property of the plaintiff and his said wife, and that the promissory note and the money due thereon was community property. Defendant filed no demurrer to the complaint. He interposed only a general denial by way of answer, and made no further appearance. Judgment was accordingly entered in favor of the plaintiff as prayed for.

[1, 2] Defendant now appeals to this court, and seeks a reversal of the judgment on the sole ground that the complaint does not state facts sufficient to constitute a cause of action in favor of plaintiff, for the reason that the money having been loaned by Elisa Caputo, and the promissory note being an instrument in writing, the presumption of law is that the money is her separate property. From the pleaded fact, however, that the note was executed to the wife of plaintiff, merely a disputable presumption arose that it was her separate property. Estate of Young, 123 Cal. 337, 346, 55 Pac. 1011; Volquards v.

Myers, 23 Cal. App. 500, 504, 138 Pac. 963. The further allegation that it was in fact community property rebutted the presumption, and rendered the complaint immune from attack on the general ground of want of facts to state a cause of action. Elisa Caputo, the wife, was not a proper party plaintiff in the action to recover the community property. Spreckels v. Spreckels, 116 Cal. 339, 349, 48 Pac. 223, 36 L. R. A. 497, 58 Am. St. Rep. 170; In re Burdick, 112 Cal. 887, 393, 44 Pac. 734.

The appeal appears to have been taken for the purpose of vexation and delay. The judgment is affirmed, and it is ordered that plaintiff recover of the defendant, as part of the costs of appeal, the sum of \$100.

We concur: KERRIGAN, J.; RICHARDS, J.

SPINDLER v. WITTEMANN CO. (Civ. 3904.)

(District Court of Appeal, First District, Division 1, California. Sept. 13, 1921.)

Judgment ⇨256(6)—Findings held not to support judgment.

Where plaintiff claimed that commissions earned amounted to \$1,192.50, and that he agreed with defendant to reduction of \$365, leaving net balance of \$827.50, that defendant paid \$285 and that net balance unpaid was sum of \$540.42, findings of court that allegations of complaint "are true except that defendant paid to plaintiff on account of said commissions \$300 * * * \$350 * * * and \$150. * * * and not \$285, as stated in said complaint, and that there is due and owing plaintiff only the sum of \$392.40," would not support a judgment for the latter amount.

Appeal from Superior Court, City and County of San Francisco; Edmund P. Morgan, Judge.

Action by Charles Spindler against the Wittemann Company. Judgment for plaintiff, and defendant appeals. Reversed.

Willard P. Smith, of San Francisco, for appellant.

Charles L. Brown, of San Francisco, for respondent.

RICHARDS, J. This is an appeal from a judgment in the plaintiff's favor for the sum of \$392.40 as the balance due for services rendered by the plaintiff to the defendant in the matter of the sale of certain machinery. The appeal is upon the judgment roll alone, and the appellant's sole contention is that the findings do not justify the judgment for the sum declared therein to be the balance due, but only for a much smaller sum.

The plaintiff alleged in his complaint that he had performed certain specified services for the defendant, which had resulted in the sale of the machinery in question for the sum of \$7,950, upon which sale price the defendant had promised to pay plaintiff a commission of 15 per cent.; that the commission thus earned amounted to \$1,192.50; "that plaintiff agreed with the defendant to a deduction of \$365 from said commission, leaving the net balance thereon the sum of \$827.50; that the defendant has paid this plaintiff on account thereof the sum of \$285; and that the net balance of said commission unpaid and due and owing from the defendant to the plaintiff is the sum of \$540.42, together with interest at the rate of 7 per cent. per annum from December 1, 1918."

There is another cause of action stated in the second count of the complaint, with which we are not concerned upon this appeal, the judgment having been as to that account in the defendant's favor.

The answer of the defendant as to the first count of the complaint, while admitting the sale of the machinery by plaintiff for defendant, denied its promise to pay a commission of 15 per cent. upon the selling price of the machinery so sold or any greater commission than 10 per cent. thereon, all of which it alleges has been fully paid. It makes no reference in its answer to the plaintiff's averment of an agreed reduction in the amount of said commission.

Upon the trial of the cause the court made its findings as to the first count in the plaintiff's complaint as follows:

"That paragraphs I, II, III, and IV of the first cause of action set out in the second amended complaint are true except that defendant paid to plaintiff on account of said commissions \$300 on July 31, 1918, \$350 on December 16, 1918, and \$150 on December 28, 1918, and not \$285, as, stated in said complaint herein, and that there is due and owing plaintiff only the sum of \$392.40, with interest thereon from December 1, 1918."

Judgment was accordingly rendered for the sum of \$392.40.

Upon this appeal the appellant contends that upon the face of the foregoing finding it appears that there could only be due to the plaintiff the sum of \$27.40. The respondent makes no satisfactory reply to this contention. The plaintiff having alleged an agreed reduction of \$365 from the amount of the gross commission which he claimed, and the answer by its silence having admitted this agreement, and the trial court having found that the plaintiff's allegation as to the gross amount of the commission due and as to the said agreed reduction thereof in said sum, leaving a balance of \$827.50 due thereon, was true; and having followed this find-

ing with the further finding of three specific payments made by the defendant to the plaintiff, to wit, \$300 on July 31, 1918, \$350 on December 16, 1918, and \$150 on December 28, 1918, said payments aggregating the sum of \$800.10, it follows inescapably that there could only have remained due to plaintiff the sum of \$27.40, instead of the sum of \$392.40, for which judgment was given.

It follows that the judgment must be reversed; and it is so ordered.

We concur: WASTE, P. J.; KERRIGAN, J.

MALTER v. NATIONAL FIRE INS. CO. OF HARTFORD et al. (Civ. 3954.)

(District Court of Appeal, First District, Division 2, California. Sept. 12, 1921.)

1. Insurance §665(3)—Evidence held to warrant finding of ownership of property under fire policy.

In an action on a fire policy, evidence held to warrant a finding that plaintiff was the sole and unconditional owner of the property specified in the policy.

2. Appeal and error §1057(2)—Exclusion of evidence held harmless, if error.

In an action on a fire policy, any error of the court in excluding statement made by plaintiff to assessor concerning ownership of property was not prejudicial, where the statement would not have contradicted in any way the testimony introduced, and plaintiff admitted making such statement.

Appeal from Superior Court, Fresno County; M. F. McCormick, Judge.

Action by George H. Malter against the National Fire Insurance Company of Hartford and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Miller, Thornton, Miller & Watt and Miller, Thornton & Miller, all of San Francisco, for appellants.

Short, Lindsay & Woolley and F. W. Docker, all of Fresno (C. O. Hansen, of Fresno, of counsel), for respondent.

LANGDON, P. J. This action is to recover from each of the defendants \$2,000 on fire insurance policies issued and delivered by them, covering certain personal property and insuring plaintiff against loss by fire. The case was tried by the court, without a jury. Judgment was for the plaintiff against both defendants.

[1] The first ground for appeal urged by the appellants is the insufficiency of the evidence to justify the findings of the court. The finding which is particularly attacked is

the one wherein the court finds that the plaintiff was, at the time of the insurance and delivery of the policies, and at the time of the fire, the sole and unconditional owner of the property specified in the policies. The testimony of the plaintiff on this point amply supports the finding. There was also other testimony which would raise a presumption of ownership in the plaintiff. The only evidence tending to prove the contrary is the testimony of a deputy tax assessor who testified that the plaintiff had signed a tax return in 1917 in which the wines and brandies and wine-making apparatus covered by the insurance policies and also other property, real and personal, were listed in the names of Pacific Vineyard Company and Mabel P. Malter. Plaintiff admitted signing the tax statement, in which the property was so listed, and explained that his vineyard and wines and manufacturing apparatus had at one time been transferred to the Pacific Vineyard Company merely for convenience; that that he had always been the real owner; that the stock of that company was owned by him, and that he had always paid the taxes on the property, although for a time the record title had been in this company; that it was no longer in the company, and that he had neglected to have the name changed on the assessment list, which list was made out by the assessor from previous records. There was no other testimony tending to disprove plaintiff's ownership in the property. We are of the opinion that the court was clearly justified in finding for the plaintiff on this issue.

[2] The only other objection urged by appellants is that the court erred in excluding the statement made by the plaintiff to the assessor in 1917. Granted, for the purposes of this opinion, that the statement should have been admitted in evidence, nevertheless, its exclusion therefrom does not under the facts of this case, constitute prejudicial error. The record contains the testimony of the tax collector regarding this statement, and also the admissions of the plaintiff that he did make it and his explanation thereof, and these matters were before the trial judge in making his findings. An examination of the statement offered in evidence discloses that it covers certain wines and brandies, which were a part of the property covered by the policies, and also musical instruments, farming utensils, wagons and other vehicles, horses and cows, poultry, sewing machines, automobile and other items. The statement was headed "Pacific Vineyard Co. and Mabel P. Malter." At the bottom of the statement the plaintiff signed the following oath:

"I do swear that I am a resident of the county of Fresno, that the above list contains a full and correct statement of all property subject to taxation, which I, or any firm of which I am

a member, * * * owned, claimed, possessed or controlled," etc.

If the statement had been admitted in evidence, it would not have contradicted, in any way, the testimony of Mr. Malter already in the record regarding the assessment of the property. He stated that the vineyard and liquors had for a time been in the name of Pacific Vineyard Company and that he had neglected to have the assessment record changed, but that he had always paid the taxes on this property personally and had paid them for the year covered by this assessment list.

With the other property listed, which was not covered by the policies, we are not concerned, and it is immaterial whether this belonged to Mabel P. Malter or Pacific Vineyard Company or the plaintiff.

The admission in evidence of the assessment list signed by plaintiff would have added nothing to defendants' case; its execution and contents were admitted by the plaintiff and were testified to by the deputy tax collector and these matters were therefore before the court. It was not conclusive as to ownership, and plaintiff contradicted it and explained the reason for the mistake. Under the circumstances, its exclusion even though conceded to be erroneous, would not warrant a reversal of this judgment which is clearly a proper and just one upon the entire record before this court.

The judgment is affirmed.

We concur: **NOURSE, J.; STURTEVANT, J.**

RIEDER v. HOGAN CO. et al. (Civ. No. 3120.)

(District Court of Appeal, Second District, Division 2, California. Sept. 12, 1921. Hearing Denied by Supreme Court Nov. 10, 1921.)

1. Principal and agent \Leftrightarrow 23(5)—Evidence held to show an ostensible agency.

Evidence that S. had been authorized or permitted to deal with P., the agent of plaintiff, in matters of the same character, and the knowledge of P. that S. held an important position of trust with defendant, supports a finding that there was an ostensible agency, under Civ. Code, § 2300.

2. Appeal and error \Leftrightarrow 931(1)—Findings presumed supported.

The Court of Appeals, in the absence of a showing, is bound to indulge that assumption which leads to a support of contested findings as to ostensible agency.

Appeal from Superior Court, Los Angeles County; Charles Wellborn, Judge.

Action by Lester Rieder against the Hogan Company and another. Judgment for plain-

tiff, and the defendant named appeals. Affirmed.

Flint & Mackay, of Los Angeles, for appellant.

Oliver O. Clark, Claud B. Andrews, and James Roche, all of Los Angeles, for respondent.

WORKS, J. This is an action for the recovery of the purchase price paid by plaintiff for five automobile lease or sales contracts. Plaintiff had judgment for the amount from defendant the Hogan Company, and that defendant appeals.

[1, 2] The contracts were purchased for respondent by the firm of Porter & Brown, who were his agents in the deal, the negotiations leading up to the sale having been conducted by Porter, a member of the firm. Porter made the purchase from defendant Sears. In fastening liability upon appellant the trial court found that Sears, in making the sale, acted as the ostensible agent of appellant. The result of the appeal depends on the question whether this finding is supported by the evidence, for appellant contends that it is not. At the time of the sale of the contracts Sears had been for some time the manager of an insurance department which was operated by appellant, and Porter knew that he was employed by appellant in that capacity. We must assume, from the very designation given to this position, that Sears occupied a somewhat important place with appellant, and Porter was justified in so regarding him. Laying aside, for the moment, the question of his authority to make sale of the five contracts, appellant held Sears out to the world as a person worthy of trust, for appellant itself had placed him and had retained him in a position of trust. That being so, no more than slight additional evidence would be necessary to justify Porter in assuming that Sears had authority to sell the contract. What additional evidence was there upon which Porter might have relied, as entitling him to assume that Sears had actual authority to sell? At the same time, what evidence is there to which we may look for a support for the finding that Sears was the ostensible agent of appellant in making the sale? Undoubtedly, evidence leading Porter justly to assume the existence in Sears of an actual authority will at the same time warrant our upholding the finding that he was clothed with an ostensible authority. Civ. Code, § 2300. Sears, after having testified concerning the sale of the five contracts to Porter, went on to say, "I had sold other contracts to Porter, acting as manager of the insurance department of the Hogan Company." This statement, especially when taken in connection with Porter's knowledge that Sears held an important posi-

tion of trust with appellant, appears to us to afford a sufficient support for the finding that there was an ostensible agency. It was evident to the trial court that appellant had authorized, or at least had permitted, Sears to deal with Porter in and about matters which were of the same character with the transaction out of which this litigation arose. Appellant asserts, however, that this evidence is not "binding" upon it for the reason that it "appears from the evidence, and the findings are to the effect, that Sears purchased and sold many contracts without the knowledge of appellant." This language is followed by no reference to any part of the evidence, but attention is directed to one of the findings. It is true that the trial court did find as stated, but it is also true that immediately preceding that finding it was found that Sears had been employed by appellant for about three years at the time of the sale of the five contracts, that during most of that time he had been the manager of appellant's insurance department, and that while acting in that capacity and with the knowledge of appellant he had bought and sold for appellant numerous automobile sales contracts. There is no means pointed out to us whereby we may ascertain whether the earlier deals between Sears and Porter were among those mentioned in the findings as having transpired without the knowledge of appellant, or whether they were among the number designated by the findings as having occurred with appellant's knowledge. We are bound, of course, in such a situation, to indulge the assumption which leads to a support of the contested finding as to ostensible agency; that is, that the earlier sales to Porter were among those declared by the trial court to have been made with the knowledge of appellant. Under these conditions it appears to us that the finding of ostensible agency is supported by the evidence. There are other portions of the evidence which lend additional support to the finding, but it is not necessary to refer to them.

Appellant contends that error was committed by the trial court in several instances in rulings upon objections to the admissibility of evidence. In view of the conclusion we have reached upon the question above discussed, we find it unnecessary to consider the points mentioned, as nearly all of them are connected with that question. If it be granted, which we do not decide, that appellant's claims as to the errors of law are well founded, it still appears to us that none of the alleged errors was prejudicial.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

DETELS et al. v. LAWRENCE et al. (Civ. 3956.)

(District Court of Appeal, First District, Division 2, California. Sept. 20, 1921.)

1. Appeal and error \S 370(3)—Order transferring cause not reviewable on appeal from order dismissing.

An order transferring a cause from one superior court to another, being an appealable order under Code Civ. Proc. \S 963, and no appeal being taken, the nature of the action and the propriety of its transfer are not subject to consideration on appeal from an order of the court to which it was transferred dismissing it for failure to pay transfer fees.

2. Venue \S 80—Suit subject to dismissal for failure to pay transfer fees within one year.

Code Civ. Proc. \S 581b, as to payment of transfer fees within one year after the transfer of a cause, is mandatory, and a suit is properly dismissed for such failure.

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Action by John Detels and others against Mabel Lawrence and others. From an order dismissing the action, plaintiffs appeal. Affirmed.

L. O. Pistolesi, of San Francisco, for appellants.

S. Laz Lansburgh and S. Joseph Theisen, both of San Francisco, for respondents.

LANGDON, P. J. This is an appeal from an order of the superior court of Marin county dismissing the action on motion of defendants under the provisions of section 581b, Code of Civil Procedure.

[1, 2] The action was originally commenced in the city and county of San Francisco, from which county it was transferred to the court in Marin county. The transfer was made upon the motion of the defendants, based upon their residence in the county of Marin. Appellants admit that they did not pay the fees required by section 581b, Code of Civil Procedure, for more than one year after the transfer of the action. Their position upon appeal is that the order of the superior court of the city and county of San Francisco transferring said action was erroneous, for the reason that the action involves title to real property part of which is situated in the city and county of San Francisco. The complaint also prays for personal judgments against certain defendants, residents of Marin county. However, the nature of the action and the propriety of its transfer are not matters for our consideration upon this appeal. The order transferring the cause was an appealable order. Code Civ. Proc. \S 963. No appeal was taken from this order, and the same has become final. The superior court of Marin county acted upon this final

determination, and properly dismissed the action under the provision of the Code section above referred to. The provisions of said section are mandatory. Davis v. Superior Court (Sup.) 195 Pac. 890.

The order appealed from is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

REED v. CORNELL et al. (Civ. 3803.)

(District Court of Appeal, First District, Division 1, California. Sept. 8, 1921. Hearing Denied by Supreme Court Nov. 7, 1921.)

1. Accord and satisfaction \S 25(1)—Must be specially pleaded.

An agreement of accord and satisfaction must be specially pleaded.

2. Pleading \S 409(4)—Plaintiff waived defendant's failure to plead accord and satisfaction by not objecting to evidence of settlement.

Where plaintiff, in an action to recover possession of a piano, payment for which had not been made as required by defendant's contract with plaintiff's assignor, interposed no objection to, and made no motion to strike out, testimony as to a settlement with such assignor at less than the agreed price, he waived defendant's failure to specially plead an accord and satisfaction.

3. Trial \S 404(5)—Where court found defendant not indebted for article sold to her, plaintiff could not recover possession, whether full contract price paid or less amount accepted in payment of balance.

In an action to recover possession of a piano, payment for which had not been made as required by defendant's contract with plaintiff's assignor, where the trial court found substantially in the language of the pleadings, which alleged defendant's indebtedness and title to and ownership of the instrument in plaintiff, that nothing was due and unpaid from defendant, and that title was in her, it was immaterial whether defendant paid in full according to the terms of the contract or settled with plaintiff's assignor for a less amount, plaintiff's right of recovery depending on the existence of an indebtedness.

4. Appeal and error \S 1012(1)—Weakness of evidence for consideration of trial court.

Alleged weakness and lack of convincing force of evidence is primarily for the consideration of the trial court.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by W. W. Reed against Ada A. Cornell and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Werner Olschewski and Frederick Olschewski, both of San Francisco, for appellant.

Marcus L. Samuels, of San Francisco, for respondents.

WASTE, P. J. The plaintiff, as assignee, brought this action to recover the possession of a certain piano. He alleged that the defendant had entered into an agreement with the Heine Piano Company, plaintiff's assignor, for the purchase of the instrument; that payment had not been made as required by the contract; that by reason of the violation of the terms of the agreement, plaintiff was entitled to a return of the piano. The defendant denied any indebtedness, and alleged that the piano had been fully paid for, and asserted title in herself. Judgment was entered for the defendant, from which the plaintiff has appealed.

The contract for the sale of the piano provided for an initial payment of \$40 upon the signing of the agreement, and monthly payments of \$10 each, until the whole amount of \$458, the purchase price, together with interest, had been paid. According to the plaintiff's theory the defendant was in arrears \$147.63, plus some additional interest, at the time of the trial. The defendant testified that she made payments on the contract until the sum of \$185 had been paid. Becoming tired of making installment payments, she asked to be allowed to settle the contract in full. Her proposition was accepted, and she paid the sum of \$200 in cash, and received a receipt for full payment of the contract. This receipt she subsequently lost when moving from one house to another. The account books of the Heine Piano Company showed the payments testified to by the defendant, and what purported to be a subsequent additional payment of \$50, made in the form of a Liberty Bond. This item was repudiated by the defendant as not having been made.

[1, 2] Appellant's major contention relates to the proof adduced in support of the defendant's case. He first contends that the evidence does not prove payment in full of the contract, but an accord and satisfaction, which, not having been specially pleaded, could not operate as a defense to the action.

The well-settled rules of pleading in this state require an agreement of accord and satisfaction to be specially pleaded, before it can be availed of as a defense, but the appellant is not in position to urge the point for the first time in this court on appeal from the judgment. The record discloses

that he interposed no objection to the evidence introduced on the part of the defendant as to the real nature of the settlement with the Heine Piano Company, and made no motion to strike out the testimony when apprised of its purport and effect. So far, therefore, as relates to the introduction of the testimony, the appellant must be held to have waived any advantage he might have gained if the timely objection had been made.

[3] The appellant raises the same objection in another way. He attacks the findings as not being supported by the evidence, his point being that only an accord and satisfaction was proved, and not that the piano was "fully paid for," as found by the trial court. Thus stated, the contention is correct, but the court found other facts. The appellant based his right to recover the piano upon an alleged indebtedness of the defendant, and title to, and ownership of the instrument in himself, all of which was denied by the defendant. The trial court found substantially in the language of the pleadings, as the ultimate facts, that nothing was due and unpaid from the defendant, and that title to the piano was in her. These facts were amply sufficient to warrant its conclusion that the defendant was the lawful owner and holder of the piano, and entitled to its possession. Whether the defendant paid in full for the piano according to the terms of the contract, or settled with the Heine Piano Company for a less amount than it would have been entitled to under that agreement, and received a receipt and discharge in full, does not matter. The ultimate fact was the indebtedness, if any, due from the defendant to the plaintiff upon the existence of which depended the right of the plaintiff to recover. This was determined and found not to exist, upon the evidence submitted to the court. *Jacobs v. Ludemann*, 137 Cal. 176, 182, 69 Pac. 965; *Tower v. Wilson*, 188 Pac. 87. The appellant was content to submit the matter upon evidence received without any objection on his part, and under the circumstances we must hold that the findings properly concluded the whole controversy.

[4] Appellant urges upon our attention the alleged weakness and lack of convincing force of the evidence for the defendant, but that was a matter primarily for the consideration of the trial court. We find no abuse of its power in that regard.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

PEOPLE v. VITRO. (Cr. 558.)

(District Court of Appeal, Third District, California. Sept. 12, 1921. Hearing Denied by Supreme Court Nov. 10, 1921.)

1. Seduction \S 45—Evidence held to show previous chaste character.

In a prosecution for seduction under promise of marriage of an unmarried female of previous chaste character, held that there was evidence tending to show previous chaste character.

2. Seduction \S 40—Evidence of subsequent acts admissible.

In a prosecution for seduction under promise of marriage of an unmarried female of previous chaste character, court properly permitted the prosecution to prove that defendant indulged in frequent acts of sexual intercourse with the prosecutrix after the commission of the act charged, and that she gave birth to a child.

3. Seduction \S 50(4)—Court did not err in modifying requested instruction.

In a prosecution for seduction under promise of marriage of an unmarried female of previous chaste character, where defendant requested the court to instruct that: "Illicit intercourse, permitted by a woman as a mere barter and trade for a promise of marriage, is not seduction. There must be the exercise of certain influence on her affections by reason of the promise. If, in order to obtain an agreement from the defendant, the prosecuting witness permitted him to have sexual intercourse with her, then there is no seduction, and the defendant should be acquitted"—court did not err in modifying the instruction by striking out the last sentence, which stated no rule of law not contained in the part given.

4. Criminal law \S 1160—Denial of new trial for newly discovered evidence contradicted by affidavit conclusive.

In a prosecution for seduction, where only evidence as to previous chastity was testimony of prosecutrix, and on motion for new trial defendant produced affidavit of third person that he had intercourse with prosecutrix prior to time of act charged, and affidavit of prosecutrix was introduced in denial, it was for the trial court to determine whether prosecutrix or the third person told the truth, and its determination, denying new trial, is conclusive on appeal.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Antone Vitro was convicted of seduction under promise of marriage, and appeals. Affirmed.

L. J. Maddux, of Modesto, for appellant.
U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant appeals from a judgment of conviction of the crime of seduction, under promise of marriage, of an unmarried female of previous chaste charac-

ter, and from the order denying his motion for a new trial.

[1] It is claimed that the evidence does not show that the prosecutrix was of previous chaste character. The prosecutrix gave her testimony through an interpreter and counsel, and the interpreter at times fell into the bad practice of putting questions and answers in the third person. The prosecutrix testified, "I had sexual intercourse with the defendant," stating the time and place, and that it was her first act of sexual intercourse with him. Thereafter the following testimony was given by her:

"Q. Why did she permit the defendant to have sexual intercourse with her during January, 1919?

"Mr. Maddux: '18.

"Q. 1918. A. Promised to marry her.

"Q. Had you ever had intercourse with any other person before that time? A. No, sir."

It is logically argued that the word "intercourse" does not necessarily mean "sexual intercourse," but, following as it does immediately after the use of the term "sexual intercourse" in the preceding question, there can be no doubt that the witness understood that "sexual intercourse" was meant.

[2] The court permitted the prosecution to prove, over the objection of the defendant, that he indulged in frequent acts of sexual intercourse with the prosecutrix after the commission of the act charged and up to February, 1920, and that she gave birth to a child October 8, 1920. It has so often been held that such evidence is admissible in the trial of a defendant on a charge of illicit sexual intercourse that citation of authorities would be superfluous.

[3] The defendant requested the court to give the following instruction:

"Illicit intercourse, permitted by a woman as a mere barter and trade for a promise of marriage, is not seduction. There must be the exercise of certain influence on her affections by reason of the promise. (If in order to obtain an agreement from the defendant, the prosecuting witness permitted him to have sexual intercourse with her, then there is no seduction, and the defendant should be acquitted.)"

The court modified the proposed instruction by striking out the part inclosed in parentheses, and gave it as so modified. The part stricken out states no rule of law not contained in the part given, and hence the modification was not error.

[4] On his motion for a new trial the defendant produced the affidavit of one Emanuel Teixeira to the effect that the affiant had sexual intercourse with the prosecuting witness in September, 1917, a few months prior to the time of the act charged by the information. In opposition to the motion the affidavit of the prosecutrix was introduced in which she denied that she ever had

sexual intercourse with Teixeira. The affidavits of defendant and his attorneys were introduced, stating that they had made diligent effort to obtain the facts in connection with the case, and that neither of them had learned of the facts stated in the affidavit of Teixeira until after the trial. The only evidence admitted at the trial on the issue of the previous chaste character of the prosecuting witness was her own testimony that she had never had intercourse with any other person prior to the act charged. It is thus apparent that the testimony of Teixeira, if worthy of belief, would be of vital importance in a retrial of the case.

But "a motion for a new trial upon the ground of newly discovered evidence has always been regarded by the courts with a great deal of suspicion and disfavor." *People v. Freeman*, 92 Cal. 366, 28 Pac. 264.

"The question as to the effect upon the case of newly discovered evidence is from its nature peculiarly one that is addressed to the discretion of the trial court." *People v. Oxnham*, 170 Cal. 215, 149 Pac. 167.

"It is well settled in this and many other states that not only may the facts of diligence and materiality be inquired into, but the truth of the evidence itself, or the truth of the facts as alleged, as well as the weight thereof and the credibility of the witnesses, may be contested by counter affidavits." *Haynes' New Trial and Appeal* (Rev. Ed.) p. 442.

"Upon the ground of newly discovered evidence it is sufficient to say that the affidavits offered in support thereof were fully contradicted by counter affidavits on the part of the prosecution, and for that reason the court below exercised a proper discretion in refusing to grant the motion." *People v. Fice*, 97 Cal. 460, 32 Pac. 532, *People v. Sing Yow*, 145 Cal. 6, 78 Pac. 235.

In the case of *People v. Byrne*, 160 Cal. 225, 116 Pac. 525, the court said:

"While a mere reading of the record in this case necessarily leaves one in grave doubt on the question of the defendant's guilt, there is certainly enough in the evidence to sustain the conclusion of the jury and trial judge who saw and heard the various witnesses, and who were in a much better position to determine the truth than a court that does not possess such an advantage. An apparently very strong showing was made for a new trial on the ground of newly discovered evidence, but in the light of the well-settled rules applicable in the consideration of appeals from orders of trial courts denying such motions, we do not see how it can properly be held that the trial court abused its discretion in denying the motion."

It was for the trial court to determine whether the prosecutrix or Teixeira told the truth relative to the facts stated in the latter's affidavit, and under the foregoing authorities that determination is conclusive on appeal.

The judgment and order appealed from are affirmed.

We concur: HART, J.; BURNETT, J.

SMITH et al. v. BACH et al. (Civ. 3645.)

(District Court of Appeal, Second District, Division 1, California. Sept. 14, 1921.)

1. Appeal and error \S 673(3)—In view of record judgment held not shown to be *res judicata*.

It cannot be held on appeal that action of court in sustaining a demurrer to plaintiffs' second amended complaint in a former action was an adjudication of subject of litigation and a bar, where neither the second amended complaint in the former action nor the demurrer thereto is set forth in the record.

2. Money received \S 14—Defendants held not jointly liable.

Where liability of defendants was not founded on contract upon which they were jointly liable, but upon an implied obligation of each for money had and received without consideration, one of the defendants was not liable for money received by the other.

3. Contracts \S 139—Illegality of contract held not to prevent recovery of money paid by one not in *pari delicto*.

Where contract, pursuant to which money was paid by plaintiffs, was for the purchase of lots referred to as delineated upon an unrecorded map, and hence null and void, as declared by St. 1907, p. 290, plaintiffs are not estopped from maintaining an action for money had and received to recover the sum so paid by reason of their having had knowledge that the map was unrecorded; plaintiffs being comparatively innocent, and not in *pari delicto*.

4. Vendor and purchaser \S 334(1)—Money paid on void contract recovered.

Where money was paid for lots referred to as delineated upon an unrecorded map, and the contract was null and void as declared by St. 1907, p. 290, no obligation was imposed upon defendants to convey the lots to plaintiffs, and hence money paid thereon was paid without consideration, and could be recovered as for money had and received.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by Clara L. Smith and others against George J. Bach and John Borgh. From judgment in favor of Bach but against Borgh, the latter appeals. Affirmed.

Clifford C. Pease, of San Diego, for appellant.

F. G. Blood and Sweet, Stearns & Forward, all of San Diego, for respondents.

SHAW, J. Action in assumpsit. Upon a trial of the case first had, a nonsuit was

granted, followed by judgment against plaintiffs, which on appeal therefrom was reversed, to which decision (reported in [Sup.] 191 Pac. 14), we refer for a full statement of the facts upon which the action is founded.

Upon a retrial, judgment was rendered in favor of defendant Bach and for plaintiffs against Borgh, but for a less sum than the amount claimed by plaintiffs. Thereupon plaintiffs, insisting they were entitled to judgment against both defendants for the full sum of their claims, appealed. This judgment was affirmed. See 199 Pac. 1108.

[1] Borgh has likewise appealed from the judgment so rendered against him. Based upon the record presented, there is no merit in his contention that, by reason of the action of the court in sustaining a demurrer to plaintiffs' second amended complaint in a former action, an adjudication of the subject of litigation was had which constituted a bar to the bringing of a new suit to recover the amount claimed. Neither the second amended complaint in the former action nor the demurrer thereto is set forth in the record, without which we cannot say the subject of the litigation in the former action is the same as in this, nor that the complaints are identical. No attack is made upon the sufficiency of the complaint in the present action. Moreover, assuming the action of the court had and taken in the former suit to have been free from error, it may have been based upon defects in the complaint not affecting the merits; hence such ruling could not bar a new suit founded upon a complaint the sufficiency of which is conceded.

[2] As held in plaintiffs' appeal (reported in 199 Pac. 1106), the liability of defendants was not founded on contract upon which they were jointly liable, but upon an implied obligation of each for money had and received without consideration. Hence, in the absence of a joint liability, Bach was not liable for the money received by Borgh.

[3] The contract pursuant to which the money was paid by plaintiffs was for the purchase of certain lots referred to as delineated upon an unrecorded map, and hence, as declared by statute (see Stats. 1907, p. 290), it was null and void. Nevertheless, appellant insists that, as plaintiffs must be deemed to have had knowledge that the map was unrecorded prior to making the payments, they are estopped from maintaining an action to recover the sum so paid. In other words, appellant's claim is that parties by their acts may destroy and render nugatory the plain language of this prohibitory provision. The contention is wholly without merit. As said by the Supreme Court in discussing the question on the former appeal by plaintiffs (Smith v. Bach [Sup.] 191 Pac. 14):

"Where money has been paid in consideration of an executory contract which is illegal, the

party who has paid it may repudiate the agreement at any time before it is executed and reclaim the money."

And in answer to appellant's claim that, conceding his violation of the statute (which act is declared a misdemeanor and punishable by fine and imprisonment), plaintiffs are in *pari delicto*, and hence should not assert claim to the money so paid, the court said:

"In such a case it is the duty of the court in furtherance of justice to aid one not in *pari delicto*, though to some extent involved in the illegality, but who, as here, is comparatively the more innocent, and to permit him to recover back money paid on a contract as the circumstances of the case may require."

What is said in the decisions on the former appeals herein cited is determinative of other points made by appellant.

[4] Since the contract was null and void, it imposed no obligation upon defendants to convey the lots of land to plaintiffs; hence the money paid thereon was without consideration, and their right to recover from each of the defendants the amount paid by him, except as barred by the statute of limitations, would seem clear.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

CALEXICO LUMBER CO. v. EMERSON et al. (Civ. 3391.)

(District Court of Appeal, Second District, Division 2, California. Sept. 14, 1921.)

1. Pleading \S 93(1)—Inconsistent defenses may be pleaded.

Inconsistent defenses may be pleaded by a defendant, and he may plead as many defenses as he may have, under Code Civ. Proc. \S 441, and affirmative matter pleaded in one defense in an answer does not operate as a waiver of a denial contained in another defense.

2. Trover and conversion \S 40(4)—Evidence of conversion insufficient.

In an action for conversion of laths, evidence held insufficient to support a finding of conversion.

3. Appeal and error \S 938(4)—Exceptions, bill of \S 12—Bill of exceptions need not contain all evidence, and it will be presumed that it contains enough.

Bill of exceptions need not purport to contain all the evidence bearing on the point involved, moving party being required only to set forth so much of the evidence as may be necessary to explain the points specified, and, when settled, it will be presumed that it contains all the evidence given in the cause which was necessary to be stated.

(201 P.)

4. Appeal and error @762—Matter raised first in closing brief not considered.

A question ordinarily will not be considered by a court of review if it is presented for the first time in a closing brief.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by the Calexico Lumber Company against Springer Emerson and another. Judgment for plaintiff, and defendants appeal. Reversed.

H. E. Gleason, of El Centro, for appellants.

Ault & Anderson, of Calexico, for respondents.

WORKS, J. This is an action of conversion. The plaintiff had judgment, and the defendants appeal.

The first point made by appellants is that the evidence is insufficient to support the court's finding of conversion. The property involved in the action consisted of 556 bundles of laths, and the parties had already had a contest over the same property in an action of replevin. In that action, which, for convenience, will be referred to henceforth as the replevin action, the defendants in this action, appellants also, were plaintiffs, and vice versa. The replevin action resulted peculiarly, in this, that the judgment was that the plaintiffs take nothing, but it did not require a delivery of the laths to the defendant, assuming for the present that at the commencement of the action the plaintiffs took possession of them from the defendant, as, of course, they had the right to do in an action of replevin.

[1] In the present cause the appellants allege in their answer that in the replevin action they, as plaintiffs therein, took the laths into their possession under the appropriate provisions of the Code of Civil Procedure. Respondent points to this allegation as one of the steps leading to the finding of conversion, insisting that it is an admission against the interest of appellants. Appellants, in turn, contend that the allegation cannot be so considered. The answer is composed of two separate defenses, the first one, in which the allegation in question is contained, being that respondent is estopped to maintain the present action for the reason that the question of the possession of the laths was litigated, or could have been litigated, in the replevin action. The second defense consists of specific denials of various averments of the complaint. Appellants' contention that the allegation of the taking of the laths in the replevin action, pleaded in the first defense of the answer in this action, cannot be considered as an admission, is based upon the fact that in the

second defense of the answer they specifically deny the taking. The denial is, in terms, that—

They, "or either of them, wrongfully or otherwise, took, carried away, converted, and disposed of to their own use, or the use of either of them, or took, carried away, converted, or disposed of to their own use, or the use of either of them, said bundles of laths, or any part thereof."

Appellants say in their brief:

"If respondent relied upon proving a conversion by showing that the appellants took the lath in the former action, * * * it was just as incumbent upon respondent to prove the taking in that action as if the answer contained only the defense consisting of denials, and the affirmative defense was omitted therefrom."

They then cite *Billings v. Drew*, 52 Cal. 565, and *Light v. Stevens*, 8 Cal. App. 74, 103 Pac. 361, to the effect that affirmative matter pleaded in one defense in an answer does not operate as a waiver of a denial contained in another defense. This rule is based upon the principle that inconsistent defenses may be pleaded by a defendant, or, to use the language of some of the cases and of the Code (Code Civ. Proc. § 441), a defendant may plead as many defenses as he may have. In addition to the cases cited by appellant, we refer to *Miller v. Chandler*, 59 Cal. 540; *Dillon v. Center*, 68 Cal. 561, 10 Pac. 176; *McDonald v. Southern Cal. Ry. Co.*, 101 Cal. 206, 35 Pac. 643; *Meyers v. Merillon*, 118 Cal. 352, 50 Pac. 662; *Banta v. Siller*, 121 Cal. 414, 53 Pac. 935; *Butler v. Delafield*, 1 Cal. App. 367, 82 Pac. 280.

These additional authorities are mentioned for the reason that the decisions in this state were not formerly in harmony on the question. In *Bell v. Brown*, 22 Cal. 671, there is a dictum at variance with the principle of the cases just cited, and the language of that case, at least, was applied in *Hayes v. Silver Creek, etc., Co.*, 136 Cal. 238, 68 Pac. 704. Although the dictum in *Bell v. Brown* is apparently in accord with the rule in many of the other states (note to *Seattle National Bank v. Jones*, 48 L. R. A. 177, 188, and note to *Suszniak v. Alger Logging Co.*, Ann. Cas. 1917C, 704, 712, 718), the language of that case, in so far as it may conflict with the views we express in this opinion, has been directly repudiated by *McDonald v. Southern Cal. Ry. Co.*, supra, and *Banta v. Siller*, supra, and that language is inconsistent, as well, with the cases cited by counsel and with the additional cases cited by us above. *Hayes v. Silver Creek, etc., Co.*, seems to present an instance of inconsistent allegation and denial within the confines of a single defense. There are many cases in this state contain-

ing expressions at variance with the dictum in *Bell v. Brown*, but in which the allegations and denials under consideration appear not to have been of the directly contradictory character which evidenced those advanced in that dictum. Those other cases apparently present allegations and denials inconsistent by implication of law rather than inconsistent in fact; the latter having been the nature of those discussed in *Bell v. Brown*. In order that the profession may have the history of this interesting question collated in one place, we present a list of the cases referred to: *Willson v. Cleaveland*, 30 Cal. 192; *Siter v. Jewett*, 33 Cal. 92; *Nudd v. Thompson*, 34 Cal. 89; *Buhne v. Corbett*, 43 Cal. 264; *Botto v. Vandament*, 67 Cal. 332, 7 Pac. 753; *Eaton v. Metz*, 5 Cal. Unrep. 59, 4 Pac. 947; *Miles v. Woodward*, 115 Cal. 308, 46 Pac. 1076; *Ball v. Putnam*, 123 Cal. 134, 55 Pac. 773; *Snipsic Co. v. Smith*, 7 Cal. App. 150, 93 Pac. 1035; *Shepherd-Teague Co. v. Hermann*, 12 Cal. App. 394, 107 Pac. 622; *Tustin Packing Co. v. Pac. Coast F. A. Co.*, 21 Cal. App. 274, 131 Pac. 338; *Cass v. Rochester*, 174 Cal. 358, 163 Pac. 212; *Clovis Fruit Co. v. California Wine Ass'n*, 40 Cal. App. 623, 181 Pac. 229; *Globe Grain & M. Co. v. Drenth*, 41 Cal. App. 604, 183 Pac. 285; *Newark Trust Co. v. Kriebel*, 193 Pac. 962.

It is undoubtedly the settled law in this state that the allegation of a fact in one defense of an answer will not operate to the disadvantage of the party making it, when the allegation is invoked against him on the trial, in the same action, of an issue presented by a denial in a separate defense of the existence of the same fact. Therefore, the affirmative allegation in question here cannot be considered as an admission against the interest of appellants, nor as a support to the finding of conversion.

[2] Respondent sees in the testimony of its president a basis for the finding of conversion. The witness said, on direct examination, that the laths "were delivered to the representative of Mr. Emerson on the order of the sheriff." This statement was but a conclusion, and a motion was immediately made to strike it out on that ground, but the court made no ruling upon the question. If we leave this state of the record out of consideration, however, and ascribe any weight whatever to the statement, an inspection of the remainder of the direct examination and of the cross and redirect examinations demonstrates that it was without foundation. On direct examination the witness testified that the laths were "hauled away and used in the construction of the Emerson building." If we indulge the wholly gratuitous assumption that this building was the property of appellants, we are met by the statement of the witness on cross-examination that he knew only that

the person who took the laths away left in the direction of the Emerson building. On that examination he also said that he did not know of his own knowledge that the material was used in the construction of the building; that, so far as he knew, it might have gone into that building and it might not; and that the laths were taken away by a son of appellant Springer Emerson and of the deceased Mary A. Emerson, but that he, the witness, did not know whether or not the son was a deputy or employee of the sheriff, or whether or not he was an agent or representative of his parents. The cross-examination and redirect examination of the witness show that he had no knowledge upon the question whether the taking of the laths had any connection with the replevin action. We are satisfied that the record shows no support for the finding of conversion.

[3] Respondent contends that the bill of exceptions contained in the record cannot be considered because it does not purport to contain all the evidence bearing upon the point made by appellant, and cites *Moore v. Tice*, 22 Cal. 513. The opinion in that case does contain language indicating that a statement of the case or bill of exceptions must show affirmatively that it contains all the evidence touching questions presented on appeal. It was said, however, in *Abbey Homestead Ass'n v. Willard*, 48 Cal. 614:

"The moving party is required to set forth so much of the evidence (and no more) as may be necessary to explain the points specified in his statement or bill of exceptions; and when such statement or bill of exceptions is settled, it will be presumed that it contains all the evidence given in the cause, which was necessary to be stated, in order to explain the points specified; and that it would not have presented a different case in respect to the specified points, had it contained, also, the omitted evidence. It is desirable that counsel shall consider this point as settled."

This rule has since been followed in many decisions, several of which are noted in *Polkinghorn v. Riverside P. C. Co.*, 24 Cal. App. 615, 142 Pac. 140.

[4] Relying on the rule that a demand for the return of converted property is necessary where the conversion results after possession has been rightfully acquired, appellants insist for the first time in their reply brief that a reversal of the judgment must result for the reason that there was no such demand in this action. We have not considered this point. A question ordinarily will not be considered by a court of review if it be presented for the first time in a closing brief. *Glasspoole v. Pac. Lumber Co.*, 22 Cal. App. 338, 184 Pac. 349; *Camp v. Boyd*, 41 Cal. App. 83, 182 Pac. 60.

Judgment reversed.

We concur: FINLAYSON, P. J.; CRAIG, J.

COOKE v. NEWMARK GRAIN CO.
(Civ. 3535.)

(District Court of Appeal, Second District,
Division 1. California. Sept. 21,
1921.)

1. **Frauds, statute of** §116(3, 4)—Action on contract of agents for purchase of barley not to be sustained without evidence of written authority.

Where a contract for the purchase of barley by defendant's agents involved more than \$5,000, action thereon could not be sustained where there was no evidence that the agents signing the contract were authorized in writing as required by Civ. Code, § 2309, to make the contract, which, being for the sale of personal property for \$200 or more, required a written memorandum under sections 1624 and 1739; no part of the purchase price being paid nor any of the barley accepted.

2. **Frauds, statute of** §116(10)—Oral ratification of contract of agent whose authority is required to be in writing held insufficient.

Oral instructions to the buyer's agent for the purchase of barley held insufficient as a ratification of the sales contract signed by the agent, since, under Civ. Code, § 2310, the ratification of the agent's act can only be made in the manner that would have been necessary to confer original authority for the act ratified; section 2309 providing that authority to enter into a contract required to be in writing can only be given by an instrument in writing.

3. **Principal and agent** §137(1)—Buyer of barley held not estopped to deny authority of agent signing contract.

In an action by the seller for breach of a contract to purchase barley, that defendant accepted and paid for other shipments from others purchased by the same agents held not to estop him to deny that the agents signing plaintiff's contract were duly authorized to do so; plaintiff having no knowledge of such other transactions at the time of his sale.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by C. E. Cooke against the Newmark Grain Company. Judgment for plaintiff, and defendant appeals. Reversed.

Bicksler, Smith & Parke, of Los Angeles, for appellant.

E. R. Simon, of El Centro, for respondent.

CONREY, P. J. In this action the plaintiff has recovered a judgment in damages for the breach of an alleged contract for the purchase of a quantity of barley. The defendant appeals from the judgment.

The defendant is sued as an undisclosed principal in relation to a contract whereby the alleged agents in their own name made a written agreement to buy the barley. Appellant contends that the evidence is insufficient to sustain the finding that the contract was

made by the defendant in this, that the evidence is insufficient to prove that the alleged agents were authorized to make the contract as agents for or on behalf of the defendant. An agreement for the sale of personal property for a price of \$200 or more is invalid unless the agreement, or some note or memorandum thereof, be in writing and subscribed by the party to be charged or his agent, unless the buyer accepts or receives part of such goods and chattels or pays at the time some part of the purchase money. Civ. Code. §§ 1624, 1739.

"An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing." Civ. Code § 2309.

[1] The contract sued on in this case involved a consideration of more than \$5,000. The defendant has not accepted or received any of the property alleged to have been sold to him, nor was any part of the purchase price paid. There is no evidence of any written authority given to the alleged agents to make the contract in question. We may assume, without so deciding, that the evidence would be sufficient to sustain the finding if an oral authorization of the agency were legally sufficient for the purpose, although it may be noted that the fact of such oral authorization is warmly disputed by the defendant, which wholly disclaims that it authorized the contract in any manner whatever.

[2] On behalf of respondent it is suggested that the defendant ratified the agency authorization by giving shipping instructions, through an agent named Wolz, for the plaintiff's grain. We have been unable to discover in the record any evidence of such instructions given by Mr. Wolz, other than a telephone message to which Hayward testified, or any evidence that Wolz had authority to give such instructions on behalf of the defendant. The ratification of the agent's act can be made only in the manner that would have been necessary to confer an original authority for the act ratified. Civ. Code, § 2310.

[3] Respondent further suggests that the defendant is estopped to deny that Hayward, Rath & Marshall, who signed the contract with plaintiff, were its duly authorized agents. This claim of estoppel is based upon the fact that the defendant accepted and paid for two other shipments of barley purchased by Hayward, Rath & Marshall at about the same time. It is argued that these three independent purchases from separate and independent sellers were all made under one authorization, and that the defendant cannot be permitted to accept the benefits from such agency authorization in two

instances and reject the third. Whatever might be said in favor of this contention if this were an action between the agents and their alleged principal, it can have no application for the purpose of raising an estoppel in favor of respondent. It does not appear that at the time when he sold his barley respondent had any information whatever concerning said other transactions, or relied upon them as constituting any matter of inducement to him in making the sale. As to those other transactions, the plaintiff is a third person who knew nothing of the conduct of the defendant and placed no reliance thereon. The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

IN re BEFFA'S ESTATE.

DOTTA v. ROCCHI.

(Civ. 2324.)

(District Court of Appeal, Third District, California. Sept. 9, 1921.)

1. Wills \Leftrightarrow 69—"Will" is disposition of property to take effect at testator's death.

A "will" is a disposition of property to take effect at testator's death.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Will.]

2. Wills \Leftrightarrow 87—Court in determining nature of instrument will give effect to testator's intention.

In determining whether an instrument was intended to be testamentary, its language will be construed in the light of the surrounding circumstances, and, if such intention appears, the court will give effect thereto if it can be done consistently with the language, regardless of the particular form of the instrument; the true test being, not testator's realization that it is a will, but his intention to create a revocable disposition of his property to accrue and take effect only on his death and passing no present interest.

3. Assignments \Leftrightarrow 31—"Assignment" defined.

An "assignment" is a transfer or setting over of property or some right or interest therein from one person to another, and includes transfers of all kinds of property, but is ordinarily limited to transfers of choses in action and to rights in or connected with property, as distinguished from the particular item of property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assignment.]

4. Wills \Leftrightarrow 88(1)—Whether instrument as signing and transferring decedent's property was deed or will determined from surrounding circumstances, maker's intention not being conclusively shown by language.

Whether an instrument assigning and transferring all of deceased's property is a

deed or will must be determined in the light of the circumstances under which it was made, the words "assign" and "transfer," while sufficient to convey property by deed or will, not being the usual operative words of either, so that the language does not show conclusively whether deceased intended the instrument as a will or as a conveyance of a present interest.

5. Wills \Leftrightarrow 88(4)—Undelivered instrument placed by maker where beneficiary would find it after his death held will.

Where a decedent, who committed suicide, executed an instrument disposing of his property, after having determined to take his life, and did not deliver it, but placed it where it would come into the beneficiary's possession after his death, the inference was justified that he intended it as a will rather than a deed; he being presumed to have known the law that without delivery the instrument would be ineffective as a deed, but effective as a will.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Application by Teodora Rocchi for the probate of the will of Candido Beffa, deceased. From a judgment for proponent, Pacifica Dotta, contestant appeals. Affirmed.

J. H. Daly, of Long Beach, and Snyder & Snyder, of San Andreas, for appellant.

Virgil M. Airola, of San Andreas, for respondent.

FINCH, P. J. This appeal is from a judgment and order admitting the instrument hereinafter set out to probate as the last will of Candido Beffa, deceased.

The appellant is a sister of the deceased and his sole heir at law. Her home is in the state of Missouri and she had not seen her brother for many years prior to his death, though they kept up a correspondence and he occasionally sent her money. The deceased was a native of Switzerland. He came to this country in 1899, at the age of 17 years, and thereafter made his home with his aunt, Mrs. Teodora Rocchi, and her husband until the latter's death; they residing on a farm in Calaveras county. Upon the death of Mr. Rocchi, Beffa and his aunt took up their residence in San Andreas where, in the language of the trial judge, "they practically lived in the relationship of mother and son" until the death of Beffa; she being the housekeeper and he being employed by others for a time and later engaging in business for himself in partnership with one Louis Queirola. Queirola, shortly before Beffa's death, decided to withdraw from the partnership business, and it seems to have been agreed that an effort would be made to sell the same. During the forenoon of April 11, 1920, the partners went over their business affairs with the purpose of ascertaining the extent of their assets and liabilities and were to meet again in the aft-

ernoon for the same purpose. Beffa failed to appear in the afternoon and his body was found the next day in the basement of a neighbor's barn. A coroner's jury found that his death was due to a gunshot wound self-inflicted, he having shot himself some time during the afternoon of the 11th.

After his death the instrument admitted to probate as his will was found in the partnership safe, in a sealed envelope, together with other papers belonging to Mrs. Rocchi. The instrument was pinned to the deed of trust referred to therein, and on the face of the envelope was written: "Papers belong to Mrs. Teodora Rocchi." Mrs. Rocchi had no knowledge of the existence of the instrument prior to Beffa's death. It is wholly in the handwriting of the deceased and reads as follows:

"April 10th, 1920.

"I Candido Beffa I sign and trasfer all my right and title of thi Deed of trust to Mrs. Teodora Rocchi is part payment of twenty years House keeping for me I also sign to her my house here in San Andrea my automobile a lot at leas Palmas and all wat will be realize of my share in the stock here in the store.

"Candido Beffa."

[1, 2] Appellant contends that the instrument is not testamentary in character. A will is a disposition of property to take effect at the death of the testator.

"It is well settled in this country and in England: First, that in determining whether the instrument propounded was intended to be testamentary, reference will be had to the surrounding circumstances, and the language will be construed in the light of these circumstances. Second, that if it shall appear under all the circumstances that the instrument was intended to be testamentary, the court will give effect to the intention, if it can be done consistently with the language of the instrument; and in such cases the particular form of the instrument is immaterial." *Clarke v. Ransom*, 50 Cal. 600.

"A will may be informally drawn, and may consist of one or more papers. No particular words are necessary to show a testamentary intent. It must appear only that the maker intended by it to dispose of property after his death, and parol evidence as to the attending circumstances is admissible." *Mitchell v. Donohue*, 100 Cal. 207, 34 Pac. 615, 38 Am. St. Rep. 279.

"It is undoubtedly the general rule enunciated by the leading case of *Habergham v. Vincent*, 2 Ves. Jr. 231, and oft repeated, that the true test of the character of an instrument is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property to accrue and take effect only upon his death and passing no present interest." *Nichols v. Emery*, 100 Cal. 329, 41 Pac. 1091, 50 Am. St. Rep. 43.

[3, 4] It is apparent, of course, that by "sign and trasfer" the deceased meant "assign and transfer." They are the words usually employed to convey a present interest in

property of the character of the deed of trust to which they are applied in the instrument. The instrument further provides, however:

"I also sign to her by house here in San Andrea my automobile a lot at leas Palmas."

The word "assign" is not the usual operative word to effect a conveyance of property of the character enumerated.

"The words 'transfer and assign' are not the usual operative words of a conveyance of real estate." *Sanders v. Ransom*, 37 Fla. 457, 20 South. 530.

"An assignment in law is a transfer or setting over of property, or some right or interest therein, from one person to another. * * * The word is sufficiently comprehensive to include transfers of all kinds of property, but ordinarily it is limited in its application to the transfers of those things which are commonly designated choses in action, and to rights in or connected with property as distinguished from the particular item of property itself." 2 R. C. L. 593.

"In its original and technical sense it is held to refer to a transfer of an interest in land only. It is most frequently used, however, to describe the transfer of nonnegotiable choses in action." 5 C. J. 836.

"The term 'assignment' refers to a class of acts by which the right or title to something of value is transferred to another before the object of the transfer has become property in possession. The assignment of such property is considered in law as an authorization to the assignee to reduce it to his possession." *Cross v. Sacramento Savings Bank*, 66 Cal. 466, 6 Pac. 96.

The deceased had not attended the schools of this country, and the instrument in question shows that he was not familiar with the use of the English language. It is evident that he did not use words in their strict technical sense. While the words "assign" and "transfer" are sufficient to convey property by deed or by will, they are not the usual operative words of either. The language of the instrument in question does not show conclusively whether the deceased intended it as a will or as a conveyance of a present interest and resort must be had to the circumstances under which it was made.

[5] It conclusively appears from the face of the instrument that the deceased intended that the property described therein should go to Mrs. Rocchi. He is presumed to have known the law. *Estate of Young*, 123 Cal. 344, 55 Pac. 1011. He is presumed to have known that without delivery the instrument would be ineffective as a deed but effective as a will. The court was justified in believing that the instrument was executed by the deceased after he had determined to take his own life. Under such circumstances, the fact that the instrument was not delivered but was placed where it would most certainly come into Mrs. Rocchi's possession after his death justifies the inference that the deceased in-

tended it as a will rather than a deed. "The nondelivery of a writing is a circumstance favoring it as a will." *Nichols v. Chandler*, 55 Ga. 369. The case of *Tozer v. Jackson*, 164 Pa. 373, 30 Atl. 400, is similar to the instant case. The will there under consideration was as follows:

"High James Rogers do give to John Jackson, Sr., my property known as 'Pen argyl Hotel' and the land adjoining in Pen argyl, in Northampton county, P. A.

"James Rogers."

The deceased shot himself in his room and, immediately after his death the instrument was found on a trunk in the same room, inclosed in an unsealed envelope indorsed "John Jackson." The court said:

"It is manifest * * * that at the moment of the death of James Rogers the paper was in his possession, and that fact alone conclusively disproves the theory that he intended it to take effect in his lifetime. He had never delivered it. * * * The paper was exposed conspicuously, lying on top of the trunk, where it could readily be seen. * * * These circumstances are only consistent with the theory that, so far as the intention of the deceased was concerned, it was his purpose that the gift of the property should become effective after his death. In truth the undisputed facts entirely exclude any other inference. * * * It is impossible to conceive of a stronger or more convincing act of testamentary purpose and intent. There is of necessity no room for any other inference."

See, also, *Kisecker's Estate*, 190 Pa. 476, 42 Atl. 886.

The judgment and order appealed from are affirmed.

We concur: BURNETT, J.; HART, J.

KELLER et al. v. CITY OF OAKLAND et al. (Civ. 3952.)

(District Court of Appeal, First District, Division 2, California. Sept. 7, 1921.)

1. Municipal corporations \S 658—Public streets belong to the people of the state.

The public streets of a municipality belong to the people of the state.

2. Municipal corporations \S 657(1, 5)—Legislature may delegate to municipality authority to close streets.

The Legislature has power to vacate public streets, and could delegate that power to the municipality by Act March 6, 1889 (St. 1889, p. 70), but its exercise by the municipality is dependent upon the will and subject to the control of the Legislature, and where the mode is prescribed it must be followed, and failure to acquire jurisdiction in prescribed manner cannot be cured by consent of abutting property owners.

3. Municipal corporations \S 657(3)—Erection of bulkhead in a street from curb to curb for parking purposes not an abandonment of street.

Where plaintiffs claim property in a street from property line to property line, and a bulkhead is erected by the municipality in the street from curb to curb, and the action sought to be taken by the municipality showed the relinquishment of a portion of the street was not permanent, but revocable at will by the city, such act by the municipality was not an abandonment of its street.

4. Municipal corporations \S 657(3)—Easement in street not extinguished by disuser in less period than provided by Code.

Under Civ. Code, \S 811, subd. 4, relating to the extinguishment of servitudes by disuse for five years, the right to use a street was not lost to a municipality by an ordinance of June, 1917, under which a bulkhead was erected from curb to curb, and action commenced to quiet title for abandonment July 14, 1920, is untimely.

5. Easements \S 29—Revocation of license to another to use easement revives right.

Where the owner of an easement licenses another to do an act which affects the enjoyment of the easement, when the license is revoked, the right to the easement revives.

6. Municipal corporations \S 657(3)—Ordinance held not to effect abandonment by city of a street.

Oakland city ordinance June 6, 1917, giving property owners a parking license in the street, revocable at will by the city, and the erection in the street of a bulkhead from curb to curb, not being permanent, is not such abandonment of the street that an action would lie by plaintiffs claiming the street on account of abandonment of the city's easement.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action to quiet title by Mary E. Keller, individually and as administratrix of Estate of Patrick J. Keller, deceased, and others against the City of Oakland and others. Demurrer to complaint sustained, and plaintiffs appeal. Affirmed.

Ostrander & Carey, of Oakland, for appellants.

H. L. Hagan, T. J. Ledwich, and Earl Warren, all of Oakland, for respondent City of Oakland.

F. L. Arbogast, of Oakland, for other respondents.

LANGDON, P. J. This is an appeal by the plaintiffs from a judgment against them, after the demurrers of the defendants to the complaint had been sustained. Plaintiffs declined to amend, and judgment was entered against them. The complaint alleges that the plaintiffs "are the owners in fee of all that certain piece or parcel of land situate in the said city of Oakland, county of Alameda,

state of California, lying between the northwestern curb line of that certain public street in said city known as 'Fairmount avenue' and the southeastern line of that certain public street in said city known as 'Piedmont avenue', and between the northeastern and southwestern property lines of what is now known as 'Rio Vista avenue.'" Plaintiffs claim title as the heirs at law of Patrick J. Keller, deceased, and it is alleged that—

"At the time of the death of said Patrick J. Keller, the said piece or parcel of land was subject to an easement over the same as a public street of the city of Oakland."

It is further alleged that on the 6th day of June, 1917, the city council passed and adopted an ordinance of said city numbered 1202 (N. S.) which ordinance is set out in *hæc verba* in the complaint. It is entitled "An Ordinance setting apart a portion of Rio Vista Avenue for Parking Purposes. * * *" Section 1 of this ordinance provides:

"The portion of Rio Vista avenue lying between the present northeastern and southwestern curb lines thereof and extending from the northwestern curb line of Fairmount avenue to a line distant 695 feet southeasterly from the southeastern line of Piedmont avenue, is hereby set apart for parking purposes, and the abutting property owners, at their own expense, are hereby permitted to plant and maintain said parking portion, subject to the condition that said permit is revocable at the pleasure of this council."

It is further alleged that—

"Pursuant to said petition and ordinance, the said city of Oakland did cause a bulkhead composed of concrete to be constructed from curb to curb upon said Rio Vista avenue."

It is to be observed that the ordinance and the bulkhead have reference only to the property from curb to curb, and plaintiffs are claiming the area of the street from property line to property line. It is not alleged that the plaintiffs are the owners of any property abutting on Rio Vista avenue.

Respondents contend, in support of the orders sustaining the demurrers, that the Legislature has prescribed a certain definite procedure for the closing of a city street, and that a street can be closed and abandoned in no other way, and that the allegations of the complaint indicate that that procedure has not been followed in the present case. The power to close up, in whole or in part, any street, etc., is given to the city council of any municipality by an act approved March 6, 1889 (Stats. 1889, p. 70). Appellant contends that the jurisdictional provisions of that act apply only to cases where assessments are required for improvements, etc. No such distinction is made in the act, but, on the contrary, section 6 thereof provides that after the city council has acquired jurisdiction in the manner provided for by the act, "the city council shall order said work to be

done, and unless the proposed work is for closing up and it appears that no assessment is necessary shall appoint three commissioners," etc. It appears, therefore, that a distinction between cases where assessments are necessary and those where assessments are not necessary is first made at a point in the procedure when the city council has acquired jurisdiction by the passage of a resolution of intention, the posting of such notice in the manner prescribed, the publication thereof, and such other matters as are prescribed by said act.

[1, 2] It appears therefore that the street could not be closed by the procedure alleged in the complaint. It is settled that the public streets of a municipality belong to the people of the state. *Ex parte Daniels*, 192 Pac. 442. The Legislature has power to vacate a street in a city and may delegate that power to the municipal authorities of a city, but its exercise by the municipal authorities is dependent upon the will and subject to the control of the Legislature. *Polack v. S. F. Orphan Asylum*, 48 Cal. 490; *McNeil v. City of South Pasadena*, 166 Cal. 153, 135 Pac. 32, 48 L. R. A. (N. S.) 138. The rule is general that where power is delegated to municipal bodies, and the mode for the exercise of that power is prescribed, the mode must be followed. As has been repeatedly held, the mode in such cases constitutes the measure of the power. *Zottman v. San Francisco*, 20 Cal. 97, 81 Am. Dec. 96; *Nicolson Pavement Co. v. Painter*, 35 Cal. 699; *McQuillin on Municipal Corporations*, vol. 3, § 1412. It is true the plaintiffs alleged that the abandonment and closing of said portion of said Rio Vista avenue was with the consent and approval of, and without objection by, the owners of the property abutting thereon. But failure of the city council to acquire jurisdiction in the manner prescribed by the statute cannot be cured by the consent of the abutting property owners. *Dehall v. Morford*, 95 Cal. 457, 460, 80 Pac. 593.

[3] Appellants argue that if the proceedings alleged in the complaint are insufficient to constitute an abandonment of the street, nevertheless, the erection of a concrete bulkhead from curb to curb of Rio Vista avenue, as alleged in the complaint, is a physical closing of the street, and amounts to an actual abandonment by the city. In the first place, it is apparent that only a part of the street claimed by plaintiffs is closed by this bulkhead, for it is alleged that it extends from curb to curb while the plaintiffs are claiming the land from property line to property line. Furthermore, it is apparent from the action sought to be taken by the city council as evidenced by the ordinance set out in the complaint that the relinquishment of a portion of this street was not a permanent relinquishment, but was made upon the condition that it was to be revocable at will by the city,

[4.] Reliance is placed upon the provisions of section 811, Civil Code. Subdivision 4 of section 811 would be inapplicable, in any event, because the ordinance is alleged to have been passed in June, 1917, and the bulkhead to have been erected in pursuance thereof. The action was commenced January 14, 1920, less than three years later. Under subdivision 4 of section 811 an easement acquired by enjoyment may be extinguished by disuser for a period of five years. *Garbarino v. Noce*, 151 Cal. 125, 130, 183 Pac. 532, 6 A. L. R. 433. The only other portion of section 811 which could have any possible application is subdivision 3 thereof, providing for the extinguishment of an easement by the performance of acts by the owner of the servitude, or with his assent, which are incompatible with its nature or exercise. It is said in the case of *Lux v. Haggin*, 69 Cal. 255, 292, 4 Pac. 919, 10 Pac. 674, that this is a recognition and statutory declaration of the well-settled rule that if the owner of a dominant estate do acts thereon which permanently prevent his enjoying an easement, the same is extinguished.

[5, 6] When the owner of an easement licenses another to do an act which affects the enjoyment of the easement, when the license is revoked, the right to the easement revives with full vigor. *Washburn on Easements and Servitudes* (4th Ed.) p. 726. In the present case it is clear that the ordinance pleaded merely gives to the abutting property owners a license to park the street with the express warning to them that the same is revocable at will. The bulkhead was erected in connection with the license granted, and may be removed whenever the license granted to the abutting owners is revoked.

Upon the face of the complaint, then, it appears that the erection of the bulkhead was not a permanent matter. Furthermore, even the temporary relinquishment of the enjoyment of the easement, in favor of the licensee, was not coextensive with the easement, for it appears that a substantial portion of the street which was occupied by the sidewalks is yet open to traffic by the public.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

BELIEU v. POWER, Sheriff, et al. (Civ. 2320.)

(District Court of Appeal, Third District, California. Sept. 14, 1921. Hearing Denied by Supreme Court Nov. 10, 1921.)

1. Homestead §88—Equitable interest of vendee under contract sufficient upon which to file declaration of homestead.

Vendee, having an equitable title under a contract to purchase property, has a sufficient

interest to entitle him to file a declaration of homestead.

2. Judgment §780(3)—Lien does not attach to equitable interest of vendee under contract.

A judgment lien does not attach to the equitable interest in real property acquired by a vendee under an ordinary contract to purchase the property, the vendee having paid a portion of the purchase price and entered into possession under Code Civ. Proc. § 671.

3. Judgment §752—Lien matter of statutory regulation.

A judgment lien is wholly a matter of statutory regulation.

4. Judgment §780(3)—Lien held not to attach to land.

Where a judgment was obtained and defendant subsequently acquired equitable interest in real property under a contract to purchase the property, and thereafter, before receiving a deed of conveyance, filed a declaration of homestead, the lien of the judgment never attached, and the land could not be sold under execution after the deed of conveyance was received, under Code Civ. Proc. §§ 542, 688.

Appeal from Superior Court, Glenn County; Wm. M. Finch, Judge.

Action by W. T. Belieu against Newt Power, as Sheriff, and another. Judgment for plaintiff, and defendants appeal. Affirmed. George R. Freeman, of Willows, for appellants.

W. T. Belieu, of Willows, for respondent.

PREWETT, Presiding Justice pro tem. This appeal involves the single question whether a judgment lien attaches to the equitable interest in real property acquired by a vendee under an ordinary contract to purchase the property—the vendee having paid a portion of the purchase price and entered into possession. A statement in chronological order of the facts upon which the controversy depends will aid in its solution. They are:

(a) On March 29, 1916, a money judgment was regularly docketed against the property of the respondent, Belieu.

(b) On December 21, 1918, the respondent entered into a contract with the owner to purchase the real property in question. He at once entered into possession and paid one-half the agreed purchase price.

(c) On April 2, 1919, the respondent filed a declaration of homestead in all respects sufficient in form to effect a valid dedication of the premises as a homestead.

(d) On May 15, 1919, the respondent paid the remaining one-half of the purchase price and received a deed of conveyance in satisfaction of the terms of his contract of purchase.

(e) On October 4, 1919, the appellants caused a writ of execution to be levied up-

on the property thus dedicated as a homestead and were about to expose it for sale when this action was commenced to restrain them from so doing. The levy was made under the claim that the property became and remained subject to the lien of the judgment of March 29, 1916.

[1] Upon this state of facts, the trial court enjoined the sheriff from proceeding further with the sale, and held, in effect, that although the equitable estate acquired by the respondent coupled with his possession was sufficient to entitle him to dedicate the property as a homestead, it was insufficient to render the property subject to the lien of a judgment. The conclusion of the trial court that such equitable estate was sufficient to sustain the claim of homestead is not open to question. *Bell v. Wilson*, 172 Cal. 123, 155 Pac. 625, and numerous authorities there cited. The same cases sustain the contention of the respondent that every addition to his title feeds the homestead right. These cases render this contention so clear that an extended examination of the point would be superfluous.

[2-4] The judgment was docketed before, and the homestead declaration was filed after the date of the contract of purchase. It becomes necessary, therefore, to inquire whether the inchoate right acquired by the respondent under his contract of purchase constituted such ownership of real property as rendered it subject to the lien of the judgment. It is clear and is perhaps conceded that property must be "owned" by the judgment debtor before any lien can attach. It is not, by any means, every interest in property to which the lien of a judgment will attach, nor will it, in fact, attach to every species of property. The lien is not even a uniform consequence of the fact that a contract lien upon the property may be protected by the recording laws, as in the case of various classes of personal property; nor that the property may be taken under execution issued upon the judgment, as is seen in the case of personal property of every class. The whole matter is statutory. If it were purely a question of logic, it might be inquired why, if the lien of a chattel mortgage is, under certain conditions, protected by the recording laws the lien of a judgment against the same classes of property should not, in like manner, be protected. Or, if certain inchoate interests in real property may be seized on execution, why they should not be subject to a judgment lien. But a judgment lien is wholly a matter of statutory regulation. In *Boggs v. Dunn*, 160 Cal. 283, 116 Pac. 743, Angellotti, afterwards Chief Justice, speaking for the court, says: "The lien of a judgment is purely the creature of the statute, no such lien having existed at common law," and in support of the text cites other California cases.

An examination of the authorities discloses a vast difference in the classes of property and interests therein that will support judgment liens, homesteads, and levies under execution. Section 671 of the Code of Civil Procedure provides that a docketed judgment becomes a lien upon "all the real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterwards acquire." Property interests of any and every kind, whether real or personal, and every interest therein are subject to seizure under attachment or levy on execution, unless exempt from execution. Sections 542 and 688, Code Civ. Proc. While many classes of property may be taken on execution, only two classes are subject to the lien of a judgment—real property owned by the debtor at the time of docketing and real property that he may afterwards acquire. While any interest in real property, legal or equitable, may be seized and sold under execution, only real property actually owned by the judgment debtor will support a judgment lien. That a mere equitable interest in real property acquired under a contract of purchase and sale is not such ownership as is contemplated by section 671 was clearly decided in the early history of the state. The case of *People ex rel. v. Irwin*, 14 Cal. 428, was a case identical in all essential respects with the one involved in this appeal. An attempt was made to assert a judgment lien against the interest of a vendee under a contract substantially similar to the one now before the court. The court, in that case, says:

"It is undoubtedly true that the statutory lien of a judgment upon the real estate of the judgment debtor, can attach only upon property in which such debtor has a vested legal interest."

The *Irwin* Case has been cited a number of times in later decisions, and, if sound, conclusively disposes of the present appeal adversely to the contentions of appellants.

In *Riley v. Nance*, 97 Cal. 203, 31 Pac. 1126, 32 Pac. 315, the court cited the *Irwin* Case with approval and made quotations therefrom. *Zenda Mining Co. v. Tiffin*, 11 Cal. App. 62, 104 Pac. 10, refers to the *Irwin* Case with approval.

"We have already noted that a docketed judgment cannot 'become a lien' on after acquired property of the judgment debtor until the property is actually acquired by him." *Hertweck v. Fearon*, 180 Cal. 71, 179 Pac. 190.

"The judgment only becomes a lien upon the real property [owned by] the judgment debtor * * * at the time of the docketing of the judgment, or afterward and before expiration of lien acquired." *Wolfe v. Langford*, 14 Cal. App. 359, 112 Pac. 203.

In *Summerville v. Stockton Co.*, 142 Cal. 529, 76 Pac. 243, it is held that an estate

for years is not such an interest in real property as is subject to a judgment lien. The importance of this authority is appreciated when it is recalled that an estate for years is an interest in real property and is subject to execution.

In Nebraska it is provided by statute that "the lands and tenements of the judgment debtor within the county where the judgment is entered shall be bound for the satisfaction thereof." This is substantially our own statute on the subject. The courts of that state have repeatedly held that a judgment is not a lien upon mere equitable interests in real estate. *Flint v. Shaloupka*, 72 Neb. 34, 99 N. W. 825, 117 Am. St. Rep. 771; *Nessler v. Neher*, 18 Neb. 649, 26 N. W. 471; *Woolworth v. Parker*, 57 Neb. 417, 77 N. W. 1090.

The state of Oregon provides by statute that "all property, including franchises or rights or interests therein," etc., shall be liable to execution. The court in construing this statute in *Pogue v. Simon*, 47 Or. 6, 81 Pac. 566, 114 Am. St. Rep. 903, 8 Ann. Cas. 474, holds that a judgment is not a lien upon mere equitable interests in real property in that state, and cites a number of cases in support of its conclusions. The court, in discussing the characteristics of an equitable title, says:

"An equitable title is a right or interest in land, which, not having the properties of a legal estate, but merely a right of which courts of equity will take notice, requires the aid of such court to make it available."

In *Bourn v. Robinson*, 49 Tex. Civ. App. 157, 107 S. W. 874, a Texas case, the court says:

"The term 'real estate' within the statute [making all the real estate of the judgment debtor subject to the lien of a judgment] means a freehold, which is either an estate for life or in fee simple, and not a mere chattel interest in land, nor a simple contract right to perform conditions."

The text-writers sustain the same doctrine. In *Pomeroy's Equity* (4th Ed.) § 367, we read:

"What is the effect at law of a contract whereby the owner agrees to sell and convey a designated tract of land, but which is not a true conveyance operating as a present transfer of the legal estate and the legal seisin? It is wholly, in every particular, executory and produces no effect upon the respective estates and titles of the parties and creates no interest in nor lien or charge upon the land itself. * * * On the other hand the vendee acquires no interest nor property right whatever; he can maintain no proprietary nor possessory action for its recovery; his right is a mere thing in action to recover compensation in damages for a breach from the vendor, and his duty is a debt—an obligation to pay a stipulated price; on his death, both his right and his duty pass to his

personal representatives and not to his heirs. In short, the vendee obtains at law no real property nor interest in real property. The relation between the two contracting parties is wholly personal. No change is made until, by the execution and delivery of the deed, the estate in the land passes to the vendee. * * *

It is quite true that that learned author in section 105 of the same work says:

"The vendee is looked upon and treated as the owner of the land and an equitable estate has vested in him commensurate with that provided for by the contract, whether in fee, for life, or for years," etc.

He announces a similar doctrine in other parts of his work; but in enunciating these principles, he is dealing with the rights of a vendee in courts of equity. It is an established doctrine of equity, disputed by no one, that a court will, for the purpose of administering equitable relief, treat the purchaser under a valid contract of purchase, as the legal owner of the property, but this is far from saying that he is vested with a legal title such as would be recognized at law.

None of the California cases cited by appellants are in point. They rely with much confidence upon the case of *Fish v. Fowlie*, 58 Cal. 373. But that case deals only with the estates or interests in real property that are subject to levy on execution, and we have already noted that the statutes relating to the two matters are quite unlike. Real property "or any interest therein" may be seized on execution, while only real property owned by the judgment debtor at the time is subject to a judgment lien. No more does the case of *Leese v. Clark*, 20 Cal. 387, aid the appellants. In that case the court was construing the rights of citizens under the provisions of the Treaty of Guadalupe Hidalgo, which stipulated that the property of the inhabitants of the newly acquired territory should be protected. In this connection, the court held that the word "property" as applied to lands embraces all titles, legal or equitable, perfect or imperfect. While the case is authority in the connection in which it arose, it is not applicable to the case in hand. The case of *Martinovich v. Mariscano*, 137 Cal. 354, 70 Pac. 459, has no application to equitable estates. In that case the court held that the title which descends to a widow in probate proceedings constitutes ownership in her within the meaning of section 671, supra. No question as to inchoate or equitable titles arose in that case, and none was decided.

The citations from other jurisdictions to which appellants direct our attention are, for the most part, singularly inapt. We find no case among them that sustains their position. The few which, at first glance, might seem to help them, are found on ex-

amination to be cases where statutory provisions impose a judgment lien upon equitable interests. In Ohio, for instance, the courts held, since the amendment to section 11,655 of their General Code, that the interest of the vendee under a contract to purchase land is bound by the lien of a judgment; but they have placed their conclusions squarely upon the amendment to said action. *First National Bank v. Logue*, 89 Ohio St. 288, 106 N. E. 21, L. R. A. 1915B, 340. Prior to the amendment, it had often been held that no such lien existed.

In the state of Georgia, it is held that such lien exists, but in that state it is expressly provided by statute that the judgment "shall bind all the property of the defendant." *Stewart v. Berry*, 84 Ga. 177, 10 S. E. 601. A similar statute prevails in Iowa; hence the citations from that state are not in point.

Hook v. Northwest Thresher Co., 91 Minn. 482, 98 N. W. 463, is cited by appellants, but it is held in that case that the words "real property" are qualified by the statute which provides that the lien shall cover "all rights thereto and interests therein."

We find no authority inconsistent with the conclusions of our Supreme Court in *People ex rel. v. Irwin*, supra. That case seems never to have been overruled or doubted, and it must be accepted as a correct exposition of the law upon the subject.

It may be added that we discover no anomaly in the rule which requires different measures of title to support levies on execution, the liens of judgments and homestead dedications. If such anomaly should be found, it may be answered that the Legislature has seen fit so to provide.

The judgment is affirmed.

We concur: BURNETT, J.; HART, J.

YOUNG v. COLYEAR et al. (Civ. 3512.)

(District Court of Appeal, Second District, Division 1, California. Sept. 14, 1921. Rehearing Denied Oct. 8, 1921. Hearing Denied by Supreme Court Nov. 10, 1921.)

1. Interpleader §12—Warehouseman barred by conduct from right to exercise interpleader.

Warehouseman employed by codefendants to store goods of which they claimed to be owners, who at their request sent his employes to plaintiff's residence, where they under codefendants' instructions, removed property in a manner little short of larceny, although innocent of any unlawful intent, was an active participant in the wrongful act, which act would bar him from asserting the right to exercise an

interpleader, which is a proceeding of equitable nature.

2. Interpleader §10—Defendant held to have assumed position inconsistent with that of disinterested stakeholder.

Where warehouseman, at codefendants' request, sent employes to plaintiff's residence, where they took property of the plaintiff in a manner little short of larceny under codefendants' instruction, and, on plaintiff's entering claim therefor, told her she must sue in replevin, and when she brought action in claim and delivery, he joined with the codefendants in denying plaintiff's title and claim to possession of the property, and contested her right thereto, and in a cross-complaint asserted claims arising from his contractual relation with his codefendants consisting of a lien for cartage, storage, and attorney's fees, he cannot contend that his cross-complaint constituted a proceeding in interpleader, under Code Civ. Proc. § 386, but must be deemed a complaint in intervention, under section 387, and he cannot complain of a judgment against him for costs.

3. Warehousemen §30—No lien on property of third person.

While a warehouseman, as provided by section 27 (St. 1909, p. 437), may by virtue of his lien retain possession of goods deposited by the owner or by one in the lawful possession thereof until the charges for which the lien exists are paid, such right does not apply to property of which the depositor has neither title nor right of possession, and who has obtained the same from a third person with the warehouseman's knowledge in a manner little short of larceny.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Marie J. Young against Curtis C. Colyear, doing business in the name of Colyear's Van & Storage Company, and others. From an adverse judgment, the named defendant appeals. Affirmed.

J. A. Adair, of Los Angeles (Henry E. Carter and W. S. Baird, both of Los Angeles, of counsel), for appellant.

Winslow P. Hyatt and Henry O. Wackerbarth, both of Los Angeles, for respondent.

SHAW, J. Action in claim and delivery for the recovery of certain household goods and furnishings. Judgment went against all of the defendants, from which defendant Colyear alone appeals.

It appears that defendant Colyear was a warehouseman, who as such was employed by his codefendants to store certain household goods and furnishings of which they claimed to be the owners. Acting at their request, he, on October 25, 1919, sent his employes with a truck to plaintiff's residence during her absence therefrom, at which time they, under instructions from defendants

Young and Appell, who had gained access to the house by unlawfully entering the same through a window and then opening a door, took the goods and chattels from plaintiff's dwelling to Colyear's warehouse, where they were, without the issuance of a receipt therefor, deposited in the name of Young and Appell. Immediately upon learning of the removal of the goods, and on the same day that they were taken, plaintiff went to Colyear and demanded a return thereof, and, in consideration of his delivering the goods, offered to give him an indemnifying bond. He refused to surrender the goods, stating that she would have to bring an action in replevin to obtain them. Thereupon, and after notice in writing served upon him that the property had been "burglariously taken from her residence," she instituted this action, wherein Young and Appell are made codefendants with Colyear. After Young and Appell had answered, denying all the material allegations of the complaint, defendant Colyear filed an answer likewise denying that plaintiff was entitled to possession of the property, and with it a cross-complaint wherein he alleged that both plaintiff and his codefendants claimed the property, upon which as warehouseman he asserted a lien for cartage, storage, and attorney's fees of \$250 incurred in the action, offering to surrender the property to such person as the court might designate, subject to the payment to him of said alleged lien, and asked that his codefendants and plaintiff be required to interplead as to their respective rights in the property so alleged to be subordinate to his claims.

The court, upon ample, though conflicting, evidence, found that plaintiff was the owner and entitled to immediate possession of the larger part of the property, the value of which was fixed at \$370, for which, with costs, judgment was given to plaintiff, and from which Colyear has appealed.

[1] The taking of plaintiff's property from her residence was little short of larceny thereof, and while Colyear, under the circumstances, should be deemed innocent of any unlawful intent, nevertheless he was, with notice of plaintiff's claim at the time of the taking, given by his agents and employees, an active participant in the wrongful act, which fact alone, since the proceeding of interpleader is of an equitable nature, should bar him from asserting a right to the exercise thereof. *First National Bank v. Bininger*, 26 N. J. Eq. 345; *North Pac. Lumber Co. v. Lang*, 28 Or. 246, 42 Pac. 799, 52 Am. St. Rep. 780.

[2, 3] However this may be, we are clearly of the opinion that the cross-complaint filed with the answer, and not before, as provided by the statute, and without application for defendant Colyear's discharge as a party and in the absence of a tender, free

from his asserted claims arising from the contractual relation with his codefendants, cannot be construed as a proceeding in interpleader under section 386, Code of Civil Procedure, but must be deemed a complaint in intervention (section 387, Code Civ. Proc.), wherein it appears that upon the institution of the action, instead of disclaiming any interest by lien or otherwise in the property and delivering the same subject to the order of the court, and, before answer filed, asking, upon affidavit as provided by said section 386, to be discharged as defendant, he joined with his codefendants in denying plaintiff's title and claim to possession of the property or any part thereof, and at the trial contested her right thereto, and now on appeal strenuously attacks the findings made adversely to his codefendants, Young and Appell, upon the ground that the evidence is insufficient to support the same. Such a position is wholly inconsistent with that of a disinterested stakeholder, which he claims to be. As cross-complainant in the action, his position, as appears from his pleading and arguments made, is that of a party litigant, wherein he not only resists the claims of the plaintiff but asserts the right to affirmative relief against her, the sole basis for which is his wrongful act. His claim of lien, in so far as valid, must be measured by the contract with his codefendants, against whom he had judgment. Having refused, upon plaintiff's tender of an indemnifying bond, to surrender the property upon demand therefor, and joined with his codefendants in an effort to sustain their right to possession thereof, upon the success of which his right depended, he is in no position to complain because of the fact that the court, in awarding possession of the property to plaintiff, adjudged that she recover from him and his codefendants her costs laid out and expended in pursuit of her property. While a warehouseman, as provided by section 27 of the act (St. 1909, p. 437) may, by virtue of his lien, retain possession of goods deposited by the owner, or by one in the lawful possession thereof, until the charges for which the lien exists are paid, such right does not apply to property of which, as in the instant case, the depositor has neither title nor right of possession. As against the true owner, the keeper of a garage could have no lien for storage upon an automobile left with him by one who had stolen it.

The appeal is not only without merit, but, in view of appellant's active participation in the unlawful entry and taking of the property from plaintiff's house, it would be impossible to conceive of a principle so unjust as to entitle him to a lien thereon for the costs and attorney's fees incurred by him in resisting her lawful claim to the possession of the property, particularly so when she of-

ferred to give him a bond indemnifying him against any loss from so doing.

The judgment is affirmed.

We concur: CONREY, P. J.; JAMES, J.

BUTLER v. SCHOLEFIELD, Supervisor in and for Sacramento County.
(Civ. 2362.)

(District Court of Appeal, Third District, California. Sept. 14, 1921.)

1. Counties §67 — Supervisor prejudiced against employee may sit in judgment and hear charges.

Strictly speaking, board of supervisors of county, when engaged in the prosecution or investigation of charges of misfeasance, nonfeasance, malfeasance, or other dereliction of duty of an employee or officer appointed by such board, exercises functions which are merely administrative, and a member thereof who has filed the charges for removal of the employee may sit in judgment on the latter.

2. Counties §67—Board of supervisors sole tribunal for trying charges against county engineer.

It is clear from St. 1919, p. 1290, authorizing the appointment of county engineer by the boards of supervisors of counties, that the Legislature intended, in a case where the engineer appointed is charged with dereliction of his duties as such, to constitute the board of supervisors itself the sole tribunal by which such charge or charges should be heard and determined, though they cannot arbitrarily discharge him, and it is not necessary to resort to Pen. Code, § 758, or section 772.

3. Counties §67—Municipal corporations §159(4)—Tribunals for trying officers or employee not subject to rules appertaining to judicial tribunals.

Trials of charges against an officer or employee of a municipality or county are not controlled by or subject to the rules that appertain to judicial tribunals, where the Legislature has expressly given the governing body of the municipality or the county the exclusive cognizance or jurisdiction of such trials.

4. Judges §49(1)—Not disqualified for bias in absence of statute.

In the absence of statute, judges of courts would not be disqualified from trying cases in which they have some bias or feeling for or against one of the litigants, except any pecuniary interest they might have in the litigation.

Original application by Drury Butler for writ of prohibition prayed to be directed to John S. Scholefield, as Supervisor in and for the County of Sacramento, to prevent him from sitting as a member of the Board of Supervisors. Writ denied.

Butler & Van Dyke, of Sacramento, for petitioner.

Hugh B. Bradford and White, Miller, Needham & Harber, all of Sacramento, for respondent.

HART, J. This is an original application for a writ of prohibition. The petitioner is, and was for some time prior to the institution before the board of supervisors of said county of Sacramento of a proceeding looking to his discharge therefrom, county engineer of said county, having been duly appointed by said board of supervisors to perform and discharge the duties of said position. St. 1919, p. 1290. The respondent, as the title of this proceeding indicates, is, and has been for several years, a duly elected and qualified member of said board of supervisors and regularly acting as such member.

On the 31st day of May, 1921, there were filed before and with said board written charges against the petitioner, accusing him of having committed, in his official capacity of county engineer of said county, "numerous offenses of misfeasance and malfeasance in office, of inefficiency, neglect of duty, and misconduct in his said office."

It is alleged in the petition:

"That said respondent, John S. Scholefield, has heretofore expressed his desire and intention to secure the removal of this petitioner as such county engineer, and that, in furtherance of his said desire and intention, said charges and specifications were formulated and prepared at the instigation of respondent, John S. Scholefield, and at his special instance and request and by his, said John S. Scholefield's procurement, and were signed by Ford P. Gage and Maurice Leavitt, who allege themselves to be residents, electors, and taxpayers of Sacramento county."

It is further alleged in the petition:

"That respondent, John S. Scholefield, as supervisor of Sacramento county, threatens and intends, and, unless prohibited by the order of this court, will proceed, to sit in judgment upon said charges, and will proceed to vote upon their truth or falsity, and will proceed to vote upon the removal or retention of said Drury Butler, petitioner herein, as such county engineer, and petitioner avers that John S. Scholefield has prejudged the said case and is solicitous for petitioner's removal, and intends and will, unless prohibited, without cause or any reason, except his dislike for and prejudice against this petitioner, proceed to vote to sustain the said charges against this petitioner, and will vote to remove this petitioner from office, and that such vote of said Scholefield may decide the judgment of the said board."

The petition declares:

"That none of the charges and specifications set forth in said Exhibit A (the written charges filed before said board, and made a part of the petition here) are true, and this petitioner

has a good and sufficient defense to each and every charge therein contained."

It is further made to appear by the petition that on June 14, 1921, the petitioner filed a petition in the superior court in and for the county of Sacramento for a writ of prohibition to restrain said Scholefield, respondent here, from sitting as a member of said board of supervisors in the proceeding before said board involving an investigation and trial of the charges preferred against the petitioner, as set forth in Exhibit A attached to and made a part of the petition here; that a demurrer was interposed to the petition so filed in said superior court upon the ground that said petition did not state facts sufficient to entitle the petitioner to the relief therein and thereby prayed for; and that said demurrer was sustained by said court, and the writ denied. It is alleged that the remedy by appeal from the judgment of the superior court is inadequate, since an appeal therefrom cannot be perfected and the same prosecuted to a finality so as to render it effectual; the time for the hearing of the said charges by said board having been fixed for Monday, July 11, 1921, at 10 o'clock a. m.

Upon the filing of the petition in this court an order to show cause and an order temporarily restraining the respondent from sitting with said board on the trial of the charges against petitioner were issued. Upon the return day respondent appeared by counsel and filed a demurrer to the petition on the general ground and on the further ground that—

"It appears on the face of the petition of plaintiff and petitioner herein that a final judgment has been entered in the same matter by the superior court of the * * * county of Sacramento."

Thus two questions are here presented for decision: (1) Whether the writ herein applied for will lie where the precise question at issue has already been determined against petitioner at nisi prius and an appeal from the judgment of the trial court therein is available to the petitioner. (2) Whether, in any event, the respondent, as a member of the board of supervisors, may be restrained by the writ herein prayed for from sitting in the trial by said board of said charges on the ground that he is, as the petition alleges, biased and prejudiced against the petitioner, and therefore disqualified from sitting in the investigation of the charges because of having been personally active in instituting or causing to be instituted the proceeding for the removal of the petitioner from the position of county engineer.

At the hearing of this proceeding it was stated by counsel for the petitioner that an appeal had been taken from the judgment of the superior court in this matter, but it is claimed by counsel for petitioner that, even if

the facts as stated in the petition are not such as to justify the issuance of the peremptory writ for the purpose of prohibiting the respondent from sitting at all in the investigation of the charges, it is nevertheless still the duty of this court in this proceeding, upon the facts as disclosed by the petition, to order a provisional writ to issue as ancillary to his remedy by appeal, or, in other words, for the purpose of preventing the board from proceeding with the trial of the charges pending the determination of petitioner's appeal, and thus preserving the efficacy thereof or the judgment on appeal in case it be favorable to him; it being manifest that the denial in toto of the application for the writ will mean that the trial of the charges may proceed, with respondent as one of the triers, before the appeal is determined.

As forecast above, the appeal from the judgment of the superior court of Sacramento county in this matter involves and is limited to precisely the same jurisdictional question that is involved in this proceeding. In other words, the petition here discloses that the petition filed in the superior court was for a writ of prohibition to restrain the respondent, as a member of the board of supervisors, from participating in the trial of the charges preferred before said board against the petitioner, and that the same broad question presented therein is submitted here, to wit, whether the respondent is, by reason of the facts set forth in said petition, disqualified as a member of the board of supervisors from acting as such member in the investigation of the charges filed against the petitioner. This being the question of overruling importance submitted both by the appeal and in this proceeding, and inasmuch as we have been persuaded to the conclusion that the respondent is not disqualified from acting in his official capacity in the hearing of the charges against petitioner, there can be no impropriety in passing upon and determining said question in this proceeding. The conclusion thus announced upon the principal question propounded here will obviously render it unnecessary to notice or consider herein the question of the propriety, under the circumstances of the case as revealed by the petition, of the remedy herein petitioned for. We will therefore now proceed with an exposition of the reasons supporting the conclusion at which we have arrived upon the jurisdictional question submitted herein.

The argument advanced in support of the position of petitioner is that the board of supervisors, when engaged in the prosecution of an investigation of charges of misfeasance, nonfeasance, malfeasance, or other dereliction of duty by an employee or officer of the county appointed by such board, exercises functions which are judicial in their nature, and therefore to permit respondent, upon the showing made by the petition that he is personally interested in and likewise

solicitous for the removal of the petitioner from the position of county engineer, to sit in judgment upon the latter in the matter of the charges pending before the board of supervisors against the petitioner, would be to impinge upon the just principle that no one should be a judge in his own case; that, at all events, the petition, the allegations of which are admitted to be true by the demurrer interposed thereto, clearly discloses that respondent is biased and prejudiced against the petitioner, or at the least has been personally so active in the preferment and thus far the prosecution of the charges against the petitioner as to raise the implication of his bias and prejudice against the petitioner; that therefore he could not try the charges fairly and impartially, and for this reason he is legally disqualified from participating in the investigation of said charges. The proposition last stated, it will be noted, involves an insistence upon the rigor with which the rules as to the disqualification of judges and juries in the trial of cases in the courts are applied.

[1, 2] While it cannot be doubted that in investigations such as the one concerned herein the board of supervisors in a sense exercise judicial functions, still we are of the opinion, considering the relation, officially, of such board to the county, or its general purpose and scope as a part of the governmental machinery of the county, that, strictly speaking, such investigations are merely administrative, and we are therefore firmly of the conviction that the respondent here is not disqualified for either of the reasons suggested by counsel for the petitioner. Moreover, it is clear from the statute authorizing the appointment of county engineers by the boards of supervisors that the Legislature intended, in a case where the engineer appointed is charged with dereliction of his duties as such, to constitute the board of supervisors itself the sole tribunal by which such charge or charges should be heard and determined.

The statute giving the board of supervisors authority to appoint a county engineer in any of the counties of the state was passed by the Legislature of 1919 (Stats. 1919, p. 1290, supra), and the first section thereof reads as follows:

"The board of supervisors of any county at their option may appoint, and upon petition therefor signed by qualified electors of the county equaling in number not less than twenty-five per cent. of the total vote cast in the county for governor at the last preceding election at which a governor was elected, they must appoint a competent civil engineer who has had within five years last past, not less than one year's actual experience in practical road building as county engineer, who shall be deemed an employee and not a county officer. The county engineer shall, under the general direction and supervision of the board of supervisors and except as otherwise provided in this act, have

complete direction and control over all of the construction, improvement, maintenance and repair of county roads, highways and bridges."

The second section reads in part as follows:

"The county engineer shall hold his employment for the term of four years from the date of his appointment; provided, that he may be removed at any time by the board of supervisors for inefficiency, neglect of duty, malfeasance, or misconduct in office, or other good cause shown, upon written charges to be filed with and heard by the board of supervisors and sustained by a three-fifths vote of said board after a hearing as herein provided. Said board is hereby vested with the power to administer oaths, compel the attendance of witnesses and the production of books, papers and testimony."

From the above provisions of the statute these propositions irresistibly follow: (1) That it was the legislative intent that the county engineer appointed by the board of supervisors should be possessed of the skill as an engineer necessary to enable him to cope with the requirements of modern road construction, and that he should, as such engineer, be entirely under the control and subject to the orders of the board; (2) that the Legislature intended to and did constitute the board of supervisors the exclusive tribunal by which any charges which might be preferred against the engineer should be heard and determined. The latter proposition follows from express language contained in the statute, while the former is deducible from the provision that the engineer so appointed "shall be deemed to be an employee and not a county officer," although it may be here parenthetically added that whether he is an employee only or a county officer is not material or important to the decision herein; the reference to said provision being made here only for the purpose of disclosing that it was the intent of the Legislature that the board of supervisors should be empowered to discharge the engineer, not arbitrarily, of course, but when, for any reason, his services as such proved unsatisfactory, much upon the same principle that a private employer may discharge an employee for inefficiency or deficiency in the qualifications required of his employment.

If, then, we were required to hold with petitioner that, where a member of the board of supervisors has himself filed charges against the engineer or has been personally instrumental in procuring such charges to be filed by some other person, such supervisor would be incompetent to sit with the board in the investigation of the charges so preferred, upon the principle that no one is to be permitted to "act as a judge in his own case," it would be necessary to hold that the provision of the statute constituting the board of supervisors the tribunal by which such charges are to be tried and determined is unconstitutional, since, by reason of the

provision that the engineer can be removed only upon a three-fifths vote of the board, the statute clearly contemplates that upon such charges he is entitled to the judgment of the whole membership of the board, and obviously, if one or two or any number of the members were incompetent, for the reasons suggested, to serve, the tribunal trying him would not be the tribunal as constituted by the Legislature. But, as above declared, we are of the opinion that the power vested in the board by the statute to investigate charges preferred against the engineer and to remove him from the position if the charges be by evidence sustained is perfectly valid and in no manner infringes the constitutional rights of the engineer. Indeed, it is clear that the Legislature, ex industria, constituted the board of supervisors the exclusive tribunal for the trial of charges of inefficiency or malfeasance or nonfeasance against the engineer, for the reason that, when appointed, he holds the position under the direct authority of said board, which is responsible to the public for the manner in which he discharges his duties as such engineer. The board is charged with the duty of seeing that he performs his official duties according to the requirements of the county, and may or may not accept as satisfactory such work as he may perform in his official capacity. We know of no other legal way than that as outlined or contemplated by the statute authorizing the appointment of a county engineer in which the supervisors may exercise the complete control over that officer or employee, whichever he may be, which the statute has undoubtedly vested in them. It is argued, however, that resort may be had either to section 758 or section 772 of the Penal Code in the case of charges preferred against the engineer, but we think that a comparison of those sections with the statute authorizing the appointment of an engineer will make it entirely clear that, if the procedure for the removal of the engineer was limited to that prescribed in either of the Code sections named, there still might be a just ground for the motion of said employee and at the same time no legal way by which such removal could be effected. Section 758 of the Penal Code provides:

"An accusation in writing against any district, county, township, or municipal officer, for willful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed."

The provisions following said section provide for the subsequent proceedings to be taken, including the trial by jury and judgment of removal in case of his conviction. Section 772 provides for the removal of any officer within the jurisdiction of the superior court who has been found guilty of charging and collecting illegal fees for services ren-

dered or to be rendered in his office or who has refused or neglected to perform the official duties pertaining to his office. Section 2 of the statute in question, it will be observed, provides that the engineer may be removed at any time by the board of supervisors for inefficiency, neglect of duty, malfeasance, or misconduct in office, or other good cause shown. It will thus be noted that, while some of the grounds upon which the engineer might be removed under the statute of 1919 are in effect the same as some of the grounds prescribed in the two sections of the Penal Code for the removal of public officers, yet it sets forth one cause for his removal which is not embraced within the provisions of the said sections of the Code, viz. inefficiency. It is hence to be seen that, if the right vested in the board to try and determine charges against the engineer and to remove him from his employment, if the charges be proved, is to be denied upon the ground that it involves a trespass upon the fundamental rights of that employee, then, obviously, if he were inefficient or incompetent as an engineer and no other ground for his removal could be sustained, there would be no power which could remove him until the expiration of his term of employment as such engineer, which, under the statute, is for four years from the date of his employment. And this very ground of distinction between the statute and the Code sections referred to clearly gives added support to the proposition heretofore stated, to wit, that it was the legislative intent to make the board of supervisors the sole and exclusive tribunal for the hearing and determination of any charges which might be preferred against the engineer.

[3] Nor are trials of charges against an officer or employee of a municipality or county controlled by or subject to the rules that appertain to judicial tribunals, where the Legislature has expressly given the governing body of the municipality or the county the exclusive cognizance or jurisdiction of such trials, and the law creating such body the exclusive tribunal by which such trials should be had makes no provision for disqualifying a member from acting upon the ground that he is biased or prejudiced against the officer or employee on trial. Of course, such an investigation, as has been before stated, is in a sense of a judicial nature, and the members of the board acting as the tribunal for the trial of the charges should not permit their bias or prejudice, if any they have, to influence them against the accused official. It is, of course, their duty to determine the question of the guilt or innocence of the accused officer or employee exclusively upon the evidence presented before them, and not to allow their minds to be influenced in the slightest degree by any personal feeling that they or any of them might have

against the officer or employee on trial before them; yet, while this is all true, it is also true, as before declared, that if any one of them happens to possess a feeling of prejudice against the accused or has acted in the preliminaries of the matter in such manner as to justify the implication that he may be biased or prejudiced against him in the trial, public policy, as it is established by the law creating the board the tribunal in such case, does not permit the member or members having such bias or prejudice to be precluded from participating in the trial upon that ground.

These propositions are sustained by the greater weight of authority, as, indeed, is the conclusion at which we have arrived upon the proposition first above considered—that is, that a member of the board who has himself filed charges or is personally interested in their filing would be acting as a judge in his own case should he be permitted to sit in the trial of the charges. In 2 McQuillin on Municipal Corporations, § 565, it is said:

“Some authorities hold that a council or other municipal board in proceedings for removal acts judicially, and therefore those boards whose members prefer the charges are disqualified from sitting as members of the council or board on hearing them, since they cannot act both as accusers and judges. But the contrary view is usually taken. Thus, in a proceeding to remove, members of the council are not disqualified because of the fact that they were members of a committee to investigate and afterwards preferred charges; the fact that they may have formed an opinion concerning the accused was regarded as immaterial. * * * On the trial of the mayor, the fact that one of the councilmen will act as mayor in event of removal, and the further fact that another councilman signed the charges, does not prevent either from sitting as councilmen at the trial. The formalities of a criminal court need not be observed.”

In *People ex rel. Burby v. Common Council of City of Auburn et al.*, 85 Hun, 601, 33 N. Y. Supp. 165, the relator, as city attorney of the city of Auburn, stipulated with counsel for the defendant in a case against the city for damages that he would abide the decision of the Supreme Court on appeal and not take the case to the Court of Appeals in the event the decision in the former court was against the city. The matter of making this stipulation was investigated by two members of the city council, and upon that investigation said members preferred charges against the city attorney of inefficiency in the management of the case referred to, and on investigation of the charges by the city council the relator was found guilty by a majority vote and removed from office. He thereupon applied for a writ of certiorari to the Supreme Court for the purpose of securing judgment nullifying the action of the city council removing him from office and assailed the jurisdiction of that body upon the ground,

among others, that the two councilmen who preferred the charges against him had taken part in the proceedings for his removal and had voted to sustain the charges. The same argument was made upon the hearing before the Supreme Court as is made here against the legal competency of the respondent to sit with the board of supervisors in the investigation of the charges preferred against the petitioner here. The court in that case said, *inter alia*:

“The common council is created, by statute, the only tribunal that can take proceedings against the relator for the matter alleged against him. It is therefore absolutely necessary that this body take this action, or it cannot be taken at all. Consequently the duty that devolved upon each member of the common council to take part in the proceeding was absolute, notwithstanding he may have formed such an opinion or taken such action in the premises as would disqualify him if he were a judge or juror in an action at law. In *re Ryers*, 72 N. Y. 1, 11-13, the county judge of Richmond county had made an order appointing commissioners in a proceeding to drain lands under a statute, and lands in which the judge was interested; he being the only authority, under the statute, that could appoint such commissioners. The point was made that the judge was disqualified from making the appointment, on account of being an interested party; and the Court of Appeals, after citing many authorities, reaches the conclusion ‘that it must be the law, from these cases, that where the judicial power has been confided to one judge, and if he should fail to act there would be no means of proceeding in the matter, though interested, he may take such cognizance of the case as is absolutely necessary, so far that the party shall not be without remedy.’ This we understand to be confined to cases where the judicial officer has not such an interest in the cause or matter that the result must necessarily affect his personal or pecuniary interest; or where his interest is minute, and he has so exclusive a jurisdiction, by Constitution or statute, that his refusal to act in the cause or matter will prevent any proceeding in it, then he may act, so far as that there may not be a failure of remedy. This is the rule as to judicial officers. The rule would be more liberal still in this case. The common council, in this proceeding, were, strictly speaking, not a court, nor were its members judges. The proceeding was not a common-law trial, with the incidents and common-law rights pertaining to a trial; nor, strictly speaking, was it a trial before a court. It was an investigation required by the statute to furnish information to the common council, upon which it could act. *People v. Board of Police Com’rs*, 93 N. Y. 102, 103; *Id.*, 98 N. Y. 334, 335; *People v. Doolittle*, 44 Hun, 293. These members of the common council had no pecuniary interest in the result of the proceeding, and were not in any sense parties to it, further than to discharge the duties imposed upon them by law. We must hold that the common council had jurisdiction, and that the authority conferred upon it by the statute in relation to the subject-matter has been pursued in the mode required by law in order to authorize them to make the determination.”

In *State ex rel. Starkweather v. Common Council of the City of Superior*, 90 Wis. 612, 619, 64 N. W. 304-306, a proceeding before the city council involving an investigation by said body of charges of official misconduct against the mayor was reviewed, and in said case the argument was made that the power conferred upon the city council to investigate charges against the mayor and remove that official from his office in case the charges were sustained was unconstitutional, because it was a grant of judicial power that could not be conferred upon any body of men save courts and justices of the peace. It was further claimed that the "court" so constituted was unconstitutional because at least two of the aldermen or councilmen were interested in the result, they having preferred the charges before the common council against the mayor. To these contentions the Supreme Court of Wisconsin replied:

"There are certainly some decisions lending color to the view that the amotion of an officer of a corporation is purely an exercise of judicial power. *Dullam v. Willson*, 53 Mich. 392; *Tompert v. Lithgow*, 1 Bush, 176. The better authority, however, is clearly to the effect that the power to remove officers for cause, though to be exercised in a judicial manner, is administrative, not judicial. It is a part of the power of the corporation which is very useful, in fact almost necessary, for the efficient performance of the corporate duties. * * * The common council, not being a court, but merely an administrative body, is not subject to all the rules governing courts in the transaction of business; and thus it undoubtedly is the law that the fact that one of the aldermen will discharge the duties of mayor in case of the removal of the mayor, and that another of the aldermen signed the charges upon which the mayor was tried, does not bar these aldermen from sitting. The Legislature has power to designate the officers who shall possess and exercise the power of removal, and it has designated in this case the common council. It created the office, and it may provide for the removal of the officer; and it may undoubtedly provide for such removal by a body, one of whom will be called to exercise the duties of mayor in case of his removal. Nor is there any affidavit of prejudice provided for by the statute. Passion and prejudice frequently play an important part in such proceedings as those before us, but in the absence of constitutional or legislative restrictions they do not disqualify the members of the removing board from acting. 'Ita lex scripta est.' *Andrews v. King*, 77 Me. 224."

The doctrine of the above authorities is expressly approved by our own Supreme Court in *Federal Construction Co. v. Curd*, 179 Cal. 479, 177 Pac. 473, Id., 179 Cal. 494, 177 Pac. 469, 2 A. L. R. 1202, in which the subject is elaborately considered, and the reasoning thereon squarely in line with that of the cases and the authorities above cited. See, also, *Grosjean v. Board of Education*, 40 Cal. App. 434, 441, 181 Pac. 118; *Riggins*

v. Richards et al., 97 Tex. 229, 237, 77 S. W. 946; *Barrett v. Board of Comm'rs*, 85 N. J. Law, 134, 88 Atl. 856, 857; *Rutter v. Burke*, 89 Vt. 14, 93 Atl. 842, 849; *Tibbs v. City of Atlanta*, 125 Ga. 18, 53 S. E. 811, 812; *People ex rel. Jones v. Sherman et al.*, 66 App. Div. 231, 72 N. Y. Supp. 718, 720; *State ex rel. Heimbürger v. Wells*, 210 Mo. 601, 109 S. W. 758, 761-762; *State ex rel. Murphy v. Burney*, 269 Mo. 602, 181 S. W. 981, 982, et seq.

All the foregoing cases declare that the power to remove an officer of a municipal corporation for cause is administrative, not judicial, and may be vested in such a body as the common council, and that the power of removal is not subject to all the rules governing courts in the transaction of business.

The case of *Stockwell v. Township Board*, etc., 22 Mich. 341, cited by petitioner, is one of the very few cases which hold adversely to the principles established by the cases above named. But we are not impressed with the reasoning by which the conclusion in that case was reached, and, as before declared, think the sounder reason is at the bottom of the cases cited by the respondent, above referred to.

[4] It may be added to what has already been said that even the judges of our courts would not be disqualified from trying cases in which they had some bias or feeling for or against one of the litigants, except for any pecuniary interest they might have in the litigation, were it not for the statutory provisions disqualifying them under certain circumstances and conditions.

We may also add that neither in the present case nor indeed in any case where the sole power of the trial of an officer upon charges which, if proven true, would result in his removal from office, is vested in the governing body of a city or county, is it to be assumed that any member of said body who is big enough, broad enough, intelligent enough, and honest enough to be elevated to so important a local public office would not be able in the trial of the officer to cast entirely aside any personal bias or prejudice he might have against such officer and so try him and determine the question of his guilt or innocence of the charges preferred wholly upon the competent evidence adduced before him. Indeed, we doubt not that the respondent in this case, even if it be true that he has entertained such a feeling of prejudice against the petitioner as appears to be shown by the petition, will try the petitioner upon the charges pending against the latter in the same fair and impartial manner as he himself would desire, and, indeed, be entitled to be tried were he placed in petitioner's position.

However, for the reasons herein stated, the demurrer to the petition herein is sustained,

and the application for a writ of prohibition, either peremptory or as auxiliary to petitioner's appeal, is denied.

We concur: FINCH, P. J.; BURNETT, J.

BRIGDEN et al. v. DODGE et al. (Civ. 3622.)

(District Court of Appeal, Second District, Division 1, California. Sept. 19, 1921. Hearing Denied by Supreme Court Nov. 17, 1921.)

1. Levees and flood control — 25—Assessment of cost of improvements in protection district without appointment of commissioners void.

Acts of board of supervisors of county in letting contracts for work in a protection district before commissioners had been appointed, as provided in St. 1895, p. 247, as amended by St. 1911, p. 446, were irregular, and assessments levied to pay the cost of the work were void.

2. Levees and flood control — 5—Protection districts possess no separate entity from county.

A protection district, created under St. 1895, p. 247, as amended by St. 1911, p. 446, relating to improvement of channels of innavigable streams and water courses, is in no wise a public corporation, and possesses no separate entity from the county itself, the scope of the statute being to authorize the creation of an assessment district to the end that the property in the district may be required to pay the cost of the work in proportion to the benefits received.

3. Levees and flood control — 26—County liable for assessments illegally collected in protection district.

If assessments have been illegally collected in a protection district created under St. 1895, p. 247, as amended by St. 1911, p. 446, then the county wherein such district is located is responsible, and must respond to a claim for reimbursement.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Petition by T. Dwight Brigden and others for a writ of mandamus against Jonathan S. Dodge and others, Supervisors of Los Angeles County, and others. From an adverse judgment granting the writ, defendants appeal. **Affirmed.**

A. J. Hill, County Counsel, and Gordon Boller, Deputy County Counsel, both of Los Angeles, for appellants.

Hartley Shaw and T. C. Gould, both of Los Angeles, for respondents.

JAMES, J. Plaintiffs, having recovered a judgment against the county of Los Angeles for a sum of money, brought this proceeding in the superior court to compel the supervisors of said county and the other dis-

bursing officers named to audit, allow, and pay the amount of said judgment from the general fund of the county. Mandate was decreed agreeable to the prayer of the complaint, and the defendants have appealed. The judgment roll alone constitutes the record on appeal.

[1-3] In 1912 the board of supervisors of Los Angeles county, acting under authority of an act to provide for the improvement of channels of innavigable streams and water courses, as the same was approved in 1895 (St. 1895, p. 247) and amended in 1911 (Stats. 1911, p. 446), adopted a resolution by which a district was described under the name of Fair Oaks Protection District, and proceed further to have surveys made and to provide for the doing of certain work and the assessment of the cost thereof against the property within said district. However, the board of supervisors did not proceed regularly with its action, but let contracts for work before commissioners had been appointed. Such procedure was not in accordance with the requirements of the act referred to. The case thus made was the same as that considered in Pasadena Park Improvement Co. et al. v. Leland, 175 Cal. 511, 166 Pac. 341. There it was held that the acts of the board of supervisors in ordering the doing of protection work and in levying assessments to pay the cost thereof were void. Plaintiffs having paid assessments levied against their property, located within the said Fair Oaks Protection District, brought an action to recover back the money, and obtained a judgment against the county, which judgment was general in its form without limiting or restricting terms as to the fund from which it was to be paid. Being a general judgment against the county, its payment would ordinarily be made from the county's common or general fund. In due course the plaintiffs presented their demand to the board of supervisors in their effort to collect upon the judgment, and the board allowed the demand, but ordered that it should be paid from the Fair Oaks Protection District improvement fund. At the time the demand of plaintiffs was so allowed no money was shown upon the books of the auditor and treasurer to the credit of the fund named, and no money was thereafter credited to that fund. As it appeared that there was ample money in the general fund of the county, plaintiffs insisted that their demand should be paid, and petitioned the superior court for the writ of mandate, which was, after final hearing, allowed to them. The position of appellants is that the Fair Oaks Protection District constituted an organization apart from the county of Los Angeles and one possessing individual and separate responsibilities, and their counsel say that, if the funds of that district were depleted,

plaintiffs could not obtain satisfaction of their demand from any other source. This conclusion would be right if the premise were correctly chosen. The situation bears no analogy to that of a school district, which is referred to in some of the decisions cited, for it has been directly held that a school district is in itself a public corporation possessing powers of a quasi municipal character. *Hughes v. Ewing*, 93 Cal. 414, 28 Pac. 1067; *Kennedy v. Miller*, 97 Cal. 432, 32 Pac. 558. In *Pasadena Park Improvement Co. v. Lelande*, supra, our Supreme Court determined that a protection district, such as that attempted to be organized by the board of supervisors, is in no wise a public corporation, and that it possesses no separate entity from the county itself, but that its scope is to authorize the creation of an assessment district to the end that the property in the district may be required to pay the cost of the work in proportion to the benefits received, and the court there says:

"In all essentials is the power conferred by the act like that conferred upon city councils and boards of trustees to create assessment districts for the improvement of streets," etc.

The act provides that the district shall be governed and controlled by the board of supervisors, and that the board, in employing the power of eminent domain, shall act in the name of the county. While it is provided that the supervisors in the formation of the district shall proceed upon receiving a petition of landowners, that is a means only for calling into use the power of the county as vested in its legislative and administrative board, and for the particular purposes provided in the act. It is true that a special fund is created into which moneys collected to defray the cost of the improvement work are to be segregated and kept; nevertheless the county is in effect the contracting agency and the collecting power. If the assessments have been illegally collected, as was determined in the cases of these plaintiffs, then the county is responsible, and must respond to a claim for reimbursement. Our Supreme Court has said, as we have noted, that a protection district of the kind referred to is similar to an assessment district described within a municipality under street improvement proceedings. In a case of the latter it has been held that the city itself owes the obligation to pay back to the property owner the amount of an assessment illegally levied and collected. *Spencer v. City of Los Angeles*, 180 Cal. 103, 179 Pac. 163. Our conclusion is that the plaintiffs are entitled to the writ which the judgment of the superior court awarded to them.

The judgment is affirmed.

We concur: CONREY, P. J.; SHAW, J.

SCOVILLE v. DODGE et al. (Civ. 3623.)

(District Court of Appeal, Second District, Division 1, California. Sept. 19, 1921. Hearing Denied by Supreme Court Nov. 17, 1921.)

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Petition by C. B. Scoville for a writ of mandate against Jonathan S. Dodge and others, Supervisors of Los Angeles County, and others. Judgment granting the writ, and defendants appeal. Affirmed.

A. J. Hill, Co. Counsel, and Gordon Boller, Deputy Co. Counsel, both of Los Angeles, for appellants.


Hartley Shaw and T. C. Gould, both of Los Angeles, for respondent.

PER CURIAM. The facts in this case are in all essentials parallel to those shown by the record in *Brigden et al. v. Dodge et al.* (No. 3622), 201 Pac. 631, in which decision was this day filed. Pursuant to stipulation, both cases were submitted on the same briefs.

For the same reasons as those stated in the opinion filed in *Brigden et al. v. Dodge et al.* the judgment herein is affirmed.

PACIFIC GAS & ELECTRIC CO. v. STATE. (No. 491-492.)

(Supreme Court of Arizona. Nov. 16, 1921.)

Electricity  Statute regulating erection and maintenance of electric poles, wires, etc., held void under previous order of Corporation Commission.

Const. art. 15, § 3, vesting power in the Corporation Commission to regulate the manner of placing, erecting, and constructing electric poles, wires, cables, and appliances, did not deprive the Legislature of the power to pass a law relating thereto, if the Corporation Commission had not exercised the power so given it, but since the commission issued General Order No. 37, regulating the placing, erection, and maintenance of telephone, telegraph, signal, trolley, electric light, and power lines, Laws 1915, Append. p. 13, subsequently enacted by Legislature, relating to same subject-matter, was void.

Appeal from Superior Court, Maricopa County; R. C. Stanford, Judge.

Pacific Gas & Electric Company, a corporation, was convicted of violating Laws 1915, Append. p. 13, regulating the placing, erection, and maintenance of electric poles, wires, cables, and appliances, and from judgment of conviction and from order denying motion for a new trial, it appeals. Judgment vacated and set aside, with directions to dismiss information and discharge defendant.

Bullard & Jacobs and Armstrong, Lewis & Kramer, all of Phoenix, for appellant.

The Attorney General, for the State.

(201 P.)

ROSS, C. J. Under date June 23, 1914, the Arizona Corporation Commission issued General Order No. 37, regulating the placing, construction, and maintenance of telephone, telegraph, signal, trolley, electric light and power lines within the state to be effective from and after July 1, 1914. Thereafter at the November, 1914, election an initiated measure "regulating the placing, erection and maintenance of electric poles, wires, cables and appliances, and providing the punishment for the violation thereof" was approved by the people, and on December 14, 1914, by the Governor proclaimed law. Under the initiative measure reconstruction and new work were exempted from its terms for six months after its passage, and a period of five years after its passage was allowed in which to reconstruct all existing work in compliance with its provisions. Appendix Laws 1915, p. 13.

On July 28, 1919, the county attorney filed two informations in the superior court of Maricopa county, charging the Pacific Gas & Electric Company with violating certain provisions of the initiative measure. To each of the informations the defendant filed a special demurrer, asserting that the power and authority to regulate the placing, erecting, and maintaining of electric poles, wires, cables, and appliances was vested by section 8, article 15, of the state Constitution in the Corporation Commission exclusively, and that for that reason the initiative measure was unconstitutional and void. The demurrer was overruled, and after trial the defendant was found guilty. This appeal is from the final judgment of conviction and from the order denying a motion for a new trial.

There is no dispute as to the evidence. General Order No. 37, which was introduced in evidence, embodied the recommendations contained in the report of the committee on overhead line construction of the National Electric Light Association made at its Thirty-Fourth Convention, held in the city of New York, in May and June, 1911, and was in all essentials the same as the orders issued by the Commissions of the states of Connecticut, Nevada, New Jersey, New York, Oklahoma, Oregon, Vermont, and Wisconsin, regulating the manner of placing, erecting, and constructing electric light and power lines. It also appeared without question that the defendant had in the erection of its poles, wires, cables, and appliances complied with the requirements and provisions of Order No. 37 as passed by the Arizona Corporation Commission. It also appeared that the construction complained of was a violation of the initiative measure and was new construction, having been made in the year 1919.

In opposition to the contention of the prosecution, not only the defendant has filed briefs, but the city of Mesa through its city attorney, and the Board of Governors of the

Salt River Valley Water Users' Association, through its attorneys, under the permission of the court, also as amici curiæ, filed briefs. It would seem that the water users' association, the city of Mesa, and perhaps other cities of the state, as well as public utility companies, have constructed their electric light and power plants in conformity with the provisions of Order No. 37, and not in accordance with the provisions of the initiative measure. Just to what extent, and how, the provisions of the initiative measure differ from those of Order No. 37 is not made to appear. If the passage of the initiative measure had the effect of abrogating Order No. 37, it follows that any municipality or public utility company, whose plant is not constructed, or was not reconstructed within five years after it became law, in accordance with its provisions, is guilty of a misdemeanor, and necessarily must be put to the expense of changing its plant to conform therewith.

It is the contention of the defendant that the ruling or decision in the case of *State v. Tucson Gas, etc., Co.*, 15 Ariz. 294, 138 Pac. 781, is in point and decisive of the issue in its favor. In that same connection it is the defendant's contention that the decision or ruling in the case of the *Arizona Eastern Railroad Co. v. State*, 19 Ariz. 409, 171 Pac. 906, is erroneous, and that this court should so hold. The present Attorney General is in agreement with these views. His predecessor, however, in a brief filed before the expiration of his term of office, took the position that the *Arizona Eastern Case* was a correct exposition of the law, and should be followed in this case. One of the amici curiæ differs with both of these positions, and takes the stand that the decisions in the *Tucson Gas Case* and the *Arizona Eastern Case* are both correct, and that while the rulings therein bear upon and affect the question we now have upon us, they are not decisive of it. In this we concur.

Because of the peculiar wording of the Constitution affecting the subject-matter in the *Tucson Gas Case*, we held the power to fix rates to be charged for gas by public utilities was exclusively vested in the Corporation Commission. In that case the only question involved was the rates and charges of public service corporations and the constitutional body to regulate them. It was what may be called a "rate case." The *Arizona Eastern Case* involved the power of the Legislature to regulate the number of cars in a train, and was clearly the exercise of the police power of the state for the safety, comfort, convenience, and health of employees of railroad companies. In this latter case it was held in effect, or negatively at least, that the Corporation Commission was vested with power to regulate the number of cars in a train under the grant to it in section 8,

article 15, of the Constitution to "make and enforce reasonable rules, regulations, and orders for the convenience, safety, comfort, and health of employees of public service corporations," but that the duty to exercise such power was permissive and not mandatory. It was also held directly the granting or delegating of such power to the Corporation Commission did not divest the Legislature of power in the interest of the safety and health of employees to limit the number of cars in a train. The logical effect of the conclusion reached in that case was that both the Corporation Commission and the Legislature could lawfully and constitutionally, in the exercise of the police power of the state, provide for the protection and safety of the employees of public service corporations. But in that case there was no conflict of authority, the Corporation Commission having failed to exercise its delegated powers to promulgate rules and regulations covering the subject-matter, while the Legislature had acted. It is interesting to note the language employed in the decision limiting its effect:

"It is perfectly clear that neither by direct language, nor by any necessary implication, from the powers granted to the Corporation Commission in section 3, is the police power in this state over a railway as a public highway, or over a railroad corporation as common carrier, vested *exclusively* in the Corporation Commission. It is equally clear that this power of the state over a railway as a public highway, and over a railroad corporation as a common carrier, may, by a plain mandate, and in the emphatic language of the Constitution, be exercised by the lawmaking department of the government. This is the extent of the matter that must now be determined." (Italics ours.)

In the present case both the Commission and the Legislature have acted covering the same ground. Both unquestionably under proper circumstances may operate there—one, the Corporation Commission, under authority delegated to it by the Constitution, and the other, the Legislature, under its inherent reserved powers. The very body, the people, that enacted the initiative measure to regulate the placing, erection, and maintenance of electric light and power plants had theretofore written and adopted a constitution into which they incorporated a provision authorizing the Corporation Commission to make and enforce rules, regulations, and orders covering the same subject-matter and the Commission having acted in the premises, their principal, under every rule of agency, is bound to respect the conduct and rights accruing thereunder.

Adopting the analogous rule that a state law covering a subject of federal cognizance is valid until the Congress invades that particular field when the state law is abrogated

(New York Central R. R. Co. v. Winfield, 244 U. S. 147) 37 Sup. Ct. 546, 61 L. Ed. 1045, L. R. A. 1918C, 439, Ann. Cas. 1917D, 1139, Order No. 37 becomes the rule of action as applied to the facts of this case. The defendant acting under what appears to be a legal and subsisting order issued by the Corporation Commission in the exercise of a jurisdiction vested in it by the Constitution, the court committed error in not sustaining the demurrer to the information and in finding the defendant guilty.

The judgment of conviction is therefore vacated and set aside, with directions that the information be dismissed and the defendant discharged.

McALISTER and FLANIGAN, JJ., concur.

JOHNSON v. MOILANEN. (No. 1888.)

(Supreme Court of Arizona. Nov. 16, 1921.)

Witnesses ~~to~~ 183—Refusal to permit plaintiff to testify as to transactions with decedent held not abuse of discretion.

Under Civ. Code 1913, par. 1678, prohibiting parties from testifying as to transactions with a decedent unless called by opposite party "or required to testify thereto by the court," the court, in a suit to recover moneys advanced to deceased, held not to have abused its discretion in refusing to permit plaintiff to testify as to such transactions.

Appeal from Superior Court, Gila County; G. W. Shute, Judge.

Suit by Alma Johnson against Abel Moilanen as administrator of the estate of John Moilanen, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

John M. Feier, of Globe, for appellant.
Frank McCann, of Globe, for appellee.

McALISTER, J. Alma Johnson filed suit in the superior court of Gila county against the administrator of the estate of John Moilanen who died January 25, 1919, in which she alleges that she loaned and advanced to the deceased upon his oral promise to repay \$800 as follows: \$500 on March 5, 1917, \$250 on May 18, 1917, and \$50 on November 30, 1917. That no part of said loan has been paid, and that a verified claim for the amount was filed in proper time with the administrator and by him disallowed. From a judgment for the defendant and an order denying plaintiff's motion for a new trial, she appeals.

Several errors are assigned, but they each raise in a different way the only question presented by the appeal, which is the correctness of the trial court's ruling in not per-

mitting the plaintiff to testify to the facts alleged in her complaint. The transaction out of which the cause of action arose occurred, according to the allegation, previous to the death of John Moilanen, one of the parties to it, and when appellant was questioned by her counsel concerning it an objection to her testifying was interposed by appellee, based on the provisions of paragraph 1678, Revised Statutes of 1913, which reads as follows:

"In an action by or against executors, administrators or guardians, in which judgment may be rendered, for or against them as such, neither party shall be allowed to testify against the other as to any transaction with or statement by the testator, intestate or ward unless called to testify thereto by the opposite party or required to testify thereto by the court; and the provisions of this section shall extend to and include all actions by or against the heirs, devisees and legatees or legal representatives of a decedent arising out of any transaction with such decedent."

At the suggestion of the court that other witnesses to the transaction, if there were any, testify first in order that it might determine whether it could exercise its discretion relieving appellant from the bar of this statute, the depositions of Annie Murto of Bruce Crossing, Mich., and of H. Woullet of Detroit, Mich., were read in evidence. It appears from the testimony of the former, who lived in Miami from the latter part of June, 1917, to November 28, 1917, and saw appellant and John Moilanen almost daily during this time—the three living at the same rooming house—that Alma Johnson loaned John Moilanen \$500 on March 5, 1917, \$250 on May 18, 1917, and \$50 on November 30, 1917; that Alma Johnson and John Moilanen both told her of these loans. In his deposition H. Woullet, who lived in Miami in 1916, 1917, 1918, and part of 1919, testified that he was acquainted with both Alma Johnson and John Moilanen and had known the latter since 1915; that John Moilanen told him in their room at Miami that Alma Johnson loaned him (Moilanen) \$500 on March 5, 1917, and showed him (Woullet) a check for this amount, saying as he did so that it was given him by Alma Johnson and he was going to buy lots in Superior with it. In response to the court's query as to whether they had the check, appellant's counsel stated that they knew nothing of any check. It appeared from the deposition of Richard T. Lobb of Superior, Ariz., that John Moilanen purchased from him two lots and a house in the town of Superior, and paid therefor \$500 on March 5, 1917, \$250 on May 18, 1917, \$250 on September 1, 1917, and \$250 on November 1, 1917, a total of \$1,250 and that he took the deed to the same in his name.

Appellant contends that these depositions "alone support every material allegation al-

leged in the complaint, regardless of the plaintiff's testimony," and that it was therefore an abuse of discretion not to permit appellant to testify following their introduction. It is not questioned, however, that under the clause in paragraph 1678, above, reading, "or required to testify thereto by the court," it was within the discretion of the trial court to refuse her permission to testify in the first instance, but the contention is that the court could not arbitrarily deny her this right after the terms of the transaction upon which her cause of action was based had been proven by the testimony of other witnesses. In substantiation of this position, she cites *Goldman v. Sotelo*, 7 Ariz. 25, 80 Pac. 696, in which this court, in commenting on the ruling of the trial court permitting the plaintiff to testify, said that the same facts had been testified to by two other witnesses and consequently there was no abuse of discretion in admitting the testimony of the plaintiff. From this it would appear that the facts to which the two witnesses and the plaintiff Sotelo testified were the same, and not that the plaintiff testified to the transaction itself and the two witnesses to an admission of it by the deceased, Wormser. In refusing appellant permission to testify in this case, however, it was observed by the trial court that the witness Annie Murto arrived in Miami some time after it was alleged the first two loans were made; that she left there on November 28, two days previous to the alleged making of the last one, which rendered it impossible for her to have had personal knowledge of it; and that all she knew of the first two was what the appellant and deceased had told her. In referring to the testimony of H. Woullet, the court said:

That he "bases his whole statement upon the proposition that he saw a check which Moilanen exhibited to him for \$500, which was the only transaction he knows anything about; and the inference must necessarily be from a reading of that deposition that it was this plaintiff's check, you can't help but indulge in that inference when you read the deposition; that he did not see the money; that he saw the check, which he says the plaintiff gave him. In view of that situation I hardly see what we are going to do with the statement which you make, which, of course, is not evidence, but I take it you know what your case is, that you know nothing about a check, if one was ever signed up you know nothing about it. It absolutely invalidates the merits or the practical worth of the two depositions, which you must depend upon before I can exercise the discretion given me to allow her to testify to statements made by deceased persons."

Keeping in mind the purpose of paragraph 1678, above, the ruling of the trial court denying appellant permission to testify cannot, under the evidence, be construed as an abuse of discretion. In *Costello v. Gleeson*, 15 Ariz. 280, 138 Pac. 544, this court in considering

the purport of this paragraph which appeared in the statutes of 1901 as paragraph 2536 and in substantially the same language, said:

"The general rule is that all parties are competent witnesses in their own behalf, but this statute makes an exception to the rule where one of the parties is an administrator, executor or guardian, and judgment may be rendered for or against him as such. Neither party is allowed to testify as to any transaction with or statement by the testator, intestate or ward in such a case, unless he is brought within one of the two exceptions—that is, called to testify thereto by the opposite party, or required to testify thereto by the court. To adopt without exception the maxim that 'The mouth of one party being closed by death, the mouth of the other is closed by the law,' would, in some instances, promote justice by preventing the enforcement of unjust claims against the estates of deceased persons, but, in others, would defeat justice by rendering it impossible to enforce just claims; while to allow the living to testify under such conditions without restriction would give him undue advantage over the estate of the deceased party, and invite the commission of perjury by dishonest persons in the assertion of unjust claims and proof of the same by their own testimony. The unwisdom of adopting either extreme being apparent, the Legislature provided that parties could testify in such cases when required to do so by the court. By this provision discretionary power is conferred on the trial court to determine the competency of parties as witnesses to transactions with or statements by the deceased in cases where the opposite party is an administrator, executor or guardian, and judgment may be rendered for or against him as such."

The only testimony other than that of statements of the deceased was the reference to a check by the witness Woullet, but this does not establish the fact that it was the check of appellant, though such an inference might be indulged from a reading of the deposition were it not for the avowal of her counsel that they knew nothing about any check. If appellant advanced the \$500 in the form of a check drawn on her account, it would appear as if she would have known about it and been able to make proof of it. The canceled check itself, or perhaps the bank accounts through which it went, would doubtless have enabled counsel to make a different avowal. As the court viewed it, the lack of any knowledge whatever of the check on the part of the one who is supposed to have drawn it renders the testimony of the witness Woullet regarding it of no value as an independent item of evidence. Eliminating this then, there remains only the evidence of the admissions of the deceased,

sworn to by the witness Murto. Remembering that the purpose of paragraph 1678, above, is to place, so far as possible, executors, administrators, and guardians in actions in which judgment may be rendered for or against them as such, on the same plane as the other party to the suit, it is apparent that a trial court, upon, whose wise use of its discretion so much depends, should weigh very carefully all testimony concerning admissions of the deceased whose mouth is closed in death before allowing them to serve as a basis for permitting the living party to give his version of the transaction out of which the action arose, or else the statute will fail in the accomplishment of that which gave it life. We do not say that evidence of admissions against interest of a deceased person as to a transaction in controversy should not be received, nor that in some instances they might not serve as a basis for the exercise by the court of its discretion to permit the living party to give his version of a transaction upon which an action might be based, yet the possibilities of fraud and perjury are so great, if the bars are thrown down, that it is incumbent on the trial court to act with the greatest precaution in order that estates of deceased persons may be protected against unjust claims. We agree with the following statement of the Supreme Court of Colorado in *De Monco v. Means*, 47 Colo. 457, 107 Pac. 1107:

"The evidence mainly relied on to establish the existence of the indebtedness was admissions and statements alleged to have been made by the deceased to third parties. Such evidence has frequently been characterized by courts as weak and unsatisfactory, and in some cases it is held that such admissions are insufficient proof to establish a claim against an estate; and while this last statement has not as yet received the entire approval of this court, the first seems to have been accepted as well as the rule that the evidence to support a claim against an estate should be clear and convincing as to its existence as well as the amount of the claim. *Clarke v. Estate of David Roberts, Deceased*, 38 Colo. 316 [87 Pac. 1077]."

A reading of the entire record does not justify this court in holding that the trial court, in whom has been lodged by statute the power to decide the competency of appellant's testimony, abused its discretion in exercising it against her. It is only where it is clear that such discretion has been abused that this court could interfere.

The judgment is affirmed.

ROSS, C. J., and FLANIGAN, J., concur.

STATE v. McCORNISH. (No. 3619.)

(Supreme Court of Utah. June 17, 1921. Re-hearing Denied Nov. 10, 1921.)

1. Statutes \S 107(3) — Matters covered by statute against pandering, as amended, held properly included under one title.

Laws 1911, c. 108, \S 1, now Comp. Laws 1917, \S 8096, relating to pandering, described as in substance procurement of a female inmate for a house of prostitution, and enticing, persuading, encouraging, inveigling or inducing a female person to become a prostitute, and section 3 thereof, as amended by Laws 1915, c. 6, now Comp. Laws 1917, \S 8097, providing penalties for receiving money from fallen women, and making it a felony to procure a female for prostitution, or to send or direct a female to any place for that purpose, whether compensated therefor by either, and other similar provisions, are cognate and related to each other, and their inclusion under one title is not in conflict with Const. art. 6, \S 23, providing that no bill shall be passed containing more than one subject clearly expressed in its title.

2. Statutes \S 107(1)—Constitutional provision that a bill shall contain only one subject, to be expressed in its title, construed.

Under Const. art. 6, \S 23, providing that no bill shall be passed containing more than one subject, which shall be clearly expressed in its title, the Legislature may not arbitrarily make one subject out of that which naturally constitutes two; but, when cognate subjects are combined in one act, the vice of duplicity is avoided, and they constitute but one legislative subject, and if the title in its broad and popular sense is the general subject, it is sufficient.¹

3. Statutes \S 105(1)—Rules construing constitutional provision that a bill shall contain only one subject, which must be clearly expressed in the title.

General rules of construction of Const. art. 6, \S 23, providing that a bill shall contain only one subject of legislation, which must be clearly expressed in its title, are as follows: (1) That the constitutional provisions should be liberally construed; (2) that it should be applied so as not to hamper the law-making power in framing and adopting comprehensive measures covering the whole subject, branches of which may be numerous, and where all have some direct connection with or relation to principal subject treated; (3) that it should be so applied as to guard against the real evil which it was intended to meet; and (4) that each case must, to a large extent, be determined in accordance with the peculiar circumstances and conditions thereof.²

¹ Edler v. Edwards, 24 Utah, 12, 95 Pac. 367; Martineau v. Crabbe, 46 Utah, 237, 150 Pac. 301; Salt Lake City v. Wilson, 46 Utah, 60, 148 Pac. 1104; Naylor v. Crabbe, 45 Utah, 617, 148 Pac. 359; State v. Erickson, 47 Utah, 452, 154 Pac. 948; Mutart v. Pratt, 51 Utah, 246, 170 Pac. 67.

² Marioneaux v. Cutler, 32 Utah, 495, 91 Pac. 365.

4. Constitutional law \S 48—Presumption is in favor of validity of statute.

Every presumption is in favor of the constitutionality of a statute, and in case of doubt it must be held valid.

5. Statutes \S 107(1) — Where objectionable matter in an amendatory act could have been included in the original under its title, the amendatory act does not combine two subjects under one title.

If a matter that is objectionable in an amendatory act could have been included in the original under the original's title, the amendatory act is not objectionable as containing a dual subject under one title, contrary to Const. art. 6, \S 23.

6. Prostitution \S 4—Evidence held to show prima facie that accused was an employee of a hotel.

In a prosecution for pandering, evidence that defendant wore the hotel's uniform and performed the duties of a bell boy showed prima facie that he was an employee of the hotel.

7. Criminal law \S 1160—Where new trial was denied, question of sufficiency of evidence to support verdict was not reviewable on appeal.

Where the trial court did not interfere with the verdict on the ground of insufficiency of evidence when the motion for new trial was argued, the sufficiency of evidence to support the verdict cannot be reviewed.

8. Criminal law \S 45—Encouraging a criminal act is a crime.

Under Comp. Laws 1917, \S 7919, to advise or encourage a criminal act is in itself a crime.

9. Criminal law \S 37—Conviction of crime instigated by detective will not be upheld.

In a prosecution for pandering, where a detective persuaded defendant to commit the crime, which he would not otherwise have committed, for the purpose of convicting him, a conviction will not be upheld.³

Appeal from District Court, Salt Lake County; H. M. Stephens, Judge.

John McCornish was convicted of pandering, and he appeals. Reversed and remanded.

King & Schuller, of Salt Lake City, for appellant.

Harvey H. Cluff, Atty. Gen., and W. Hal Farr, Asst. Atty. Gen., for the state.

WEBER, J. The defendant appeals from a judgment of conviction in the district court of Salt Lake county on the charge of pandering. The charging part of the information is in substance as follows:

That the said John McCornish, being at the time a bell boy employed in the Wilson Hotel, did then and there willfully, unlawfully, knowingly, and feloniously procure, direct, and send a female person, to wit, Marie Morgan, to room No. 131 of said hotel for the purpose of pros-

³ City v. Robinson, 40 Utah, 448, 126 Pac. 667.

titution with another male person, to wit, Joe Bringham, who was then and there occupying said room.

To this information defendant interposed a demurrer, alleging that the statute upon which the information is based is null and void, for the reason "that the statute, and such portions of it as relate to the offense described in the information, was not passed in accordance with the requirements of the law." This demurrer was overruled, the ruling is assigned as error, and thereby the validity of that part of chapter 108, Laws 1911, as amended by chapter 6, Laws 1915 (now chapter 25, Comp. Laws 1917), is challenged.

[1] Counsel argue that the portion of the act under which appellant was prosecuted is unconstitutional and void, for the reason that it is in violation of section 23, art. 6, of the Constitution of Utah, which provides that "no bill shall be passed containing more than one subject, which shall be clearly expressed in its title." By chapter 6, Laws 1915, section 3 of chapter 108, Laws 1911, was amended; the title of the amended Act being:

"Receiving Money from Fallen Women. An act to amend Sec. 3, Ch. 108, Laws of Utah 1911, relating to receiving money from fallen women."

Section 3 of the act of 1911 relates entirely to receiving money from fallen women, and prescribes the penalty, while the amended section contains, in addition, provisions making it a felony for any person to procure a female for the purpose of prostitution for another male person, by either personal solicitation, messenger, telephone call, or other means, and makes it a felony to send or direct any female person to the sleeping apartment or lodging room of any male person, or to any other place for the purpose of prostitution, whether for hire or commission in the proceeds of the prostitution, or for any other consideration of value from either the man for whom such female was procured or from the female so procured; that every messenger, hotel or rooming house proprietor, clerk or other employee of such place, every chauffeur or hack driver, or any other person, who by any means sends, directs, takes, or conveys any female person to any room or other place for the purpose of prostitution or who keeps a list of female persons to call or be called for the purpose of prostitution shall be deemed guilty of a felony; that every hotel, lodging house or rooming house keeper or any other person having charge of such places, who knowingly allows rooms of such places to be used for the purpose of prostitution shall be guilty of a felony. The amendment also contains other provisions of a similar nature.

It is argued by counsel for appellant that the subject of the act of 1911 is "pandering," which is described in great detail in section 1 of the act; the substance, however, being that pandering is the procurement of a female inmate for a house of prostitution, and enticing, persuading, encouraging, inveigling, or inducing a female person to become a prostitute; that "receiving money from fallen women" is a separate and distinct matter, not included in the definition of "pandering" as contained in said section 1, c. 108, Laws 1911; that section 3, therefore, is separate and distinct from pandering, as defined, and creates a new crime, as the subhead of said section provided, to wit, "Receiving Money from Fallen Women." Counsel therefore conclude that:

"It is therefore obvious that chapter 108, as it is arranged and divided under the one head, subject and title of pandering, treats of two separate and distinct crimes, to wit: (1) Pandering, as defined by the statute; and (2) receiving money from fallen women, and that but one subject is expressed in the title of the act."

[2] The subjects included in the act may be distinct in one sense, nevertheless they are cognate and related to each other and are properly included in one act and under one title. As stated in *Marloneaux v. Cutler*, 32 Utah, 485, 91 Pac. 355, the Legislature may not arbitrarily make one subject out of that which naturally and logically constitutes two; but when cognate subjects are combined in one act the vice of duplicity is avoided, and they constitute but one legislative subject. It has been said that a title was never intended to be an index to the law. If the title, in its broad and popular and not in its technical and restricted sense, gives the general subject of the enacted legislation, it is sufficient. So, in the act in question, everything therein included is related to the one purpose of the act, and that is the suppression of pandering, the prevention of prostitution, and the suppression and punishment of kindred crimes. Section 3 of the 1911 law, which was all that was amended, relates to the subject of receiving money from fallen women. By the amendment of 1915 that section is amplified, and a number of cognate and related subjects are added.

[3] Referring to section 23, art. 6, of the Constitution, quoted above, and particularly as applied to amendatory acts, the general rules of construction and interpretation have been declared by this court in *Edler v. Edwards*, 34 Utah, at page 18, 95 Pac. 367, to be: (1) That the constitutional provision now under consideration should be liberally construed; (2) that the provision should be applied so as not to hamper the lawmaking power in framing and adopting comprehensive measures covering the whole subject,

the branches of which may be numerous, but where all have some direct connection with or relation to the principal subject treated; (3) that the constitutional provision should be so applied as to guard against the real evil which it was intended to meet; (4) that no hard and fast rule can be formulated which is applicable to all cases, but each case must to a very large extent be determined in accordance with the peculiar circumstances and conditions thereof, and that the decisions of the courts are valuable merely as illustrations or guides in applying these general rules. The doctrine of the *Edler Case*, 34 Utah, 13, 95 Pac. 367, has been approved and applied in *Martineau v. Crabbe*, 46 Utah, 327, 150 Pac. 301; *Salt Lake City v. Wilson*, 46 Utah, 60, 148 Pac. 1104; *Naylor v. Crabbe*, 45 Utah, 617, 148 Pac. 359; *State v. Erickson*, 47 Utah, 452, 154 Pac. 948; *Mutart v. Pratt*, 51 Utah, 246, 170 Pac. 67.

[4, 5] It is also well-settled doctrine that every presumption is in favor of the constitutionality of a statute and that in case of doubt the statute must be held to be valid. It is equally well settled (see cases above cited) that if the matter that is objectionable in an amendatory act could have been included in the original, under the title of that act, then the amendatory act is not vulnerable to the objection that it contains a dual subject. Applying these principles and rules to the amendatory act, the validity of which is challenged, it is plain and clear that the amendment of 1915 is not repugnant to the Constitution, and that the law is valid.

[6, 7] The next assignment of error is that there was no evidence to prove that appellant was an employee of the Wilson Hotel at the time of the alleged crime. One of the issues submitted to the jury was that defendant was an employee of said hotel. By its verdict the jury answered that question in the affirmative. At the time of the alleged commission of the crime by defendant, he was performing the duties of a bell boy at the hotel; he wore the hotel's uniform; he answered telephone calls; he conducted guests to their rooms, and performed such other services as bell boys usually perform. That certainly was *prima facie* evidence that he was an employee of the hotel at the time. The jury evidently accepted this *prima facie* evidence in preference to the evidence produced by the defendant. That was the right and privilege of the jury, with which the trial court did not interfere when the motion for a new trial was argued, and it is therefore not a subject for review in this court.

[8, 9] In another assignment of error it is claimed:

That "if any offense was committed it was committed solely by the prosecuting witness, Bringham, and that "it was induced by him at the expense of Salt Lake City, and without

any suggestion, intimation, aid, assistance, or acquiescence whatever on the part of the defendant herein, and under such circumstances that clearly establish the fact that the defendant is not guilty of the pretended crime charged."

On March 17, 1920, Joe Bringham, a city policeman, was serving for the first time on the "anti-vice" or "purity" squad. In the evening of that day he went to the Wilson Hotel and procured a room. He testified that he went there to "get something on the hotel." Royally he spent the city's money, paying \$12 per pint for whisky which he bought of the defendant. Later on he left the hotel and telephoned for a policeman, who returned with him and was secreted in a closet adjoining his room. Thereafter a woman, claimed by the police to be a prostitute, went to Bringham's room, who, as he claims, was sent there by defendant. From reading the evidence, which need not be repeated here, we have arrived at the conclusion that whatever wrong was committed by the defendant in sending the woman to Bringham's room was induced by the solicitations of Bringham, the "anti-vice" squad policeman. The record is devoid of any evidence indicating that the defendant was or ever had been a panderer. As we read the evidence, no offense would have been committed, had Bringham not instigated its commission. It was Bringham's encouragement and importunities which apparently led the defendant into whatever crime he may have committed.

Policemen are conservators of the peace. It is their duty to prevent crime, not to instigate and encourage its commission. Nothing can be more reprehensible than to induce the commission of crime for the purpose of apprehending and convicting the perpetrator. To advise or encourage a criminal act is in itself a crime. Comp. Laws Utah, § 7919. In his zeal and anxiety to apprehend some one in a criminal act, this city detective deliberately planned and induced the commission of an offense which otherwise would not have been committed by any one.

By these strictures we do not intend to criticize the good services rendered by faithful policeman generally, but, in the language of the Supreme Court of Colorado in *Connor v. People*, 18 Colo. 373, 33 Pac. 159, 25 L. R. A. 341, 36 Am. St. Rep. 295:

"We do say that when in their zeal, or under a mistaken sense of duty, detectives suggest the commission of a crime and instigate others to take part in its commission in order to arrest them while in the act, although the purpose may be to capture old offenders, their conduct is not only reprehensible, but criminal, and ought to be rebuked rather than encouraged by the courts."

This court is squarely on record as to what should be done under the facts and circumstances disclosed by the evidence in the present case. In *City v. Robinson*, 40 Utah, 448, 125 Pac. 687, Mr. Chief Justice Frick, who delivered the opinion of the court, said:

"No doubt, if public officers have induced or procured a defendant to commit a burglary or larceny or other offense which he did not intend to commit, nor would have committed except for the inducement of such officer, public policy will not justify a conviction for an offense committed under such circumstances. * * * When it is made to appear that the offense charged was induced by a detective or other person, * * * both the prosecuting officers and the trial courts should carefully scrutinize the evidence and should permit no conviction to be had, or, if had, to stand, in case the offense was induced as aforesaid. * * *

The principles announced in the *Robinson* Case meet our approval and are applicable here.

The judgment is therefore reversed, and defendant is granted a new trial.

CORFMAN, C. J., and GIDEON, THURMAN, and FRICK, JJ., concur.

On Petition for Rehearing.

FRICK, J. Counsel for the state have filed a petition for rehearing, in which they contend that this court erred in reversing the judgment. The principal reasons urged for a rehearing are that this court "erred in its application of the principle of law announced in the case of *State v. Robinson*, 40 Utah, 448,"¹ and that it also "erred in its conclusion from the evidence that if any crime was committed it was committed by the witness Bringham and not by the defendant."

Counsel insist that, if the decision stands, the state will be greatly hampered both in detecting crime and in convicting criminals. There is no merit to the contention. All that is held in *State v. Robinson*, supra, is that, where it is made to appear that the accused was induced to commit the alleged crime by an officer of the law, which crime would not have been committed but for the inducement of such officer, the conviction will not be permitted to stand. What amounts to such an inducement is pointed out in that case. The facts in that case were, however, en-

tirely different from those in this case. If the defendant in this case had been engaged in some unlawful business or enterprise, as was the case in *State v. Robinson*, supra, and an officer had merely, in the course of defendant's business, asked him to deal with such officer as he dealt with others, the case would be entirely different. The defendant in this case, was, however, not carrying on, either directly or indirectly, an unlawful business or enterprise; but he, as we construe the evidence, was by the officer requested and induced to do an act constituting a crime which he would not have done but for the inducement of the officer. The officer thus induced the defendant to do what he would not have done but for such inducement. An officer may not induce a boy to commit a larceny or a burglary, and then insist that the boy should be charged with the crime and convicted upon such officer's statements. This court has not the slightest desire to hamper the officers in detecting crime, but it cannot and will not sustain convictions for alleged crimes which would not have been committed but for the inducement of the officers of the law.

Counsel, it is true, contend that in this case the evidence does not bear out our conclusion that the defendant was induced to commit the crime of which he stands convicted. After again carefully considering all of the evidence, we are still satisfied that our former conclusion is right. We could subserve no good purpose by stating the evidence and the reasons which impelled us to arrive at that conclusion in the original opinion. If the rule stated in the opinion is correctly interpreted and applied, there is no danger whatever that any officer of the law or prosecutor will be hampered either in detecting crime or in convicting criminals. The rule that officers of the law are not permitted to induce acts constituting crimes which would not have been committed but for such inducement, and that convictions based upon such inducements will not be permitted to stand, is both wholesome and salutary and should be enforced. That is precisely what is held in the former opinion.

The petition for a rehearing should therefore be, and it accordingly is, denied.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

¹ 125 Pac. 687.

**KING et al. v. STATE ex rel. O'REILLY, Co.
Atty. (No. 11484.)**(Supreme Court of Oklahoma. Sept. 13, 1921.
Rehearing Denied Nov. 8, 1921.)*(Syllabus by the Court.)*

1. Schools and school districts \Leftrightarrow 38—Petition by requisite number of qualified voters condition precedent to calling voters' meeting; after sufficiency of petition for meeting determined, and majority present vote for consolidation, and district organized, sufficiency of signatures to petition not to be inquired into collaterally, in absence of fraud.

Article 7, c. 219, Sess. Laws 1913, authorizes the county superintendent to call a meeting of the voters of two or more adjacent districts to determine whether such districts shall consolidate, when petitioned by one-half of the legal voters residing in each district. *Held*, the filing of petitions signed by the number of qualified persons as prescribed by statute, is a condition precedent to the calling of the meeting. *Held*, further, after the sufficiency of the petition has been determined by the county superintendent and the call issued for such meeting, and a majority of those present vote in favor of consolidation and the consolidated district is organized, in all other respects according to law, in the absence of fraud, the question of whether the petitions were signed by the proper number of qualified persons cannot be inquired into in a quo warranto proceeding.

2. Schools and school districts \Leftrightarrow 39—Statutes held to authorize appeal from calling of consolidation election, and to provide for appeal from order organizing district.

Section 8, art. 7, c. 219, Sess. Laws 1913 (section 7781, Rev. Laws 1910) authorizes an appeal from the action of the county superintendent in calling an election for a consolidation of certain districts, and provides for an appeal from the order of the county superintendent organizing said district.

Appeal from District Court, McIntosh County; Mark L. Bozarth, Judge.

Action in the nature of quo warranto by the State of Oklahoma, on the relation of E. I. O'Reilly, County Attorney of McIntosh County, against June B. King and another, officers of Consolidated School District No. 1, and from a judgment and order disorganizing the consolidated district, the defendant officers appeal. Reversed and remanded, with directions.

E. J. Van Court, of Eufaula, for plaintiffs in error.

E. I. O'Reilly, of Eufaula, for defendant in error.

McNEILL, J. This is an action in the nature of quo warranto brought in the name of the state, upon relation of the county attorney of McIntosh county, against the officers of consolidated school district No. 1, to test

the validity of the organization of consolidated school district No. 1, and to cancel the bonds issued by said district.

The material facts may be summarized as follows: In the month of March, 1919, there was filed with the county superintendent of said county from school districts Nos. 24, 45, 29, 63, 30, and part of No. 25, petitions purported to be signed by more than 50 per cent. of the voters of each district requesting the county superintendent to call an election to permit the voters to vote upon the question of whether the districts should be consolidated. After the petitions were filed with the county superintendent she issued a call for an election or meeting of the voters of the various districts as provided for by law for the 1st day of April, 1919, and at said meeting there were 229 votes cast in favor of consolidation and 22 votes against. On the 2d day of April, 1919, the county superintendent issued an order declaring the old districts disorganized and the consolidated district organized.

This case was referred to a referee, who made certain findings of fact and conclusions of law, and the court approved the report of the referee, and made an order disorganizing said consolidated district for the reason the petition filed with the county superintendent from school district No. 63 was not signed by 50 per cent. of the voters of said district. From said judgment an appeal has been prosecuted to this court.

[1] For reversal there are numerous assignments of error, but the case in its final analysis depends upon whether the finding of the county superintendent that the petition from school district No. 63 was signed by 50 per cent. of the legal voters of said school district can be collaterally attacked in a quo warranto proceeding, in the absence of fraud. This court has never passed upon this identical question, nor have we been able to find where it has ever been presented to this court.

The general rule, however, is stated in 15 Cyc. 319, as follows:

"The presentation of such petition is a condition precedent to holding an election, and it must be signed by the number of qualified persons prescribed by the statute; otherwise the election will be void."

This court in several cases has announced this general principle of law, to wit: School District No. 44 v. Turner, 13 Okl. 71, 73 Pac. 952; Cleveland v. School District No. 79, 51 Okl. 69, 151 Pac. 577. But in these cases there was no issue whether, if a petition was presented and the county superintendent found it contained the number of qualified persons prescribed by statute, said question would be subject to be reviewed in a collateral proceeding.

The facts in this case come within the exception to the general rule, which is stated in 15 Cyc. 320, as follows:

"But after the sufficiency of the petition has been passed upon by the proper authority, and the order has been made, the decision is not open to collateral attack, especially where an election has been held under the order and in other respects according to law."

The same rule is stated in 20 C. J. 95, as follows:

"Where the officer with whom it is filed has authority to hear and determine the sufficiency and validity, his decision thereon is final, unless such decision has been fraudulently or corruptly made or procured or unless he has been guilty of abuse of discretion."

The case supporting this proposition is *Ryan v. Varga*, 37 Iowa, 78, where the court stated as follows:

"After township trustees have passed upon the sufficiency of a petition presented to them, calling for an election to decide the question of levying a tax in aid of the construction of a railroad, and the election has been ordered, and the tax voted and levied, the validity of such tax cannot be assailed on the ground that the petition was not signed by one-third of the resident taxpayers."

"The trustees having jurisdiction to determine that question, their decision cannot be collaterally assailed, but like any other judicial determination remains conclusive until reversed or set aside by writ of error, certiorari, or other direct proceeding provided by law."

This decision has been followed and cited by the Supreme Court of Iowa in a long line of cases, being cited and approved in the case of *State ex rel. Ondler v. Rowe*, 187 Iowa, 1116, 175 N. W. 32. The court stated as follows:

"Where jurisdiction to call an election on the question of formation of a consolidated school district has attached, subsequent mistakes and irregularities in the manner and method of the call made and election held does not oust the jurisdiction, and errors so committed are to be corrected by appeal if provided for, and not by quo warranto."

In the case of *State v. Mackin*, 51 Mo. App. 299, the court stated as follows:

"Where a tribunal, though inferior, or a ministerial board, is requested to find the existence of a fact in pais in order to warrant it to do what it does, it will not be presumed to overthrow its jurisdiction in the silence of the record that the fact did not exist, but that it did exist, until the contrary is made to appear in a direct proceeding."

The law relating to the formation of consolidated school districts is found in article 7, c. 219, Session Laws 1913. Although there have been some amendments to the law relating to consolidating districts, none of the amendments are material in this case. Sec-

tion 1 of article 7 provides that, upon petitions signed by one-half of the voters residing in each district, the county superintendent may call a meeting of the voters for the purpose of voting for or against establishing a consolidated district.

[2] Section 8 of article 7 of said chapter 219, Session Laws 1913, provides:

"In all matters relating to consolidated school districts, not provided for in the preceding sections, the law relating to school districts shall be in force where said laws are applicable."

Section 7781, Revised Laws 1910, provides in substance that any person feeling aggrieved in the formation or alteration of, or refusing to form or alter, school districts shall have a right to appeal to the board of county commissioners. By construing these two sections together, if a petition is filed with the county superintendent and the county superintendent finds the petition contained one-half of the legal voters of each of said districts, and calls a meeting of the voters, any person feeling aggrieved thereby could appeal from said order of the county superintendent to the county commissioners, and there the question of whether the petition was sufficient could be tested and tried before said board. The law also permits an appeal from the board of county commissioners to the district court, and from there to this court.

This court in the case of *Woolsey v. Nelson*, 43 Okl. 97, 141 Pac. 436, in the second syllabus of said case, stated:

"That the acts authorized by these two sections [sections 7780 and 7781], considered together, are in their nature quasi judicial, and that upon an appeal from the action of the county commissioners to the district court the district court has jurisdiction to try said matter de novo."

Upon the same principle, if we construe section 1, art. 7, c. 219, and section 7781 of Revised Laws 1910 together, the acts of the county superintendent in passing upon the sufficiency of the petition would be quasi judicial, and not a ministerial act, and an appeal would lie from her order.

This court in the case of *School District 68, Noble County, v. Wollingford*, 170 Pac. 901, held that section 7781, R. L. 1910, was applicable in a case where certain portions of a consolidated district were attempting to be detached from a consolidated district, and in that case an appeal was prosecuted from an action of the county superintendent to the board of county commissioners, and from the board of county commissioners to the district court, and from there to this court. If we apply the law announced above to the facts in the case at bar, when the county superintendent made an order calling the meeting of the voters, he necessarily had to decide that the petition contained one-

half of the legal voters of the district, and any person feeling aggrieved could have appealed from said order to the county commissioners; but no appeal was taken. Having failed to appeal, the order is not subject to attack in this proceeding in the absence of fraud. We think the rule is well settled where parties are granted the right of appeal from a judgment upon a question of fact, and for an opportunity to be heard, and where they fail to exercise that opportunity, they cannot thereafter attack the finding upon a question of fact, in a collateral proceeding.

Counsel for defendant in error relied upon the cases of Board of County Commissioners of Grady County v. Davis, 99 Kan. 1, 180 Pac. 581, Hovey v. Barker, 45 Kan. 690, 26 Pac. 591, and County Attorney ex rel. Lewis v. Eggleston, 34 Kan. 714, 10 Pac. 3, and numerous other cases, but this line of cases can all be distinguished from the case at bar. It would serve no useful purpose to enter into a long discussion in distinguishing these cases, but a reading of the cases readily discloses the facts are so materially different they are not authority.

For the reasons stated the judgment of the trial court is reversed and remanded, with instructions to set aside the judgment of the trial court and take such other and further proceedings not inconsistent with the views herein expressed.

HARRISON, C. J., and PITCHFORD, JOHNSON, EITING, KENNAMER, and NICHOLSON, JJ., concur.

BROOKS et al. v. TUCKER et al. (No. 10884.)

(Supreme Court of Oklahoma. June 28, 1921.
Rehearing Denied Nov. 1, 1921.)

(Syllabus by the Court.)

1. Guardian and ward \S 105(1)—Guardian's fraudulent sale may be set aside unless property has passed to bona fide purchaser.

Where a guardian sells the lands of his wards upon a secret understanding that the purchaser shall not pay for the same, but shall, after confirmation of the sale and delivery of guardian's deed, secure a loan upon the lands, turn the money over to the guardian, and then deed the lands to the wife of the guardian, such a sale constitutes a fraud upon the estates of the wards, and the sale may be set aside in an action by the wards against such purchaser except where the title to the lands has vested in a bona fide purchaser.

2. Guardian and ward \S 108, 175—Land fraudulently sold by guardian vests in bona fide purchaser, and ward's remedy is on guardian's bond.

Where the lands of minors have been sold by their guardian in consummation of a fraud-

ulent agreement between the guardian and the purchaser, and the probate procedure under which such sale was made is regular, the title of the property sold under such sale vests in a bona fide purchaser of the grantee at such sale without notice of the fraudulent agreement; the remedy of the wards is an action against the guardian and his bonds for the amount of their damage resulting from the fraudulent sale. *Berry v. Tolleson et ux.*, 172 Pac. 630.

3. Vendor and purchaser \S 220, 244—"Bona fide purchaser" defined; evidence held to show land was in hands of bona fide purchaser.

The essential elements which constitute a bona fide purchaser are a valuable consideration, the absence of notice, and the presence of good faith. The evidence examined in this cause, and the purchaser held to be a bona fide purchaser.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bona Fide Purchaser.]

Appeal from District Court, Jefferson County; Cham Jones, Judge.

Action by the Boston Mutual Life Insurance Company, a corporation, against Cassie Ellen Tucker and George Wilson Tucker, minor defendants, B. O. Tucker, legal guardian, Noma Simons, George Simons, P. H. Brooks, Blanche Brooks, and others, for foreclosure of real estate mortgage. Cassie Ellen Tucker and George Wilson Tucker, minor defendants, filed cross-petition against plaintiff and P. H. Brooks and Blanche Brooks, defendants. Judgment in favor of the plaintiff, foreclosing the mortgage, and in favor of the defendants Cassie Ellen Tucker and George Wilson Tucker upon their cross-petition against the defendants P. H. Brooks and Blanche Brooks, decreeing cancellation of a deed. P. H. Brooks and Blanche Brooks appeal from the judgment decreeing cancellation of deed. Reversed and remanded, with directions to enter judgment in favor of P. H. Brooks quieting title, subject to mortgage, of Boston Mutual Life Insurance Company.

H. A. Ledbetter, of Ardmore, and Guy Green, of Waurika, for plaintiffs in error.

T. B. Orr, U. S. Probate Atty., and Moore & West, all of Ardmore, for defendants in error.

KENNAMER, J. The Boston Mutual Life Insurance Company instituted this action in the district court of Jefferson county against Noma Simons, George Simons, Cassie Ellen Tucker, a minor, George Wilson Tucker, a minor, P. H. Brooks, Blanche Brooks, and others, to foreclose a mortgage executed by Noma Simons and George Simons upon certain lands allotted to Cassie Ellen Tucker and George Tucker, minors,

and members of the Chickasaw tribe of Indians, of the unrestricted class. It appears from the pleadings and evidence introduced in the trial of the cause that the lands in controversy were owned in fee simple by Cassie Ellen Tucker and George Wilson Tucker, minors; that B. O. Tucker, as the legal guardian of said minors, sold the lands through a probate sale to George Simons; that the probate sale in all respects appeared regular. Simons, the purchaser at the probate sale, in a few days after the lands had been conveyed to him by guardian's deed, executed a mortgage to the Deming Investment Company to secure a loan of \$1,100; that, after having received the money on said loan and turned the money over to the guardian, B. O. Tucker, he deeded the lands, which he had purchased at the guardianship sale to Victoria Tucker, the wife of the guardian; that the deed made by Simons to the wife of Tucker, the guardian, was about 60 days from the time that Simons had purchased the land at the guardianship sale.

The Deming Investment Company had sold the loan to the Boston Mutual Life Insurance Company, the plaintiff in this action. It is undisputed that Tucker, the guardian, had made an agreement with Simons to purchase the lands at the guardianship sale, and to secure a loan upon said lands and then reconvey them to him or his wife. After Simons, the purchaser, had secured the loan and deeded the lands to Victoria Tucker, the wife of the guardian, Victoria Tucker and her husband, B. O. Tucker, the guardian, executed a deed purporting to convey the lands to Roy Evans, and Roy Evans sold the lands to P. H. Brooks, one of the defendants in this action, and whose title is attacked by the Tucker minor defendants herein.

Cassie Ellen Tucker and George Wilson Tucker, the minor defendants, filed answer and cross-petition pleading that the sale made by their guardian, B. O. Tucker, to George Simons, was void on account of the fraud practiced by the guardian and purchaser at said sale; charged the Boston Mutual Life Insurance Company, plaintiff in the action, and P. H. Brooks, who was asserting title to the property, with actual notice of the fraud perpetrated in the probate sale of the property, and prayed the judgment of the court quieting their title to the property. Judgment was rendered foreclosing the mortgage of the Boston Mutual Life Insurance Company. The trial court held that the Boston Mutual Life Insurance Company was an incumbrancer without notice of the fraud committed in the sale of the property by the guardian, but judgment was rendered in favor of the minor defendants on their cross-petition decreeing a can-

cellation of the deed executed by Roy Evans to P. H. Brooks, decreeing the defendant Brooks to have no interest in the property. The defendant P. H. Brooks and Blanche Brooks, his wife, have appealed to this court and have assigned numerous grounds of error.

[1] There is only one question to be determined by this court in order to dispose of this appeal. The question is whether or not the plaintiff in error P. H. Brooks was an innocent purchaser of the property in controversy. Upon an examination of the evidence found in the record, it appears that P. H. Brooks purchased the lands in controversy from Roy Evans, paying Roy Evans the sum of \$3,500 in property, which consisted of the home of P. H. Brooks and wife, located in Temple, and other property; that P. H. Brooks assumed the loan, which had been placed upon the land by George Simons, the purchaser at the guardianship sale; that the consideration paid by Brooks was a fair value for the land; that Brooks, prior to closing the deal for the purchase of the land, requested an abstract of the title, which was furnished to him, and he sent his wife from Temple, Okla., to Lawton, where he had formerly lived, and submitted the abstract to McElhoses, Ferris & Rhinefort, lawyers of that city, for an opinion as to whether or not Evans could convey him title; that these attorneys wrote a letter, in which they expressed the opinion that the title to the land was absolutely good. There is no evidence in the record which in any way tends to show that Brooks in purchasing the lands had actual notice of the fraud committed by the guardian and purchaser in the probate sale. The record, however, does disclose that the probate attorney has, with great vigilance, prosecuted this action to recover the lands for these minors, and while he is to be commended for endeavoring to protect the interest of these minor defendants, we are of the opinion that his efforts should be devoted to another action against the guardian, B. O. Tucker, and the sureties upon his guardian bonds; and, undoubtedly, grounds exist for removal proceedings against B. O. Tucker as guardian for his children, but the testimony of B. O. Tucker shows that he is still the legal guardian.

[2] The statutes in force in this state regulating the sale of minors' property contemplates that, upon a return of a sale having been filed by a guardian, the return of sale will be under order of the court set for hearing at a future date; at such time the county court, sitting in probate, will have a full and complete hearing as to the acts of the guardian in conducting the sale. The hearing on the return contemplates that the court will hear testimony offered in support

of the return of sale, and that if after a full hearing the testimony shows that the sale has been fairly conducted and the property sold for its fair cash value, and the guardian has in all his acts conducted the sale as provided by law, the court will enter an order confirming the sale. The law contemplates that the court must be satisfied from credible testimony adduced on the hearing of the return of the sale that the same has been conducted in accordance with the statutes and a fair value paid for the property, and the decree confirming the sale is a solemn judgment of the court vouching for the truthfulness of all of the essential facts necessary to constitute a valid sale. Purchasers in dealing with this class of land have a right to assume that the court has faithfully performed his duty, and there is no excuse for the existence of these fraudulent and sham sales, except that gross neglect of duty on the part of courts entering the decrees of confirmation in this class of sales. No court should ever confirm a sale made by a guardian until the judge thereof is convinced by credible testimony that the property has been sold for a fair value and the money paid to the guardian or deposited with the court for the guardian. But where minors have been defrauded by fraudulent sales of their property, they are not without a remedy, but they have a cause of action against the guardian and his bondsmen on the general and special sales bonds to the extent of their damages on account of the fraud committed by the guardian in making the sale; and the judges of county courts who negligently make a practice of informally approving such sales are incompetent to hold an office of trust, and should be removed from office. It is inequitable to make bona fide purchasers of the property at such sales suffer on account of the wrongs committed by such guardians and courts.

It is true that in suits brought to set aside conveyances obtained by fraud, and the fraud clearly appears, the conveyances will be set aside as between the parties, but where the rights of third persons, who are purchasers without notice for a valuable consideration, have intervened, the same cannot be disregarded, but, according to the rules of equity, must be protected if the title to property in this state is to command respect and confidence. *Fletcher v. Peck*, 10 U. S. (6 Cranch) 132, 3 L. Ed. 177; *Morrow v. Graves et al.*, 77 Cal. 218, 19 Pac. 489.

[3] In the case at bar the plaintiff in error parted with the title to his home and practically all of the property he possessed, and after sending his wife several miles to secure the opinion of a firm of lawyers that he had the utmost confidence in and the

record shows that an ex-member of Congress appears as a member of the firm of lawyers that approved the title. No doubt that the Brookses had known these lawyers for years, and, being advised that the title was good, acted in the best of faith in parting with the earnings of a lifetime in order to secure a tract of land upon which to make a home. The average man would not do more than the Brookses did in this case. For years on the east side of the state land titles have been a very much mooted question with the best of lawyers, and to say that the Brookses, unlearned in the niceties of the law, should have analyzed the probate proceedings in the sale of these lands, and determine whether or not the county court of Jefferson county was permitting guardians and sham purchasers to lightly commit frauds, would be applying an inequitable rule of exaction to them. We believe the rule announced by Justice Owen in the case of *Berry v. Tolleson*, 172 Pac. 631 (not yet officially reported), to be founded upon reason and supported by the authorities. The opinion in part is as follows:

"We have the same condition as if there was no consideration whatever passed from Tolleson to the guardian, or if the guardian, after receiving the money, had misappropriated it. He is liable under his bond to the minors to the extent of their damage as the result of this fraud. The statute requires a bond to cover the proceeds of the sale in addition to the general bond of the guardian, and was enacted to meet conditions arising from just such fraud as appears here. This bond contemplates a sale being conducted as provided by law. It covers the collection and retention of the purchase price. If the guardian fails to collect, or, after collecting, fails to retain the purchase price, the liability accrues upon his bond. *Dunleavy v. Mayfield*, 155 Pac. 1145; *Allison v. Crummey*, supra [166 Pac. 691]; *In re Potter's Estate*, 249 Pa. 158, 94 Atl. 485, L. R. A. 1916A, 637. * * * Probate sales in this state are entitled to the same faith and credit of any judicial sale, and will not be set aside as against an innocent purchaser on proof of secret agreements between the guardian and the original purchaser, which are not disclosed by the record and cannot be ascertained by such investigation as would ordinarily be made by a reasonably prudent person."

The cause is reversed, and remanded to the district of Jefferson county, with directions to the court to enter judgment in favor of P. H. Brooks quieting his title to the lands in controversy, subject to the mortgage of Boston Mutual Life Insurance Company.

HARRISON, C. J., and JOHNSON, MILLER, and ELTING, JJ., concur.

ROGERS v. BENFORD. (No. 10037.)

(Supreme Court of Oklahoma. Oct. 4, 1921.
Rehearing Denied Nov. 1, 1921.)

(Syllabus by the Court.)

1. Chattel mortgages \S 176(6)—Where evidence tends to show wrongful taking by mortgagee, overruling defendant's demurrer to evidence is not error.

In an action against a chattel mortgagee for wrongful conversion of mortgaged property it is not error to overrule a demurrer to the evidence where it strongly tends to show the taking and selling of the mortgaged property was wrongful.

2. New trial \S 41(1)—Failure to show substantial errors held to warrant overruling of motion.

In an action by mortgagor against mortgagee for wrongful conversion of mortgaged property, where there are no substantial errors committed in the admission or rejection of testimony, nor in other proceedings, and the issues made by the pleadings are properly submitted to the jury, and no substantial error as to any part of the proceedings are made to appear, it is not error to overrule motion for new trial.

3. Chattel mortgages \S 176(6)—Where evidence shows the taking wrongful, as a matter of law, the court may so instruct, limiting jury to question of damages.

In an action for wrongful conversion of mortgaged property, where the undisputed facts show, as a matter of law, that the taking of the property and conversion of same were wrongful, it is not error for the court to instruct the jury that, as a matter of law, the taking was wrongful, and that the only thing left for the jury to determine was the extent of plaintiff's damages, if any, and the amount, if anything, he should recover.

4. Chattel mortgages \S 169—Defendant's acts held to constitute wrongful conversion by mortgagee.

Where the undisputed facts show that the taking and conversion of mortgaged property were done under the following circumstances: First, by refusing to accept any payment unless all was paid; second, by informing mortgagor that he had better turn the property all over to him, mortgagee, and get out of it the best he could; third, by informing the mortgagor that if he did not turn all of the property over to mortgagee that he would start criminal proceedings; fourth, by starting criminal proceedings and having mortgagor arrested and put in jail for an alleged criminal charge, which there was no evidence to sustain; fifth, by taking possession of the property under a void order of replevin, and, in the meantime, selling such property and appropriating the proceeds to the mortgagee's own benefit—such circumstances constitute a wrongful conversion.

5. Chattel mortgages \S 176(5)—Mortgagor may recover exemplary, in addition to actual, damages from mortgagee for wrongful conversion.

In an action for wrongful conversion, the mortgagor may recover exemplary damages for such wrongful conversion in addition to the actual damages sustained.

6. Appeal and error \S 1070(1)—Where evidence sustains each of two causes of action, there will be no reversal, although the verdict is general.

Where there are two causes of action, one for damages for wrongful conversion and one for damages for malicious prosecution and imprisonment, and the evidence in each cause of action is sufficient to sustain the verdict, the judgment will not be reversed, although the verdict is general.

Appeal from District Court, Lincoln County; Chas. B. Wilson, Jr., Judge.

Action by J. A. Benford against George B. Rogers for damages for wrongful conversion and malicious prosecution. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

Jarrett & Speakman, of Chandler, for plaintiff in error.

Thos. G. Andrews and Emery A. Foster, both of Chandler, for defendant in error.

HARRISON, O. J. This was an action by J. A. Benford against George B. Rogers for wrongful conversion of property consisting of a cotton crop and a span of mules and for damages for malicious prosecution. The action grew out of the following circumstances: In the spring of 1916 Rogers owned a mule which he proposed selling to Benford. Benford was a negro farmer. He, in substance, told Rogers that he could not buy the mule unless he could buy two and would be compelled to buy both of them on time. They finally agreed upon a mule belonging to one Ellis. Rogers bought the mule, or at least the mule was obtained on the strength of Benford giving his note for \$83 and Rogers signing same as security. This note was made due October 1, 1916. Rogers then sold both mules to Benford, taking Benford's note for \$165, and taking a mortgage on the two mules and Benford's cotton crop for that year as security. Benford thus seems to have been bound for the price of three mules and had bought only two. He was on the Rogers note for \$165, the price of both mules, and had both mules and his cotton crop mortgaged to secure the note to Rogers. When the notes became due they were not paid, but a few days before the mortgage note for \$165 was due Rogers went to Benford and demanded payment. Benford, in substance, told Rogers that he had not picked his cotton, but would pick it and sell it and apply it on the note as fast as he got the money; also that some other

cotton coming to Benford from a subtenant had been picked, and Benford would apply the proceeds of that toward paying the interest on the notes. To this Rogers replied, "If you do not have it all, you need not pay none." Subsequent to this, and possibly on the same day, Benford went into an attorney's office where Rogers was, and some further conversation was had between them, in which Benford testified that Rogers said to him:

"You better turn everything you've got over to me and get out of it the best you can. * * * If you don't turn it over, I will start proceedings right away"

—and in answer to the further question of his attorney:

"Q. What else did he say? A. He didn't look right, and I got away from him."

On the following day Rogers procured an order of replevin from the justice court, and from the same justice procured a warrant for Benford's arrest. Benford was arrested and taken to Chandler and placed in jail, and Rogers took possession of Benford's mules and cotton crop under the order of replevin and later had the mules and cotton sold at public auction and appropriated the proceeds to his own benefit. A trial was had in the same justice court of the criminal charge against Benford for selling mortgaged property and Benford discharged; the facts disclosing that he had not sold any mortgaged property. He was also charged with removing mortgaged property and discharged from that on the ground that he had not removed any mortgaged property. Later Benford employed attorneys to set aside the judgment in the replevin action for lack of jurisdiction of the justice of the peace. The justice of the peace set aside the judgment on the ground that the amount for which judgment had been rendered was \$240, and therefore beyond the jurisdiction of the justice court. In December, 1916, Benford filed this action for damages for the wrongful conversion of his property and for malicious prosecution and obtained a verdict and judgment for \$475. From the judgment upon such verdict this appeal is prosecuted.

Three propositions are presented for reversal: First, that the court erred in overruling the demurrer to the evidence; second, that the court erred in overruling motion for new trial; third, that the court erred in giving the following instructions:

"The evidence in the case relating to plaintiff's first cause of action admits of no other conclusion than that the defendant's action in taking and selling the cotton and mules was wrongful, and there remains nothing in that cause of action for you to determine except the extent of plaintiff's damages and the amount, if anything, he should recover."

"It will be your duty to determine from the

evidence in the case the extent of plaintiff's damages by reason of the defendant having taken and sold his said property without authority, and in arriving at that determination you may take into consideration the value of each item of such property at any time between the date of the taking thereof and this date.

"After arriving at a determination of this amount, you should then determine from the evidence in the case what amount, if any, remained due and unpaid to the defendant on account of the \$165 note involved in the transaction at the time the property was taken, including interest at 10 per cent. from February 23, 1916, and you should then deduct that amount from the amount which you determine to be the extent of plaintiff's damages by reason of the wrongful taking of said property, and after making such deduction it will be your duty to return a verdict for the difference, if any.

"If you should find that there is no difference it will then be your duty to return a general verdict for the plaintiff and against the defendant without fixing any amount of recovery."

[1] The first proposition is directed at the insufficiency of the evidence to show a wrongful conversion of the property. This contention cannot be sustained, as the record shows sufficient evidence to warrant the conclusion that the property was taken possession of wrongfully: First, by telling Benford in the attorney's office that he would start proceedings against him unless Benford turned all of his property over to him; second, by starting proceedings against Benford and having him arrested and thrown in jail upon a complaint which there was no evidence to support; and, third, by procuring from the justice court an order of replevin, which was void for lack of jurisdiction. Property taken possession of under such circumstances cannot be said to be rightfully taken. Hence the court did not err in overruling the demurrer to the evidence.

[2-4] The second and third propositions may be disposed of together. As to the instructions complained of we perceive no error, for, as the court says, the evidence in the case admits of no other conclusions than that the taking and selling of the cotton and mules was wrongful. Neither do we perceive error in the method pointed out in the court's instruction for ascertaining the amount of damages sustained by Benford, and how such damage, if found, should be applied. It is argued by plaintiff in error that the mortgage was a valid and subsisting mortgage under the uncontradicted evidence, and that there was no fraud practiced by the defendant or breach of peace committed by him in obtaining possession of the cotton and mules. This contention is not borne out by the record. True, there was a valid and subsisting mortgage, but Rogers obtained possession of the property as follows: First, by refusing to

accept any payment unless all was paid; second, by informing Benford that he had better turn the property all over to him and get out of it the best he could; and, third, by further informing him (Benford) that if he did not turn all of it over to him (Rogers) he would start proceedings; fourth, by starting proceedings and having Benford arrested and thrown in jail, thereby preventing him from picking his cotton and paying off the note; and, fifth, by taking possession of the property under a void order of replevin while Benford was in jail, and under such proceedings selling the property and appropriating the proceeds to his own benefit. The fact of selling and appropriating to his own benefit constituted conversion, and the circumstances under which it was done constituted wrongful conversion. Therefore we cannot hold that the court erred in the instructions complained of.

[5, 6] There is some controversy over the question whether the terms of the mortgage should be construed to include the portion of cotton which Benford was to get from a subtenant, Benford contending that the mortgage did not cover that cotton, Rogers contending that it did, but under the circumstances of the taking possession this question is immaterial, for, as disclosed by the record, all of the property was wrongfully taken and converted. Objection is also made to the form of the verdict, plaintiff in error contending that, there being two distinct causes of action, and the verdict being general, this court will be unable to tell what amount of damages was found to have been sustained under either cause of action, and that the judgment should be reversed, citing *St. Louis & S. F. Ry. Co. v. Farmers' Union Gin Co.*, 34 Okl. 270, 125 Pac. 894. True, there were two causes of action in said case, as in this case, but in one cause of action in said case there were improper elements of damage submitted to the jury, and this court, being unable to determine whether the verdict was based solely upon such improper elements of damage, reversed and remanded the case for further trial upon the proper elements of damage and suggesting in the opinion that the better practice would be for the verdict to contain separate findings as to damages in each cause of action, but in the case at bar there were no improper elements of damage submitted to the jury, and, although there were two causes of action, one for damages sustained by reason of the wrongful conversion of property, the other for damages sustained by reason of malicious prosecution, the court properly instructed the jury both as to the elements of damage for wrongful conversion and as to the elements of damage for malicious prosecution, and, in our opinion, the evidence was sufficient to sustain the verdict in either cause of action. Therefore, had the jury found damages in the sum of \$475 in either cause

of action, the court would not set it aside for not being supported by sufficient evidence. There was no objection made to the instructions on the question of damages for malicious prosecution, but we have examined the instructions, and find no substantial error in this regard, nor do we find error in the instructions on damages for wrongful conversion. Hence the form of the verdict is immaterial in this case; for we could not hold it to be excessive if based altogether upon the damages from either cause of action.

In an action of this character the jury is permitted to assess exemplary damages in addition to the actual damages sustained. *Ray et al. v. Navarre*, 47 Okl. 439, 147 Pac. 1019. In such case it was held that—

"In an action of replevin a verdict for the return of said property, or the value thereof, and assessing exemplary damages for the sake of example and by way of punishing the defendants, is proper. * * * Although a chattel mortgage provides that the mortgagee, under certain condition, may go upon the premises of the mortgagor and take possession of the mortgaged property, yet neither the mortgagee nor any one in his behalf has the right to take possession of such goods by force and threats of violence and without the consent of the mortgagor. The law will not permit a mortgagee to commit or threaten a breach of the peace and then to justify his conduct by a trial of the right of property. * * * A verdict, assessing damages for the plaintiff in an action of replevin, will not be set aside on the ground of the excessiveness of the damages, where the proceeding on the part of the defendant is vexatious and oppressive. The jury in such cases is authorized to give smart money."

On the other hand, if the verdict was based solely upon the damages sustained by reason of malicious prosecution, we should not hold the verdict to be excessive. It is contended by plaintiff in error that he acted in good faith and upon the advice of attorneys in having Benford prosecuted. The record does not bear out this contention. A trial of the criminal charges disclosed that Benford had not sold any mortgaged property, nor removed any mortgaged property, and was therefore arrested on a false complaint.

The circumstances of the case, taken as a whole, were sufficient to warrant the jury in believing that Rogers had conceived the idea of prosecuting Benford as a means of getting possession of this property, and had resorted to the criminal laws of the state as an agency for enforcing collection of a debt.

Upon the whole we do not think the verdict excessive, and find no substantial error in the record.

The judgment is affirmed.

KANE, JOHNSON, ELTING, and MILLER, JJ., concur.

HAWKINS et al. v. CORBIT et al.
(No. 10190.)

(Supreme Court of Oklahoma. Oct. 4, 1921.
Motion to Set Aside Denied Nov. 8, 1921.)

(Syllabus by the Court.)

1. Constitutional provision preventing spouse from selling or mortgaging homestead without consent of other.

"The homestead of the family shall be, and is hereby protected from forced sale for the payment of debts, except for the purchase money therefor or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon, nor shall the owner, if married, sell the homestead without the consent of his or her spouse, given in such manner as may be prescribed by law: Provided, nothing in this article shall prohibit any person from mortgaging his homestead, the spouse, if any, joining therein; nor prevent the sale thereof on foreclosure to satisfy any such mortgage." Section 2, art. 12, Const. Okl.

2. Statute preventing sale or mortgage of homestead except by deed by both spouses.

"No deed, mortgage or other conveyance relating to real estate or any interest therein, other than for a lease for a period not to exceed one year, shall be valid until reduced to writing and subscribed by the grantors; and no deed, mortgage or contract relating to the homestead exempt by law, except a lease for a period not exceeding one year, shall be valid unless in writing and subscribed by both husband and wife, where both are living and not divorced or legally separated, except to the extent hereinafter provided." Section 1143, Rev. Laws Okl. 1910.

3. Homestead §118(4)—Husband's deed and wife's subsequent separate deed are insufficient to convey title.

Under the above provisions of the Constitution and laws of Oklahoma, the homestead exempt by law cannot be alienated except by a written instrument joined in and subscribed by both husband and wife, where that relation exists. In this case the husband executed a deed at Muskogee on February 2d. The wife was not present at the time he executed the deed. On February 5th, at Tulsa, the wife signed a separate deed, an entirely different writing, in the absence of her husband. *Held*, this was not a sufficient compliance with the statute to convey title to the homestead.

4. Homestead §91—Equitable courts may not declare a debt a lien on homestead, as such liens can only be made as provided by law.

It is not within the equitable power of courts in this state to declare any indebtedness a lien on a homestead. The Constitution and statutes of this state have prescribed the manner in which it may be created, and they must be strictly followed.

Pitchford, V. C. J., dissenting.

Appeal from District Court, Okmulgee County; Mark L. Bozarth, Judge.

Action by Dan Hawkins and Beatrice Hawkins against A. Corbit and Joe Bryant to cancel certain deeds effecting the title to the homestead of the plaintiffs. Judgment for the defendants. Plaintiffs appeal. Reversed and remanded, with instructions to grant a new trial.

Charles A. Dickson, of Okmulgee, J. A. Whalen, of Tulsa, and J. Hugh Nolan, of Okemah, for plaintiffs in error.

James Hepburn, of Okmulgee, and Charles E. Barrett, of Henryetta, for defendants in error.

MILLER, J. This action was commenced in the district court of Okmulgee county on July 9, 1917, by Dan Hawkins and Beatrice Hawkins, as plaintiffs, against A. Corbit and Joe Bryant, defendants, to cancel certain deeds, one executed by Dan Hawkins to A. Corbit, and one executed by Beatrice Hawkins (Mrs. D. E. Hawkins being named as grantor, and it was signed D. E. Hawkins) to A. Corbit, also, one deed executed by A. Corbit and wife to Joe Bryant, each purporting to convey the southeast quarter of section 6, township 11, range 12 east, in Okmulgee county.

The case was tried to the court on March 28, 1918. At the close of the testimony of the plaintiffs, the defendants interposed a demurrer to the evidence, which was by the court sustained, and judgment rendered against the plaintiffs, to reverse which the plaintiffs perfected this appeal. The plaintiffs below are plaintiffs in error here, and the defendants below appear here as defendants in error. For convenience they will be referred to as they appeared in the lower court.

Numerous assignments of error have been made by the plaintiffs in error, but it will only be necessary to consider one. Was the separate deeds taken by defendant Corbit from the plaintiffs void because in violation of the homestead provisions of the Constitution and the statutes of Oklahoma passed pursuant to the provisions of the Constitution? We hold the deeds were void.

The petition recites the execution of these deeds; that the land in controversy was the homestead of the plaintiffs; that the relation of husband and wife existed, and they were occupying the land as their homestead. The petition further recites the grossest kind of fraud in procuring the deeds. The deed of the husband was procured at Muskogee on February 2, 1917. The deed of the wife was obtained at Tulsa, February 5, 1917, late at night, when she was in a drunken condition. The husband and wife were not together at the time of the execution of either of the deeds. The evidence introduced by the plain-

tiffs fully bears out these allegations in the petition. The answer is a general denial. The plaintiffs are negroes. Dan Hawkins is an enrolled Creek freedman, and the land in controversy is his allotment.

From the evidence introduced it is conclusive that the plaintiffs were husband and wife; that they were at the time of the execution of the deeds and for several years prior thereto and up to and including the date of the trial occupying the land in controversy as their homestead. Defendants in their brief make repeated reference to the plaintiffs as husband and wife, therefore admitting that relation existed. They do not deny or even suggest that plaintiffs were not occupying the land in controversy as their homestead. By their brief they clearly concede this to be a fact. With these facts established, we will now apply the Constitution and laws of Oklahoma.

[1] Section 2, article 12, Constitution of Oklahoma, relating to homesteads and the alienation thereof, provides as follows:

"The homestead of the family shall be, and is, hereby protected from forced sale for the payment of debts, except for the purchase money therefor or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon; nor shall the owner, if married, sell the homestead without the consent of his or her spouse, given in such manner as may be prescribed by law: Provided, nothing in this article shall prohibit any person from mortgaging his homestead, the spouse, if any, joining therein; nor prevent the sale thereof on foreclosure to satisfy any such mortgage."

[2] This section of the Constitution says that the owner shall not sell the homestead without the consent of his spouse given in such manner as may be prescribed by law. We find section 1143, Revised Laws of Oklahoma 1910, prescribes the manner by which they may sell and convey.

"No deed, mortgage or other conveyance relating to real estate or any interest therein, other than for a lease for a period not to exceed one year, shall be valid until reduced to writing and subscribed by the grantors; and no deed, mortgage or contract relating to the homestead exempt by law, except a lease for a period not exceeding one year, shall be valid unless in writing and subscribed by both husband and wife, where both are living and not divorced or legally separated, except to the extent hereinafter provided."

It will be observed that the Legislature took especial precaution in protecting the homestead. That part applicable to conveyance by deed, stripped of the other parts which do not apply, would read:

"No deed * * * relating to the homestead exempt by law * * * shall be valid unless in writing and subscribed by both husband and wife."

[3, 4] Under the constitutional provisions safeguarding the homestead for the use, benefit, and protection of the family, where the relation of husband and wife exists, it can be alienated only in the manner prescribed by the statutes, and such statutes must not violate the provisions of the Constitution. In order to convey the homestead there must be a deed; it must be in writing; that writing must be subscribed by both husband and wife. Webster's International Dictionary defines the word "subscribe" as follows:

"(L. *Subscribere*, *Subscriptum*; *Sub* under *Scribere* to write.)

"1. To write underneath, as one's name; to sign (one's name), to a document.

"2. To sign with one's own hand; to give consent to, as by something written, or to bind one's self to the terms of, by writing one's name beneath; as, to subscribe a bond.

"3. To attest by writing one's name beneath; as, officers subscribe their official acts; clerks subscribe copies of records."

This is more strict than if the word "sign" had been used. It designates where they shall sign. It means they must each subscribe, sign underneath, the same writing. This language must be strictly construed with the view of protecting the homestead. There must be a literal compliance with it in order to convey title to the homestead. The two separate deeds did not constitute a writing subscribed by both husband and wife. One deed was made at Muskogee on the 2d of February; the other deed was made three days later, and at Tulsa. The cases cited by defendants to the effect that where two separate writings are made at the same time and relating to the same matter, constitute one transaction, and are to be read together have no application.

It is clear to us from the wording of the statute enacted by the Legislature pursuant to the direction of the Constitution that the husband and wife must join in the execution of the same instrument in writing in order to convey title to the homestead.

"The homestead interest is jointly vested in the husband and wife for the benefit of themselves and family, without regard to which spouse owns the title to the land; the homestead interest is a creature of the Constitution and statutes, nothing like it being known at common law; it is a special and peculiar interest in real estate; it is not a mere inchoate interest in either spouse, to become vested upon the death of the other; this joint right is paramount to the individual rights of either, and, being incapable of division and partition between husband and wife, it cleaves and adheres so closely to the title to the land itself that it cannot be dissociated therefrom by a mortgage foreclosure sale under a court decree to which either husband or wife is not a party. See paragraph 9, Op." *Pettis v. Johnston*, 78 Okl. 277, 190 Pac. 681.

"Section 2, art. 12, of the Constitution pro-

hibits the sale of the homestead of the family, where the owner is a married man, without the consent of the wife, given in such manner as may be prescribed by law. An attempted conveyance by deed of the homestead of the family by a married man, given without the wife's consent in the manner prescribed by law, is void." *Whelan v. Adams et al.*, 44 Okl. 696, 145 Pac. 1153, L. R. A. 1915D, 551.

"Certain land was allotted to Peggie, which was thereafter occupied as the homestead of herself and husband. Peggie executed to Norton a deed to the land so occupied, but without her husband joining therein. Afterwards the husband died, and Peggie intermarried with one Joseph, who with Peggie continued to reside upon the land, claiming the same as their joint homestead. Thereafter Peggie filed an action against Norton to cancel the deed, alleging fraud in procuring the same. Joseph was not made a party to this action. Norton prevailed in the suit, and then instituted the present action against Peggie and Joseph for possession of the premises. Held, that the deed to Norton was void at the date of the marriage of Joseph to Peggie, and as Joseph and Peggie thereafter occupied the premises as their joint homestead, Joseph was not concluded by the judgment in favor of Norton against Peggie, and that Norton was not entitled to the possession of the premises sued for." *Shanks v. Norton*, 79 Okl. 93, 191 Pac. 170.

"A verbal agreement, entered into by a married man for the sale of the homestead of the family, made without the consent of the wife, though accompanied by partial performance on the part of the intended purchaser, is void, and will not be enforced in an action for specific performance brought by such purchaser." *Elliot v. Bond*, 176 Pac. 991.

"An oil and gas lease covering a homestead which grants the right to enter upon the same and operate for oil and gas, together with the right to lay pipe lines, telephone and telegraph lines, and erect power houses, stations, fixtures necessary for the production of oil and gas, is such a grant of the use and occupancy of the homestead as requires the joint consent of both the husband and wife." *Carter Oil Co. v. Popp*, 174 Pac. 747.

"Under the act of 1901 (Sess. Laws 1901, p. 78, c. 10; Comp. Laws 1909, § 1187), which provides that no deed, mortgage, or contract relating to the homestead shall be valid unless in writing and subscribed by both husband and wife, an instrument executed by the husband alone, conveying a right of way for a period of 10 years over a part of the homestead, is not valid as against the wife." *Kelly et al. v. Mosby et al.*, 34 Okl. 218, 124 Pac. 984.

One of the earliest adjudicated cases on conveyance of the homestead exempt by law is *Dickinson v. McLane*, 57 N. H. 31. That part of the statute which the court was construing reads as follows:

"And no release or waiver of such exemption shall be valid, unless made by deed executed by the husband and wife, with all the formalities required by law for the conveyance of real estate."

The syllabus in the case reads as follows:

"Under the act of 1851, exempting the homestead of families from attachment, etc. (Comp. Stats., ch. 196), a married woman cannot release her homestead in the estate of her husband by her separate deed."

Ladd, J., concurring in the opinion of the court, states:

"The separate deed of the husband, and the separate deed of the wife, are alike ineffectual to pass the homestead right. By the plain terms of the statute, neither can have any effect upon it. It seems to follow that the separate deeds of both must be equally ineffectual. The statute created a new and somewhat peculiar estate, an inchoate right in which the wife and minor children, as well as the husband, have an interest. It provides the exact mode in which that right may be released or conveyed."

In *Howell, Jewett & Co. v. McCrie*, 36 Kan. 636, 14 Pac. 257, 59 Am. Rep. 584, the very able, logical, and exhaustive opinion written by Simpson, C., is so illuminating that it is worthy of an extended quotation:

"The homestead feature of the laws has always been regarded with peculiar favor by the courts of those states by which it has been enacted. It has been the theme of both forensic and judicial eloquence. It has been repeatedly declared in legislative halls and from the bench, that the policy of these laws is 'liberal' and 'benevolent,' 'their object a noble one'; that 'they are an enlightened public policy,' and 'their provisions the most beneficent.' In the convention that framed the Constitution of this state there was no one subject that was more carefully considered and more thoroughly discussed than the homestead provision. At least 25 pages of the published debates of that body are devoted to the discussion of this subject. In the various stages and phases of that discussion, among the many opinions and comments made on the section, as it was being perfected, and as finally adopted, the following expressions are selected as guides to the intention of its authors, to wit:

"The wife's right to the actual control of the homestead."

"The guaranty of a home to every member of the family."

"A reckless or drunken husband should not have power to alienate the home of his family."

"The protection of the family, and not the head of the family merely."

"To give permanency and value to the homestead by making its alienation difficult."

"To put it out of the power of the husband or the misfortunes of trade to take away the homestead."

"A home for the family, that Shylocks cannot reach."

"The woman, the wife and mother, shall have control of the home."

"There is no intention to exclude the woman, for that would destroy the object of a homestead."

"Neither the hand of the law nor all the uncertainties of life can eject the family from possession of it."

"Gives every mother and child in the state a home to which they may retire and find shelter from the storms of life."

"This is the spirit in which the homestead provision was conceived, and these are the reasons for its adoption, and it must be read in the light, and construed in the spirit, of these declaratory statements of its framers. In the earliest adjudications of this court on questions arising under this homestead feature of our Constitution the same or similar expressions are used. In *Morris v. Ward*, 5 Kan. 239, Mr. Justice Valentine says:

"The homestead was not intended for the play and sport of capricious husbands merely, nor can it be made liable for his weaknesses or misfortunes. It was not established for the benefit of the husband alone, but for the benefit of the family and of society; to protect the family from destitution, and society from the danger of her citizens becoming paupers."

"In *Helm v. Helm*, 11 Kan. 19, Chief Justice Kingman says: 'The wife's interest is an existing one. The occupation and enjoyment of the estate is secured to her against any act of her husband or of creditors without her consent. If her husband abandons her, that use remains to her and her family. With or without her husband, the law has set this property apart as her home.'

"These citations are sufficient to show that both the convention that framed the Constitution and the court whose prerogative it is to construe it have unitedly declared its purposes and objects to be for 'the protection and maintenance of the wife and children against the neglect and improvidence of the husband and father.'

"This court, in the consideration of questions arising under this provision of the Constitution and the statutory enactments in aid thereof and supplemental thereto, must give them a liberal construction, so that the purposes intended by the laws shall the better be advanced and secured. *Thomp. H. & Ex.* p. 8, and authorities there cited. These same considerations induce the courts to adopt a strict rule respecting their alienation, to the end that what is regarded so highly as to be embodied in the organic law as the most beneficent legislation and the most enlightened public policy is not to be lightly regarded and easily avoided by the parties for whose protection the legislation was adopted. Hence it is held that the homestead right can be barred only by complying strictly with the laws prescribing the mode of alienation. *Moore v. Titman*, 33 Ill. 360; *Kitchell v. Burgwin*, 21 Ill. 45; *Connor v. McMurray*, 84 Mass. 202; *Greenough v. Turner*, 77 Mass. 332; *Hoge v. Hollister*, 2 Tenn. Ch. 606; *Dickinson v. McLane*, 57 N. H. 31. To divest the homestead estate, the mode of conveyance prescribed by the law governing the alienation of such estates must be strictly pursued is the rule generally adopted in all the states in which such laws have been enacted, held more strictly in some than in others, and yet in all there must be a literal compliance with the provisions of the statutes in this behalf.

"From all the adjudications upon this subject, the three following rules are deduced, and may fairly be considered as settled:

"(1) The object of the homestead law is to

protect the family of the owner in the possession and enjoyment of the property.

"(2) That construction must be given such laws, which will best advance and secure their object.

"(3) To divest the homestead estate, there must be a literal compliance with the mode of alienation prescribed by the statute."

The rules laid down in the foregoing Commissioner's opinion are fully supported by the Supreme Court of Kansas which has held, in numerous decisions, to a strict rule of construction in favor of maintaining the integrity of the homestead:

"While W. and wife owned and occupied a homestead, she duly executed and acknowledged a power of attorney, appointing and authorizing him, as her lawful attorney, 'to sign deeds and mortgages, notes, checks, releases, etc., to loan moneys, to sue and be sued, to collect rents, make contracts, giving and granting unto my said attorney full power and authority to do and perform all and any acts and things whatsoever requisite and necessary to be done in and about the premises, as fully and to all intents and purposes as I might or could do if present, with full power of substitution and ratification, hereby ratifying and confirming all that my said attorney or his substitutes shall lawfully do or cause to be done by virtue hereof.' This power of attorney was duly recorded in the county where the homestead was situated. More than 2½ years afterward, the power being still unrevoked, the husband obtained a loan and executed a mortgage to secure the payment of the same, which he signed for himself, and also signed as attorney in fact for his wife. In an action to foreclose the mortgage, it was contended by the wife that a conveyance of a homestead by virtue of a power of attorney is unauthorized, and, further, that the authority conferred by the power of attorney in this instance was too general and indefinite to authorize the execution of a mortgage upon the homestead. Held, that the power of attorney executed by the wife was insufficient to express that joint consent which the Constitution and statutes of this state require in the alienation or incumbrance of a homestead." *Wallace v. Travelers' Ins. Co.*, 54 Kan. 442, 38 Pac. 489, 26 L. R. A. 806, 45 Am. St. Rep. 288.

"A mortgage, given upon the homestead without the joint consent of husband and wife, is void. The alienation of a homestead after it has once been established is such a personal privilege as cannot be delegated by either the husband or wife to the other. There has been a guard thrown not only around the wife, but also around the husband. The doctrine of unity between husband and wife has been solemnly declared in the Constitution, and the homestead cannot be alienated without their joint consent." *Locke v. Redmond*, 6 Kan. App. 76, 49 Pac. 670.

In *Morris v. Ward*, 5 Kan. 239, it is held:

"A mortgage of the homestead executed by the husband alone is void."

In *Dollman v. Harris*, 5 Kan. 597, it is held:

"A mortgage of a homestead, executed by the wife alone, is void, notwithstanding the legal title to the same may be in her and not in her husband."

How then can it be said that two void instruments, one executed by the husband and the other by the wife, mortgaging the homestead, can have the effect to create a lien? They are void for all purposes, whether considered separately or taken together.

See *Bird v. Logan et al.*, 35 Kan. 228, 10 Pac. 564; *Berry v. Berry*, 57 Kan. 691, 47 Pac. 837, 57 Am. St. Rep. 351; *Withers v. Love*, 72 Kan. 140, 83 Pac. 204, 3 L. R. A. (N. S.) 514; *Terrant v. Swain*, 15 Kan. 146; *Chambers v. Cox*, 23 Kan. 393; *Coughlin v. Coughlin*, 26 Kan. 116; *Warden v. Reser*, 38 Kan. 86, 16 Pac. 60.

Probably the first record we have of a conveyance of real estate by an instrument under seal as evidence of the transaction is in the first part of the thirty-second chapter of Jeremiah. These instruments under seal, executed for the purpose of conveying title to real estate have become universally known as deeds.

In defining a deed, *Bouvier, Law Dict.* vol. 1, p. 811, says:

"*Deed.* A written instrument under seal, containing a contract or agreement which has been delivered by the party to be bound and accepted by the obligee or covenantee. Co. Litt. 171; 2 Bla. Com. 296; Shepp. Touchst. 50.

"A writing containing a contract sealed and delivered to the party thereto. 2 Washb. R. P. 239.

"A writing under seal by which lands, tenements, or hereditaments are conveyed for an estate not less than a freehold. a Bla. Com. 294.

"A writing or instrument, written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties whose deed it is to the things contained in the deed. American Button-Hole Overseaming S. M. Co. v. Burlack, 35 W. Va. 647, 14 S. E. 319. See *Baker v. Westcott*, 73 Tex. 129, 11 S. W. 157."

"*Deed Poll.* A deed which is made by one party only."

Under this definition, the deed executed by Dan Hawkins at Muskogee was a deed poll. The deed executed by Beatrice Hawkins at Tulsa was a deed poll.

Bearing in mind that the statute says:

"No deed * * * relating to the homestead exempt by law * * * shall be valid unless in writing and subscribed by both husband and wife."

—It is clear to us that one of the objects of the statute was to prevent the very thing which has occurred here. No one would contend in the face of the statute that the deed of Dan Hawkins conveyed any title to the homestead. All would agree that it is void. The same is true of the deed of Beatrice Hawkins. If the deed executed by the

husband alone is void and the deed executed by the wife alone is void, how then can it be said that two void instruments create one valid instrument. To hold that these two deeds were sufficient to pass the title to the homestead would be to disregard the plain provisions of the statutes, and this we may not do.

The petition makes some reference to a tender of \$1,110 by the plaintiffs to the defendants. Of this the defendants on page 11 of their brief say:

"There is no evidence of any tender of \$1,100 or any other sum. We apprehend that the court will have no trouble in determining that no tender has ever been made the defendants in error."

In view of this position taken by the defendants, it is unnecessary for us to pass on the question of a tender of defendants' right to recover any sum paid the plaintiffs for this land. The defendants would not be entitled to a lien on the land for any money they had paid plaintiffs for these deeds. The courts would be powerless to decree the money so paid to be a lien on the land, for this would be doing indirectly what we have just held cannot be done directly, to wit, alienate the homestead without the deed being subscribed by both husband and wife. If this was decreed to be a lien on the land, and the plaintiffs were unable to pay the money necessary to discharge the lien, the land, which constitutes the homestead, could be sold to satisfy the lien. This is expressly prohibited by the Constitution and statutes hereinbefore quoted.

"A mortgage lien on a homestead cannot be created without the written consent of the wife. The husband alone, by his contract, cannot change the character or the priority of a mortgage lien on the homestead; neither can he alone restore it after loss, or re-create it, without the consent of the wife, in the exact manner prescribed by law.

"A husband whose homestead was incumbered by a mortgage lien made an agreement with the mortgagee to execute another mortgage for the benefit of the creditor, who was to discharge his mortgage so that the new mortgage might become the first lien on the homestead, the money derived from the new mortgage to be paid to the creditor; and for the remainder due the creditor a second mortgage was to be executed by the husband and wife on the homestead. The new mortgage was executed, the money received and paid to the creditor, whose mortgage was released and discharged on the margin of the record thereof. The wife had no knowledge of the agreement until after the new mortgage was executed, and the discharge of the first was entered on the record. She refused to execute the mortgage for the remainder due. The creditor brought an action to cancel the discharge, and to foreclose the original mortgage, praying the court to declare it a second lien on the homestead. Held, that the court has not the power to declare the original mortgage a lien on the homestead;

such a lien can only be created by the written consent of the wife, in the manner prescribed by law.

"It is not within the equitable power of courts in this state to declare any indebtedness a lien on a homestead. The Constitution of the state prescribes the manner of its creation and this must be strictly followed."

Jenkins v. Simmons et al., 37 Kan. 496, 15 Pac. 522.

A tender of the money is not a prerequisite to the plaintiff's right to have the deeds canceled. It may be they are unable to make the tender. If the court should hold a tender was necessary, and they could not make it, their poverty would defeat the Constitution and statute designed to protect the very class of persons who need its protection.

The deeds were absolutely void, and plaintiffs are entitled to have them canceled. The judgment of the district court is reversed, and this cause remanded, with instructions to the trial court to grant a new trial and proceed in accordance with the views herein expressed.

HARRISON, C. J., and KANE, JOHNSON, ELLING, KENAMER, and NICHOLSON, JJ., concur.

PITCHFORD, V. C. J., dissents.

JOHNSTON v. BALDOCK. (Nos. 11730, 11997.)

(Supreme Court of Oklahoma. Sept. 18, 1921.
Rehearing Denied Nov. 18, 1921.)

(Syllabus by the Court.)

1. Specific performance §44—Of oral contract for sale of land may be had where payment has been made and refusal would constitute a fraud.

The principle upon which a decree is granted for the specific performance of an oral contract for the sale of real estate is where the party seeking performance, with the knowledge and consent of the promisor, has made payments or has done acts in reliance upon the promise which change the relation of the parties so as to render a restoration of their former condition impracticable, and where it would amount to a fraud upon the part of the promisor to set up the statute of frauds as a defense, and thus to receive benefits of the acts done by the party relying upon the promise.

2. Specific performance §119—Not intended to shield wrong, but burden is on plaintiff to show it would be inequitable to refuse relief.

The statute of frauds was never intended to be used as a shield or as a breastwork to aid any one in the perpetration of a wrong. In all instances, however, the burden is upon the party alleging the oral agreement to clearly es-

tablish the same, together with the acts constituting the full performance, or such part performance of the contract as would satisfy a court of equity that it would be inequitable to refuse relief.

3. Specific performance §41—Part payment with possession and the making of valuable improvements will warrant enforcement of oral land sale agreement.

The part payment of the purchase money is not alone such part performance of an agreement to sell real estate as will authorize a court to enforce its specific performance. But part payment and taking possession in good faith, or taking possession with the knowledge of the vendor and making valuable and lasting improvements, constitute such part performance as will ordinarily warrant a court in decreeing specific performance of the contract.

4. Specific performance §42—Prior possession under lease continued held wholly insufficient to take oral land sale out of statute.

The possession necessary to take an oral contract for the sale of real estate out of the statute of frauds must be clearly shown by the evidence to refer to and result from, and to have been taken and entered into by virtue of the contract. A prior possession taken under a lease and continued, without a surrender of the premises and a re-entry under the contract to purchase, is wholly insufficient and of no avail, to take the oral contract out of the statute of frauds.

5. Specific performance §47—Improvements to take oral land sale out of statute must be valuable and permanent.

Improvements relied upon in connection with possession must be both valuable and permanent. Slight expenditures are insufficient.

6. Justices of the peace §36(7)—Action cannot be converted into an action to try title to deprive justice of the peace of jurisdiction.

In an action brought under the forcible entry and detainer statute, the introduction of evidence by either party showing title to the real estate does not operate to divest the justice court of jurisdiction. In such action possession alone is involved, and the action cannot be converted by the acts of either party into an action to try title.

Appeal from District Court, Oklahoma County; James I. Phelps and Edward D. Oldfield, Judges.

Actions by J. T. Johnston against Nancy E. Baldock, and by Nancy E. Baldock against J. T. Johnston. Actions were consolidated. Demurrer to the evidence was sustained and J. T. Johnston appeals. Affirmed.

Loyal J. Miller, of Oklahoma City, for plaintiff in error.

Geo. B. Rittenhouse and F. A. Rittenhouse, both of Chandler, and Gordon Stater and P. T. McVay, both of Oklahoma City, for defendant in error.

(201 P.)

PITCHFORD, J. On the 2d day of December, 1919, the plaintiff in error instituted an action in the district court of Oklahoma county, against the defendant in error, to enforce the specific performance of a contract for the sale of lots 25 and 26 in block 7, in Northwest addition to Oklahoma City. For convenience, the parties hereafter will be designated as they appeared in the trial court.

After the plaintiff had introduced his evidence, the defendant filed a demurrer thereto; the grounds of the demurrer being: First, that the evidence was insufficient to entitle plaintiff to the relief demanded; second, that the contract claimed to have been made was not in writing subscribed by the defendant; third, that the plaintiff was in possession of the premises by virtue of a lease between himself and defendant at the date of the contract, and had not surrendered possession of the premises to the defendant prior to the commencement of the instant action. The plaintiff prosecutes an appeal to this court from a judgment sustaining the demurrer, and assigns numerous errors. The errors assigned are practically covered by the second assignment of error, which is that the court erred in sustaining the demurrer.

The evidence discloses that, on the 19th day of October, 1914, the defendant, in writing, leased the premises in controversy to the plaintiff for a term of two years, beginning on the 18th day of October, 1914, and ending on the 18th day of October, 1916, for the consideration of \$600, payable \$25 per month in advance. Upon the expiration of the lease, plaintiff continued to occupy the premises by paying \$25 per month. No different arrangements were made between the parties until July, 1919, when the rents were raised to \$35 per month. During the latter part of July, 1919, plaintiff and defendant discussed the sale of the property to the plaintiff. There seems to have been several conversations regarding the sale which led up to an agreement on the 1st or 2d of August, whereby plaintiff was to buy the property, paying therefor the sum of \$4,500. This sum was to be paid by the plaintiff assuming a mortgage on the property for \$2,200, and to pay to the defendant the balance, to wit, \$2,300, at the rate of \$25 each month with interest thereon until the full purchase price had been paid.

On the date the parties came to an agreement, it was agreed that the plaintiff would have the papers prepared and bring the same back to the defendant so that she could sign the deed; that he would prepare the papers he was to sign and get his wife's signature to the same; that the monthly payments on the \$2,300, with the interest thereon, would approximate \$40; that on the 2d day of August, the date of this conversation, the de-

fendant stated to the plaintiff she was needing \$45. The plaintiff's reply was:

"All right then, I will just make it \$45, and we can adjust that in the next monthly payment."

The plaintiff deposited, on that day, \$45, in the Security National Bank to the credit of the defendant and mailed her a duplicate slip showing that the sum had been so deposited. On September 2, he deposited in the same bank \$35.49, and on the 4th of October, he deposited \$40. Deposit slips for the last two payments were mailed to the plaintiff. On November 1, \$39.83 was deposited. Duplicate deposit slip was mailed to the defendant, accompanied by the following letter:

"Dear Mrs. Baldock: I am inclosing herewith duplicate deposit slip for \$39.83, being the November first payment on my place, as per our contract, deposited to your credit in the Security National Bank to-day.

"Respectfully,

J. T. Johnston."

On November 19, the plaintiff received from the defendant the following letter:

"Mr. J. T. Johnston—Dear Sir: I am in receipt of your letter dated Nov. 1, 1919, inclosing deposit slip for \$39.83 which you have placed to my credit in the Security National Bank of this city. I note you state the above amount is payment on my home. I wish to advise you are in error, and I am accepting your deposit only for the regular monthly rent for the month of November 1, which should be \$40 instead of \$39.83, this to apply on rent of my property at 814 West 8th street.

"Yours truly,

Mrs. N. E. Baldock."

On the 1st of December, the plaintiff, in company with Mr. Bernard Miller, went to the home of defendant and informed her that he had come to make the December first payment; that he had brought a mortgage properly executed by himself and wife, and the notes for the deferred payments properly signed; that he also had a deed prepared for her to execute and informed her that if she did not like the form of the deed any satisfactory deed would be satisfactory to him. The plaintiff further informed the defendant that the payment tendered was on the condition that it was to be taken as a payment on the purchase of the property and not as rent. The tender of the money was refused. It further appears that, after the contract of sale, the plaintiff built a storeroom on the premises, and also placed gravel in the basement of the garage so that the latter might be rented for automobiles.

On cross-examination, the plaintiff testified that some time in August, the exact date is not given, the defendant informed him that she would go no further with the deal; that she had sold another piece of property and had become easy on money matters and would not be forced to sell the premises in controversy.

It further appears that the plaintiff, at no time prior to the contract with defendant, had surrendered the possession of the premises to the defendant.

Under section 941, Revised Laws of 1910, a contract for the sale of real property is invalid, unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent.

It is contended on the part of the plaintiff that the above statute has no application in this instance, in view of the evidence presented to the trial court, for the reason that a parol agreement for the sale of real estate is not within the statute of frauds, where the vendee has paid all or a part of the purchase price and taken possession of the property and made valuable and lasting improvements thereon. This proposition is sustained by numerous authorities from almost every state in the Union; but in every instance we find that the payments made must have been made as part of the purchase price, that possession must have been taken under and by virtue of the oral contract, and that the improvements made must have been made by the purchaser under the honest belief that he had a right to make the same, and that such improvements so made must be lasting and valuable.

We shall discuss these several requirements in the order named: Under the evidence, the only payment which the plaintiff is justified in claiming as payment on the purchase price is depositing, in the Security National Bank on the 2d day of August, the sum of \$45 to the credit of the defendant. We are borne out in this statement by the evidence of the plaintiff himself, wherein he says he was informed by the defendant some time in August that she would go no further with the sale. The exact date in August, when plaintiff received this information, does not appear, so when the payments were made in September, October, and November, plaintiff then knew that defendant had repudiated the contract. He claims, however, that some one told him that defendant might go ahead with the deal and avoid trouble. It is in evidence that it was the understanding of the parties on August 2, when the contract was made, that plaintiff would have the necessary papers prepared and the deal closed by the execution of the necessary instruments by the respective parties. However, so far as the evidence shows, nothing was done as to the execution of these instruments until the 1st of December thereafter, and no excuse is given for the long delay. The question naturally arises: Was not the delay caused by the information received by plaintiff from defendant that the deal was off? When the plaintiff made the November payment, the letter accompanying the deposit slip informed the defendant that the amount deposited

in the bank was to be applied, not as rents, but as a part of the purchase price for the premises. The defendant notified the plaintiff that this payment would not be received as part of the purchase price, but would only be received as rents. No protest seems to have been made by the plaintiff to this claim on the part of the defendant. When the 1st of December arrived, the plaintiff, as we have seen, went to the home of the defendant and tendered the December payment on the conditions as heretofore stated.

[1, 2] The principle upon which a decree is granted for the specific performance of an oral contract for the sale of real estate is where the party seeking performance, with the knowledge and consent of the promisor, has made payments or has done acts in reliance upon the promises which change the relation of the parties so as to render a restoration of their former condition impracticable, and where it would amount to a fraud upon the part of the promisor to set up the statute of frauds as a defense, and thus to receive benefits of the acts done by the party relying upon the promise. The statute of frauds was never intended to be used as a shield or as a breastwork to aid any one in the perpetration of a wrong. In all instances, however, the burden is upon the party alleging the oral agreement to clearly establish the same, together with the acts constituting the full performance, or such part performance of the contract as would satisfy a court of equity that it would be inequitable to refuse relief.

[3] In the instant case, the plaintiff has wholly failed in making any showing entitling him to the relief he asks, by reason of payment of a part of the purchase price of the land.

In *Halsell et al. v. Renfrow and Edwards*, 14 Okl. 674, 78 Pac. 118 (2 Ann. Cas. 286), the eighth and ninth paragraphs of the syllabus are as follows:

"8. The payment of the purchase money is not alone such part performance of an agreement to sell real estate as will authorize a court to enforce its specific performance. But part payment and taking possession in good faith, or taking possession with the knowledge of the vendor and making valuable improvements, constitute such part performance as will ordinarily warrant a court in decreeing specific performance of the contract.

"9. The acceptance of benefits under a contract which will impose consent to all the obligations arising from such acceptance, must be a voluntary acceptance with a knowledge of the facts affecting such acceptance, and payment of money to an agent will not constitute such voluntary acceptance unless it is shown that he was authorized to accept such payment."

In *Levy v. Yarbrough et al.*, 41 Okl. 16, 136 Pac. 1120, it is held:

"(a) But the mere acceptance of the purchase price under an oral contract is not of it-

self sufficient to take the sale out of the statute of frauds."

See *Kelly v. Fisher*, 263 Ill. 184, 105 N. E. 21; *German National Bank v. Laffin*, 78 Neb. 715, 111 N. W. 578; *Milholland v. Payne*, 169 App. Div. 712, 155 N. Y. Supp. 773.

In order for any payment made by plaintiff to entitle him to specific performance, it would be necessary for him to show that he had taken possession of the premises by reason of the oral contract of sale. We therefore come to the question: Did the plaintiff take possession under the alleged contract? We have seen that he went into possession under the lease dated October 18, 1914, and held under this lease until October, 1916, and thereafter continued to pay the same rents as he had paid under the lease which continued until July, 1919, when the rents were raised to \$35 per month. These several payments were made by depositing the amounts in the Security National Bank and mailing the defendant deposit slips. Was there a change of possession? In other words, is the plaintiff allowed to say that, while he was a tenant of the defendant, he and defendant entered into this oral contract for the sale of the premises held by him at the time as a tenant?

In the instant case, if plaintiff had shown that the contract had been fully executed on his part, he would be protected, as there is sufficient elasticity in the rules of equity to enable the court to render such a decree as would give such relief as would fully compensate the plaintiff and a decree that would not permit the defendant to retain the land, and also the fruits of performance on the part of plaintiff; and in such a case a court of equity might find that, in order to protect the right and prevent the wrong, the only decree that would effectuate this end would be by granting specific performance. But authorities cited by plaintiff fail to show that specific performance has been decreed in a single instance under facts similar to those in the case at bar.

[4] The possession required to take an oral contract for the sale of real estate out of the statute must be clearly shown by the evidence to refer to and result from, and to have been taken and entered into by virtue of the contract. A prior possession taken under a lease and continued, without a surrender of the premises and a re-entry under the contract to purchase, is wholly insufficient and of no avail to take the oral contract out of the statute of frauds. Some authorities hold, however, that where all of the purchase price is paid, it would be inequitable to refuse specific performance.

In *Larney et al. v. Aldridge*, 31 Okl. 447, 122 Pac. 151, it is said:

"A tenant, while remaining in possession, even after the expiration of his term, is precluded, on the doctrine of estoppel, from either setting

up an adverse title to defeat an action of ejectment, or without first surrendering possession, making a contest with his landlord over the title held by him at the time of securing the right of entry."

In *Pappe v. J. L. Trout et al.*, 3 Okl. 260, 41 Pac. 397, it is stated:

"Where it is shown that a tenant is in possession of property, under a written lease and permission of his landlord, held, that he is estopped from setting up an adverse claim of title, in himself, in the property while he holds under such condition.

"Where a lease is entered into for a period of six months, and a provision is inserted to the effect that, after the expiration of such period, if the tenancy continues, it shall be deemed a tenancy from month to month, held, that after a tenant has continued to occupy the premises leased, after the expiration of the six months, and paid rent as agreed in the lease, he will not be permitted to deny its validity."

In *Roberts v. Templeton et al.*, 48 Or. 65, 80 Pac. 481, 3 L. R. A. (N. S.) 790, the syllabus reads as follows:

"Where plaintiff, up to the time of his oral purchase of the interest of a tenant in common in a mine, was in possession under a contract with a cotenant of the vendor, so that his prior possession merged into that under his purchase, there was not such a change of possession under the contract as to take it out of the statute of frauds."

In the body of the opinion, the rule is stated as follows:

"To entitle a party to a specific performance of an oral contract to convey real property it must affirmatively appear that the possession was taken in pursuance of and under the agreement alleged in the complaint."

In *Hutton v. Doxsee*, 116 Iowa, 13, 89 N. W. 79, it is said:

"Where a party is in possession of land under a lease, his continuance in that possession will not be sufficient to support a claim of part performance under a subsequent contract of purchase."

In the body of the opinion, the rule is stated as follows:

"The rule seems to be well settled that, if one is already in possession of land under a contract of lease, his continuance in that possession will not be sufficient to support a claim of part performance under a subsequent contract of purchase."

The rule is stated in 36 Cyc. 659, as follows:

"Possession, in order to be an act of part performance, either alone or in connection with other acts, is subject to several requirements. First, it must have been taken in pursuance of the contract. Further, it must be exclusively referable to the contract; that is to say, it must be such a possession that an outsider, knowing all the circumstances attending it save only the one fact, the alleged oral contract,

would naturally and reasonably infer that some contract existed relating to the land, of the same general nature as the contract alleged.

"If the possession, therefore, could be accounted for just as well by some other right or title actually existing in the vendee's favor, or by some relation between him and the vendor other than the alleged oral contract, it is not such a possession as the doctrine requires.

"The most important application of this rule relates to a possession begun before, and continuing after, the making of the oral contract. Such continuance in possession does not satisfy the tests of an effective act of part performance, since it does not point to a new contract but may be accounted for by reference to the former right or title; also since there has been no change of position on plaintiff's part which could work a fraud upon him on refusal of specific performance.

"Thus the continuance in possession of a tenant will be referred to his original tenancy, even though the original term has expired, since it is a frequent and natural thing to find a tenant holding over after the expiration of his term, calling for no contract to explain it. A tenant's continued possession therefore is not an act of part performance of his contract to purchase from his landlord, nor of his contract for a renewal of the lease."

[8] Plaintiff contends that after the contract with defendant he made lasting and valuable improvements consisting of a store-room on the premises and placing gravel in the basement of the garage so that the latter could be rented for automobiles.

The authorities hold that the making of valuable and permanent improvements on premises by a vendee, whose possession antedated the oral contract of sale, must be of such character as cannot reasonably and naturally be accounted for by his original tenancy; and such improvements must be of such a character as to be inconsistent with the continuance of the old relation. Slight improvements considerably less than the rental will not suffice. Not only in magnitude and value, but in other respects, the improvements must unequivocally refer to and result from the agreement. There is no evidence showing that these improvements were made with the consent of the defendant, or that she knew of the same being made, nor is it shown that the improvements claimed were made before the defendant repudiated the contract. There is nothing to show whether or not the improvements were valuable or lasting; nothing to show that they were permanent and became a part of the real estate further than the inference that the storage room was erected on the premises and would therefore become a part of the real estate.

In 36 Cyc. 670, the rule is stated as follows:

"If improvements are relied upon, not merely as evidence that an actual possession was taken, but as an additional, independent ground for specific performance, they must be both valu-

able and permanent. Slight expenditures for repairs, and the like, such as might naturally be made by any person as incident to an occupation of the premises, are insufficient."

In *Ryan v. Lofton* (Tex. Civ. App.) 190 S. W. 752, the first and second paragraphs of the syllabus are as follows:

"1. Improvements, consisting of piping a house for gas, the value not shown, and the purchasing of wall paper amounting to \$2.10, not paid at the time of trial, were so insignificant as not to take the conveyance as to which an oral contract was sought to be enforced, out of the statute of frauds (Vernon's Sayles' Ann. Civ. St. 1914, art. 3965, subd. 4); the property being worth \$700, with a rental value of \$10 per month.

"2. Where, to enforce oral contract to convey, reliance is had upon the claimant's possession and improvement of the premises, the value of the improvements must be shown to be such proportion of the value of the property and made in such reliance upon the contract as to give the claimant equitable rights."

In *Bradley v. Owsley*, 74 Tex. 69, 11 S. W. 1052, it was held that possession under an oral agreement to convey land and the building of a hogpen or ranch containing about one-half acre, and the moving away of a house on the premises by the buyer, did not constitute such improvements as to take the contract out of the statute of frauds.

In *Baldwin v. Squier*, 31 Kan. 283, 1 Pac. 591, Justice Brewer, delivering the opinion of the court, uses the following language:

"The contract, being one in parol, was obviously under the statute of frauds nonenforceable. Three matters are presented, to take the case out of the statute: First, the improvements. To this we reply, that as these were made after Baldwin's death and without authority from his heirs, they can have no effect. If the title did not pass at Baldwin's death, it has not been transferred by any subsequent matters. Second, delivery of possession. But to take a parol contract for the sale of land out of the statute of frauds by reason of a delivery of possession, such possession must be notorious, exclusive, and obviously in pursuance of the contract."

In the case of *Cobb v. Johnson*, 101 Tex. 440, 108 S. W. 811, plaintiff brought action to compel specific performance of an oral contract to convey land. He claimed that, after the contract, he took possession of the premises and made valuable improvements. The improvements made consisted of a hen-house valued at \$15. It was held that this improvement did not entitle the plaintiff to specific performance. In the body of the opinion, the court said:

"The character of the improvements claimed by Johnson to have been made by him are no more permanent than the hogpen which was held not to constitute such improvements in *Bradley v. Owsley* [11 S. W. 1052], above cited. The insignificance of the improvements

made must relate to the value, and, if we consider in this case the improvements as being of the value of \$15, as testified by Johnson, then to compare that with the contract price of the land, \$1,100, we have the improvements as compared to the value of the land in the ratio of not exceeding $1\frac{1}{2}$ per cent."

We conclude that the judgment sustaining the demurrer to the evidence should be affirmed.

[8] On the 8th day of December, 1919, the defendant Nancy E. Baldock filed in the justice court of Oklahoma county an action of unlawful detainer against J. T. Johnston and wife for the possession of the premises in controversy. To this action, J. T. Johnston and wife, as their defense thereto, claimed that the justice had no jurisdiction over the subject-matter of the action, for the reason that an action had been filed in the district court of Oklahoma county, wherein the plaintiffs had brought an action against the defendant for the specific performance of a contract for the sale of the real estate involved; that the said action was still pending and undetermined in the district court. Judgment was rendered by the justice of the peace in favor of the defendant, from which the plaintiffs appeal to the district court. Upon trial in the district court, judgment was rendered in favor of defendant, from which plaintiff appeals. These causes, numbered in this court, respectively, as 11730 and 11997, upon motion, were advanced and by order of this court consolidated.

The error assigned for reversal of the judgment of the trial court in No. 11997, the action for unlawful detainer, is:

"Error of the trial court in refusing to sustain the objection of the plaintiff in error to the jurisdiction of the court, and in overruling the same, and in overruling their motion to dismiss said action in the district court, over their objection and exception."

It is the contention of plaintiffs that, where a court of equity has obtained jurisdiction of the controversy for any purpose, it will retain jurisdiction for the purpose of administering complete relief, and it may for this end determine purely legal rights, which otherwise would be beyond its authority; that a court of equity, which has obtained jurisdiction of the controversy on any ground for any purpose, will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject-matter, and to avoid multiplicity of suits, and cites a number of authorities to sustain this contention.

We have examined the authorities cited and find that the same are not applicable to the facts in this case. The action of unlawful detainer, under our law, is purely possessory. No question of title can properly be raised or tried in such an action. It is tried in a summary manner, and one of

the objects of the action is to give relief in as short a time as may be, to one who is wrongfully held out of the possession of real property, and such a one has this remedy irrespective of any other rights in or to the property which may be litigated in the district court at law or in equity.

The question of title or boundaries cannot ordinarily arise or be tried in such a proceeding. The defendant in such an action is not allowed to inject such questions into the case, and have the same transferred to the district court, under section 5357, Rev. Laws of 1910, when it is clearly shown that he entered into possession of the premises as a tenant of the owner and was holding as tenant on the date he claims an unexecuted oral contract was made for the sale of the premises.

In Zahn v. Obert, 24 Okl. 159, 103 Pac. 702, the court said:

"For the reason that title may not be adjudicated and finally determined in a forcible detainer action, it is provided that neither before a justice of the peace nor in the district court, in such action, shall such judgment be a bar to any other action brought by either party. See section 5068, Wilson's Rev. & Ann. St. 1903. * * * When a party seeks to have title adjudicated in such an action, or to oust the court of jurisdiction by such an averment, such allegation should be stricken out upon motion."

In Deninger et ux. v. Gossom, 46 Okl. 596, 149 Pac. 220, the plaintiff brought an action of forcible entry and detainer before the justice of the peace, and the defendant answered setting up an equitable title "that the title to property was involved, and prayed the justice of the peace to certify the cause to the district court." A motion to strike the equitable defense was sustained. We quote from the body of the opinion (46 Okl. 604, 605, 149 Pac. 223) as follows:

"Defendants argue that the justice of the peace erred in sustaining the motion of plaintiff to strike out the equitable defense, and the only authorities cited in their brief is upon this point. Defendants should have refuted their answer in the county court and had the trial court pass on same; however, the Supreme Court of this state, as well as the Supreme Court of Kansas, from whence our statute came, have often held that the Unlawful Entry and Detainer Act is purely a possessory action, where title will not be litigated, and when an answer is filed setting up an equitable defense and the case is certified to the district court, such court is not vested with jurisdiction."

In Armour Packing Co. v. S. K. Howe, 62 Kan. 587, 64 Pac. 42, it is said:

"Section 5042 of the General Statutes of 1899 (Gen. Stat. 1897, c. 103, § 26), providing that, when it appears to the satisfaction of a justice of the peace that the title or boundary of land is in dispute in any action, he shall certify the case to the district court for trial, has no application to actions of forcible entry and detainer."

In the body of the opinion, the rule is stated as follows:

"It was the manifest intention that forcible entry and detainer proceedings should speedily terminate. They are summary in character. No continuance is allowed by the statute for a longer period than eight days without the giving of bond to the adverse party. The delay incident to actions where title is tried and adjudicated would tend to defeat the purposes for which the remedy is given. Section 5042, *supra*, has been borrowed and re-enacted in Oklahoma, together with our procedure relating to actions of forcible entry and detainer. In the case of *McDonald v. Stiles*, 7 Okl. 327, 54 Pac. 487, the Supreme Court of that territory passed on this question, and held as we do."

In *Casey v. Kitchens*, 168 Pac. 812, L. R. A. 1918B, 687, the syllabus reads as follows:

"1. *Forcible Entry and Detainer—Title—Evidence.* Evidence of title to real estate can be introduced in an action of forcible entry and detainer only as an incident tending to show the right to possession."

"4. *Justices of the Peace—Forcible Entry and Detainer—Possession.* In an action brought under the forcible entry and detainer statute, the introduction of evidence by either party showing title to the real estate does not operate to divest the justice court of jurisdiction. In such action possession alone is involved and the action cannot be converted by the acts of either party into an action to try title."

See *Brown v. Hartshorn*, 12 Okl. 121, 69 Pac. 1049; *Anderson v. Calvin Ferguson et al.*, 12 Okl. 307, 71 Pac. 225.

We conclude that the judgment of the trial court in cause No. 11730, wherein J. T. Johnston was plaintiff and Nancy E. Baldock was defendant, and in the action No. 11997, wherein Nancy E. Baldock was plaintiff and J. T. Johnston et al. were defendants, should be affirmed, and it is so ordered.

All the Justices concur, except KANE, J., being absent.

BUTLER v. CHATEAU et al. (No. 12468.)

(Supreme Court of Oklahoma. Nov. 1, 1921.)

(Syllabus by the Court.)

Appeal and error \S 356—**Petition in error, filed more than six months after judgment, dismissed.**

Where a petition in error is not filed in this court until after the expiration of six months from the date of final judgment or order appealed from, this court has no jurisdiction over the subject-matter, and the appeal will be dismissed.

Appeal from District Court, Atoka County; J. H. Linebaugh, Judge.

Action between J. B. Butler and Meady Chateau and others, and from the judgment

therein the former appeals. Appeal dismissed.

I. L. Cook and Maxey & Cook, all of Atoka, for plaintiff in error.

J. W. Clark, of Atoka, for defendants in error.

HARRISON, C. J. The judgment appealed from herein was rendered by the trial court February 4, 1921, and purported appeal filed in this court July 18, 1921. On August 27, 1921, defendant in error filed motion to dismiss on the ground that the purported case-made fails to show that it had ever been filed with the court clerk of the trial court, and, more than six months having expired since the rendition of the judgment, the appeal cannot be perfected. *Banks v. Watson*, 40 Okl. 450, 139 Pac. 306; *Gibbs v. Tanner*, 43 Okl. 477, 143 Pac. 189; *Wagnon v. Davison*, 79 Okl. 209, 192 Pac. 565.

The appeal is dismissed.

KANE, JOHNSON, MILLER, and KEN-NAMER, JJ., concur.

NOWAHOMA OIL & GAS CO. et al. v. LONG-BONE et al. (No. 11118.)

(Supreme Court of Oklahoma. Nov. 1, 1921.)

(Syllabus by the Court.)

Appeal and error \S 356—**Appeal will be dismissed where petition in error is not filed within six months from final judgment or order appealed from.**

Where a petition in error is not filed in this court until after the expiration of six months from the date of final judgment or order appealed from, this court has no jurisdiction over the subject-matter, and the appeal will be dismissed.

Appeal from District Court, Nowata County; C. W. Mason, Judge.

Action between the Nowahoma Oil & Gas Company and others and Frank Longbone and another. Judgment for the latter, and the former appeal. Appeal dismissed.

J. G. Hutchison, of Kansas City, Mo., and E. E. Sams, of Nowata, for plaintiffs in error.

J. Wood Glass and Floyd A. Calvert, both of Nowata, for defendants in error.

HARRISON, C. J. The judgment appealed from herein was rendered June 12, 1919, and appeal not filed until December 24, 1919, 12 days after the expiration of the 6-month statutory period within which to file an appeal in this court.

Where petition in error and case-made are not filed within this court within 6 months from the date of the order or judgment ap-

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pealed from, as required by Session Laws 1910-11, c. 18, the appeal will be dismissed upon the proper motion of defendant in error. *Davis v. Revelle*, 75 Okl. 8, 180 Pac. 958; *Hamm et al. v. Veasey*, 79 Okl. 133, 191 Pac. 1094.

Where petition in error is not filed in this court until after the expiration of 6 months from date of order or judgment appealed from, this court has no jurisdiction over the subject-matter, and the appeal will be dismissed. *Wagon v. Davison*, 79 Okl. 209, 192 Pac. 565.

The appeal is dismissed.

KANE, JOHNSON, MILLER, and KEN-NAMER, JJ., concur.

WALDOCK et al. v. SINCLAIR. (No. 12184.)

(Supreme Court of Oklahoma. Nov. 1, 1921.)

(Syllabus by the Court.)

Appeal and error \S 573, 638—Case-made not filed in lower court is nullity and after expiration of six months appeal will be dismissed.

A case-made filed in this court which does not show that it has been filed in the office of the clerk of the trial court is a nullity, and, where such a case-made remains in this court after the expiration of the statutory time in which to perfect an appeal, on motion the appeal will be dismissed.

Appeal from District Court, McCurtain County; A. C. Brewer, Judge.

Action between A. J. Waldock and others and W. C. Sinclair. From a judgment therein, the former appeal. Appeal dismissed.

A. J. Waldock, for plaintiffs in error.

Etheredge & Arnett, of Idabel, for defendant in error.

HARRISON, C. J. The judgment appealed from herein was rendered in the district court of McCurtain county October 13, 1921. The petition in error and purported case-made were filed in this court April 11, 1921, but the record, on its face, shows not to have been filed with the court clerk after settlement of case-made, but was filed with the clerk of this court without showing to have been filed with the court clerk below.

On September 6, 1921, defendant in error filed motion to dismiss appeal for the reason, among other reasons assigned, that the petition in error and case-made was not filed in the office of court clerk of the trial court. It is unnecessary to decide the other grounds.

A case-made filed in this court which does not show that it has been filed in the office of the clerk of the trial court is a nullity, and where such a case remains in this court

after the expiration of the statutory time, six months, in which to perfect an appeal, on proper motion the appeal will be dismissed. *Banks et al. v. Watson et al.*, 40 Okl. 450, 139 Pac. 306; *Gibbs v. Tanner*, 43 Okl. 477, 143 Pac. 180.

The appeal is dismissed.

KANE, JOHNSON, MILLER, and KEN-NAMER, JJ., concur.

SMITH v. STATE. (No. A-3732.)

(Criminal Court of Appeals of Oklahoma. Nov. 12, 1921.)

(Syllabus by the Court.)

Criminal law \S 1069(1)—Felony appeal must be within six months by petition in error with case-made attached or transcript of record.

In felony cases the appeal must be taken within six months after the judgment is rendered. Section 5991, Rev. Laws 1910. In such cases the appeal is taken by filing in this court a petition in error with case-made attached, or transcript of the record, together with proof of service of notices of appeal as required by statute, and when this is not done within the time prescribed by the statute, this court does not acquire jurisdiction of the appeal, and such an appeal will be dismissed.

Appeal from District Court, Le Flore County; E. F. Lester, Judge.

Frank Smith, was convicted of burglary, and he appeals. Appeal dismissed.

Neal & Neal, of Poteau, for plaintiff in error.

The Attorney General and E. L. Fulton, Asst. Atty. Gen., for the State.

DOYLE, P. J. Plaintiff in error, Frank Smith, was convicted of burglary in the second degree, and his punishment assessed at imprisonment in the penitentiary for the term of two years. In pursuance of the verdict the court rendered judgment on the 20th day of September, 1919. From the judgment an appeal was attempted to be taken by filing in this court of March 22, 1920, a petition in error with case made.

The Attorney General has filed a motion to dismiss the appeal based upon the fact that said appeal was not taken within six months from the date on which the judgment was rendered.

Sec. 5991, Rev. Laws, provides:

"In felony cases the appeal must be taken within six months after the judgment is rendered."

It was two days too late. It has been uniformly held by this court, when an appeal is not taken within the time prescribed by

statute, this court does not acquire jurisdiction of the appeal, and such appeal will be dismissed. *Barks v. State*, 11 Okl. Cr. 446, 147 Pac. 1055; *Gordon v. State*, 12 Okl. Cr. 103, 152 Pac. 142.

It follows that the motion to dismiss the appeal must be sustained.

It is therefore ordered that the purported appeal be and the same is hereby dismissed.

MATSON and BESSEY, JJ., concur.

THOMAS v. STATE. (No. A-3721.)

(Criminal Court of Appeals of Oklahoma. Aug. 3, 1921. Rehearing Denied Nov. 19, 1921.)

(Syllabus by the Court.)

1. Criminal law §1148—Names of additional witnesses may be indorsed on information at any time in the court's discretion.

In felony cases, less than capital, the names of additional witnesses may be indorsed on an information at any time, within the discretion of the court, and this discretion will not be reviewed upon appeal, unless the record shows it was abused.

2. Criminal law §1159(2)—Verdict, supported by substantial evidence, not disturbed on appeal.

Where there is substantial evidence to support the verdict of conviction, and the record discloses no indication that the conclusions reached were the result of passion or prejudice, such verdict will not be disturbed on appeal.

3. Larceny §55—Evidence held to sustain conviction.

Evidence held sufficient to sustain a conviction for the larceny of domestic animals.

Appeal from District Court, McCurtain County.

Dock Thomas was convicted of cattle theft, and appeals. Affirmed.

Jeff D. McLendon, of Idabel, for plaintiff in error.

The Attorney General and W. O. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. This appeal is from a judgment of the district court of McCurtain county, rendered upon a verdict finding the defendant, Dock Thomas, guilty as charged in the information, and fixing his punishment at imprisonment in the penitentiary for a term of five years. The information jointly charged Dock Thomas and Joe Melson with the larceny of two certain bull yearlings, the personal property of one Tobe Phillips. The record shows that the defendant Melson died before the case was called for trial.

The errors assigned are that the verdict was contrary to the law and the evidence, and that the court erred in permitting the county attorney to indorse the name of an additional witness on the information when the case was called for trial. The defendant is not represented by counsel in this court; however, we have carefully read and examined the entire record. The state relied for this conviction upon the testimony of the alleged owner and four or five other witnesses, showing that on the date alleged Tobe Phillips, living four or five miles north of Heworth, in McCurtain county, was the owner of two bull yearlings, one a deep red and the other a red roan, both without marks or brands; that two or three weeks after he missed them they were found in the possession of the defendant, Dock Thomas, in a pasture on what is known as the cut-off on Red river; that at that time they had been altered, and each had a metal tag on the ear; that the defendant, Dock Thomas, lived about a mile and a half from Tobe Phillips, and well knew that these yearlings were raised and owned by Tobe Phillips.

Other witnesses for the state testified to the identity of the yearlings found in the possession of the defendant as being the property of Tobe Phillips. As a witness in his own behalf Dock Thomas testified that he bought the red yearling from the late Joe Melson, his codefendant, and that he raised the other yearling, claimed by Tobe Phillips; that at the time he was associated with Dr. McBrayer in buying cattle, and they had about 100 head in a pasture on the Red river cut-off.

[1] The rule is well settled that in felony cases, less than capital, the names of additional witnesses may be indorsed on an information at any time within the discretion of the court, and this discretion will not be reviewed upon appeal, unless the record shows that it was abused. *Star v. State*, 9 Okl. Cr. 210, 131 Pac. 542; *Hawkins v. State*, 7 Okl. Cr. 385, 123 Pac. 1024.

[2] The jury are the exclusive judges of the credibility of witnesses and the weight to be given their testimony, and where there is substantial evidence to support the verdict of conviction, and the record discloses no indication that the conclusions reached were the result of passion or prejudice, such verdict will not be disturbed on appeal.

[3] Upon the record before us, the case was one for the consideration of the jury. The trial was in all respects fair, and we are unable to find anything in the record to warrant us in interfering with the conviction.

The judgment of the lower court is therefore affirmed.

MATSON and BESSEY, JJ., concur.

SMITH v. STATE. (No. A-3733.)(Criminal Court of Appeals of Oklahoma.
Nov. 16, 1921.)*(Syllabus by the Court.)*

1. Criminal law \S 678(1)—Where more than one act on which conviction could be based was shown, the state should elect.

In a prosecution for statutory rape, where there is evidence of more than one act of sexual intercourse between defendant and prosecutrix upon which a conviction could be based, the trial court should either require the prosecution to elect upon which of such acts it would rely for a conviction, or else have treated the act of which the state first introduced evidence to tend in any degree to prove the offense as an election and should have given a specific instruction limiting the jury to a consideration of such particular act as a basis for a conviction.

2. Criminal law \S 373—Rape not a continuing offense, and conviction must rest on one act only.

In this state a person may be tried for and convicted of only one offense at a time. Rape is not a continuous offense, and whilst in a prosecution for statutory rape proof of other acts of intercourse, occurring both prior to and subsequent to the one relied upon for a conviction, may be proved for the purpose of showing the intimate relations between the parties, etc., the conviction must be based solely upon one of such acts and not all of them, and it is error prejudicial to the defendant, where no election of acts is required, to instruct the jury in effect that a conviction should result from proof beyond reasonable doubt of any of such acts.

Appeal from District Court, Beaver County; Arthur G. Sutton, Judge.

Arthur O. Smith was convicted of statutory rape, and he appeals. Reversed and remanded.

Dickson & Dickson, of Beaver, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

MATSON, J. This is an appeal from the district court of Beaver county, wherein the defendant, Arthur O. Smith, was convicted of the crime of rape, alleged to have been committed upon his daughter, Leola Mary Smith, a child under the age of 14 years.

Numerous assignments of error are relied upon for reversal of this judgment; but, in view of disposition made of this appeal, it will be necessary only to consider one of such assignments.

The information charged the offense to have been committed on or about the 1st day of August, 1918.

[1] The evidence disclosed that the prose-

cutrix reached the age of 14 years on the 4th day of September, 1918. To obtain a conviction the prosecutrix testified to several acts of sexual intercourse with the defendant, beginning some time between Thanksgiving and Christmas of 1916, and extending up until a short time before the filing of this charge in March, 1919.

The prosecution made no election as to which particular act of sexual intercourse upon which reliance would be had for a conviction. The trial court did not require the prosecution to elect, for a conviction, upon any particular act of intercourse between the defendant and the prosecutrix, prior to the time the prosecutrix reached the age of 14 years. In the court's general charge to the jury the following instruction was given:

"Any unmarried female under the age of 16 years is incapable of consenting to an act of sexual intercourse. The act of sexual intercourse therefore accomplished by a male with a female, under the age of 16 years, not the wife of the perpetrator, is rape, whether the perpetrator obtain her consent or not. Rape committed by a male over 18 years of age upon a female under the age of 14 years, or incapable, through lunacy or unsoundness of mind, of giving legal consent, or accomplished with any female by means of force overcoming her resistance, or by means of threats of immediate and great bodily harm, accomplished by apparent power of execution, preventing such resistance, is rape in the first degree. Rape in the first degree is punishable by death or imprisonment in the penitentiary, not less than 15 years, in the discretion of the jury. If therefore you believe from all the evidence, facts, and circumstances in this case, beyond reasonable doubt, that the defendant accomplished sexual intercourse with the prosecuting witness, Leola Mary Smith, in said Beaver county, at any time, within three years from the filing of said information, that the said Leola Mary Smith was not at that time the wife of the said defendant, and was at that time under the age of 14 years, then your verdict should be that the defendant is guilty of rape in the first degree."

The foregoing instruction was excepted to by defendants' counsel. We think the giving of same over the objection and exception of defendant constituted a reversible error in this case.

[2] Rape is not a continuous offense. On the evidence in this case every act of sexual intercourse testified to by the prosecutrix constituted a distinct crime, and the trial court should either require the prosecution to elect upon which of such acts it would rely for a conviction, or else the court would have treated the act of which the state first introduced evidence to tend in any degree to prove the offense as an election and should have given a specific instruction limiting the

jury to a consideration of this particular act as a basis for a conviction. 22 R. O. L. p. 1227, § 63. This the court did not do, but, on the contrary, instructed the jury that—

If they believed from all the evidence beyond a reasonable doubt "that the defendant accomplished sexual intercourse with the prosecutrix, Leola Mary Smith, in said Beaver county at any time within three years from the filing of said information, that the said Leola Mary Smith was not at that time the wife of said defendant, and was at that time under the age of 14 years, then your verdict should be that the defendant is guilty of rape in the first degree."

It is apparent that on this instruction the jurors were permitted to base a conviction upon any of the numerous acts of sexual intercourse testified to by prosecutrix as occurring between her and the defendant before she reached the age of 14 years, all of which occurred within three years from the filing of the said information. Manifestly one of the said jurors may have believed the defendant guilty, basing his belief upon proof of an act of sexual intercourse testified to by prosecutrix, entirely different from that upon which another of said jurors based his belief, so therefore, while the twelve jurors may have unanimously arrived at the conclusion that the defendant was guilty of the crime charged, there is no way of determining by this record that each of said jurors based his conviction of guilt upon the same act of sexual intercourse. See *Montour v. State*, 11 Okl. Cr. 376, 145 Pac. 811.

It has been repeatedly held in this state that a person may be tried for, and convicted of, only one offense at a time, and while proof of other acts of intercourse, in a prosecution for statutory rape occurring both prior to and subsequent to the one relied upon for a conviction, may be proved for the purpose of showing the intimate relations existing between the parties, etc., the conviction must be based solely upon one of such acts and not all of them. *Gracy v. State*, 13 Okl. Cr. 643, 166 Pac. 442.

An examination of this record discloses that this case was not tried with reference to any particular act of sexual intercourse alleged to have been committed by the defendant with the prosecutrix on or about the 1st of August, 1918, or any other particular act of sexual intercourse occurring within three years preceding the filing of the information and at a time when the prosecutrix was under the age of 14 years. But the trial court in not requiring the state to elect upon one such particular act, and in submitting the question of guilt on all of such acts, clearly committed reversible error, as this conviction could be pleaded in bar of a subsequent prosecution based on any definite act of sexual intercourse alleged to have occurred

between the defendant and the prosecutrix in Beaver county, prior to the date that the prosecutrix reached the age of 14 years.

For reasons stated, the judgment is reversed, and cause remanded for further proceedings not inconsistent with this opinion.

The warden of the penitentiary at McAlester will deliver the defendant to the sheriff of Beaver county, who will hold him in custody until otherwise ordered according to law.

DOYLE, P. J., and BESSEY, J., concur.

JONES v. STATE. (No. A-2878.)

(Criminal Court of Appeals of Oklahoma.
March 5, 1921. Rehearing Denied
Nov. 19, 1921.)

(Syllabus by the Court.)

1. Jury \S 131(15)—In examining veniremen, neither party may ask the jurors how they would decide on an assumed state of facts.

In the examination of a venireman as to his qualifications to sit as a juror, neither party has the right to assume the facts of the case in detail, and assume that the court will instruct the jury in a particular way, and then call upon the prospective juror for a statement as to how he would decide under this supposed state of the evidence. This might be calling for a prejudgment of the case, and the sustaining of an objection to such questions is not error.

2. Jury \S 131(2, 4)—Examination of jurors in sound discretion of trial judge; parties should be given latitude to enable them to procure disinterested jury; limitation of examination of jurors in murder case held not an abuse of discretion.

The manner and extent of examinations of jurors, touching their qualifications, cannot be prescribed by any definite, unyielding rule, but rests to a large extent in the sound discretion of the trial judge. In the examination, such latitude should be given the parties as will enable them to procure a jury free from outside influence, bias, or personal interest. *Held*, that the limiting of the examination of Juror Brown was not an abuse of the court's discretion.

3. Criminal law \S 655(5), 1166½(12)—Court should not make disparaging remarks concerning attorneys; disparaging remarks by court concerning attorneys held not prejudicial.

The trial court should refrain from making disparaging personal remarks concerning any of the attorneys engaged in the trial. The attorneys, on the other hand, should refrain from unnecessarily irritating the court. A trial in a court of justice should not be permitted to degenerate into a contest of wits or skill between the court and attorneys, or between the attorneys themselves. *Held*, in this case, that the

attorneys for defendant were in some measure responsible for the disparaging remarks of the court, and that the remarks so made, under all the circumstances, were not prejudicial.

4. Witnesses \S 337(5)—Other offenses inadmissible where good character not put in issue by defendant himself; good character of defendant may be impeached by general reputation only.

Unless the defendant himself puts his good character in issue, it is not admissible, on cross-examination of the defendant, to interrogate him as to the commission of other particular crimes or offenses not connected with the crime for which he is being tried. If the good character of the defendant is made an issue by the defendant, it may be impeached only by showing that his general reputation was bad, and not by evidence of particular acts.

5. Criminal law \S 1170 $\frac{1}{2}$ (1)—Interrogation as to other offenses prejudicial only where defendant injured; interrogatories as to other offenses held nonprejudicial error.

As to whether the error in permitting a defendant to be interrogated about several other specific acts of wrongdoing, not within the issues, is prejudicial depends upon whether, from an examination of the entire record, it appears that the defendant was injured by such testimony, or whether the jury considered the same in arriving at their verdict. *Held*, in this instance, that the propounding of the questions complained of was not prejudicial error.

6. Criminal law \S 1165(1)—Test as to harmless error in admission of incompetent evidence stated.

As to the tests in determining whether incompetent testimony is harmless, see the text of this opinion.

7. Criminal law \S 768(4)—Homicide \S 340(3)—Instruction that jury should fix punishment at life imprisonment error; defendant cannot complain of errors prejudicial to state only.

The giving of an instruction to the jury that, if they should find the defendant guilty of murder, they should fix his punishment at life imprisonment in the state penitentiary, is error. By statute it is provided that the punishment for murder shall be death or imprisonment for life, at the discretion of the jury; but, since this error was prejudicial only to the state, the defendant cannot be heard to complain.

8. Homicide \S 300(3)—Instructions as to self-defense held not insufficient.

Instructions as to self-defense and apparent danger examined, and *held* sufficiently, if not correctly, stated.

9. Criminal law \S 1166 $\frac{1}{2}$ (12) — Remarks of court provoked by defendant's attorney held not ground for reversal.

Where the defendant's counsel, in the presence of the jury, unnecessarily provokes the court to make disparaging remarks of and towards the attorney for the defendant, culminating in a fine or threatened fine for contempt of court, the defendant will not be heard to complain of such action of the court, unless it ap-

pears that it probably operated to the injury of the defendant.

Appeal from District Court, Texas County; W. C. Crow, Judge.

Tillman Jones was convicted of murder, and he appeals. Affirmed.

J. S. Harris, of Oklahoma City, W. H. Sullivan, of Fort Sumner, N. M., and John L. Gleason, of Enid, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

BESSEY, J. The plaintiff in error, Tillman Jones, hereinafter referred to as the defendant, was on the 1st day of May, 1915, informed against in the district court of Texas county, Okla., for the murder of Paul Herzog on the 29th day of November, 1914. Upon trial in said court, defendant was on the 27th day of May, 1916, convicted of murder, and his punishment fixed at life imprisonment in the state penitentiary.

The evidence on the part of the state discloses: That prior to the day of the homicide there had been no ill feeling between the defendant and the deceased; that the deceased was a school teacher, a young man of exemplary habits, who was not in the habit of drinking intoxicating liquor or using profane language. That immediately prior to the date of the shooting the deceased lived a distance of about two miles from the father of the defendant, with whom the defendant had for some time been making his home. That on this day the deceased had been to Tyrone, in company with others, and that on their return, about sundown, he left their conveyance some distance from his home and was proceeding on foot, carrying a sack of flour and a package of salt, when he overtook the defendant, who, after some remarks, demanded of the deceased that he hitch up his team and take defendant and his trunk to Tyrone. That the defendant was in an intoxicated condition, and stated that he had had a dispute with his father, who did not want him to go to Tyrone. That the defendant had a pistol, and threatened to shoot the deceased if he did not go. That the deceased then carried the flour and salt to his house, and there met his wife and called her attention to defendant's intoxicated condition. That he then went to the stable, hitched up a team of mules to a wagon, and, after again going to the house and giving his pocketbook to his wife, drove away with the defendant in the direction of the home of the latter. That on their arrival there the defendant's father objected to his taking the trunk, but later the trunk was placed on the wagon, and deceased then stated that he did

not want to take the trunk if the father objected. After some discussion the deceased got up on the wagon, preparatory to driving off, and invited the defendant to get on also; that the defendant refused, stating that he would walk down to the gate and close it after they drove through. The deceased got off of the wagon, urging the defendant to get on, and as he approached the defendant, the defendant shot him with his pistol, the ball entering his abdomen, severing the intestines in a number of places, resulting in death some hours later. The defendant, immediately after the shooting, fled, and some months later was apprehended and arrested in Tennessee. The pistol which he had used was found some distance from the scene of the tragedy. The deceased had no gun or other weapon, and had made no threats towards the defendant. That the deceased was carried into the Jones house, physicians were called, and his relatives notified. That the physicians, after their arrival, decided that an operation was necessary, and as soon as preparations could be made they placed deceased under the influence of an anesthetic, opened up the abdomen, and sewed up the punctures in the intestines. That before the operation the father and sister of the deceased arrived; that the deceased knew that he could not recover, and before the operation made a statement to his father, in the presence and hearing of his sister, relating how the difficulty took place. That it required approximately an hour and a half to complete the operation, and soon after the deceased came from under the influence of the anesthetic, at about 1 o'clock of the morning following, a hypodermic injection of H. M. C. was administered. That some time following this the deceased made a statement as to how the difficulty occurred to his mother-in-law; and later still, at about 5 o'clock of that morning, he made another statement, a portion of which was reduced to writing. These dying statements all indicated that the shooting was done without provocation.

The defendant admitted the killing, and claimed justification. He admitted that he had seen the deceased a few times, and knew him slightly. That he went over to the home of the deceased at about sundown on the evening of the 29th of November, 1914, to get him to haul his trunk to Tyrone, and that the deceased overtook him a short distance from his house. That he told the deceased that he wanted him to take him and his trunk to Tyrone, and that he gave him \$1 for that purpose. That he had a pint of whisky with him, and that he gave deceased a drink just after they met; that before leaving the defendant had taken a drink or two. That they hitched up the team of mules and drove over towards the defendant's home. That on the way over the deceased

took two more drinks, and that somewhere along the road the deceased said to the defendant, "Jones, I understand that you said that I stole some of your fruit down there," and that the defendant replied to the effect that it looked like either he or some of the Hoeckendorf boys did. That the deceased then cursed him, and started towards him, whereupon defendant got off the wagon and ran back up the road a distance of about 100 yards, pursued by the deceased. That the deceased failed to overtake the defendant, and, after using more profane language, returned to the wagon, and that the defendant followed and they both got on the wagon and pursued their journey towards the Jones home. That after arriving at his home they both went into the house, and that the deceased continued cursing and using profane and abusive language in the presence of defendant's father and mother. That defendant's gun and scabbard were in the cupboard. That he got them, and buckled them around him, after which deceased and he together loaded the trunk on the wagon. The deceased got on the wagon and picked up the lines and invited the defendant to get on. Defendant refused and said he would walk down to the gate and shut it. After some talk the deceased said he didn't believe that he would take the defendant to town; that the defendant insisted that he do so, and that the deceased then cursed the defendant again and said, "You accused me of stealing, and I am not going to stand for it," and got off the wagon and started towards the defendant. That defendant retreated, and told the deceased to stop, and that the deceased then reached in his bosom and threatened the defendant with what seemed to be something bright in his hand. That the deceased kept advancing, and that the defendant then shot him. The defendant then related the details of his flight to Tennessee.

The defendant admitted that he had drunk whisky nearly all of his life; that he had been drinking on that day; that he had whisky at home, and filled up his pint bottle before he started to the home of the deceased; and that he had taken a drink or two before starting.

The only eyewitness to the shooting was Herman Hitchcock, a brother-in-law of the defendant. He testified that the shooting occurred in front of the Jones home, about 30 minutes after the arrival there of the two men. That the night was clear, as well as he could remember, and that the moon was shining. This witness corroborated the defendant as to the abusive and profane language alleged to have been used by the deceased, and stated that just before the fatal shot was fired the deceased was advancing towards the defendant, in a threatening manner, reaching in his inside overcoat pocket,

and that he had something bright in his hand.

A number of witnesses testified as to what took place after the shooting. Expert and other witnesses testified as to the mental condition of the deceased after the shooting and before his death, as affecting the credibility of his dying statement. The father and mother of the defendant did not testify. Other than above stated, there was no testimony that the deceased had a weapon, and so far as this record shows, none was found on his person or elsewhere.

The record in this case is ponderous, containing 826 pages. The defendant urges 48 assignments of error. From an analysis of defendant's brief, we find that these errors may be classified and grouped as follows:

(1) Error of the court in refusing to permit the defendant to make a sufficient examination of the jurors touching their qualifications.

(2) Error of the court in permitting the county attorney and special counsel for the state to make prejudicial remarks about the defendant and his counsel, and permitting prejudicial questions to be propounded, indicating that the defendant was a dangerous man.

(3) Error of the court in giving erroneous instruction as to the death penalty.

(4) Errors of the court in the admission of incompetent and prejudicial testimony concerning the alleged dying declarations of the deceased.

(5) Errors of the court in giving certain erroneous instructions, and the refusal of the court to give the instructions offered by the defendant.

(6) Error of the court in fining one of the attorneys for the defendant for contempt of court, in the hearing and presence of the jury.

First. This was not such a trial as would ordinarily excite wide publicity or make it difficult to procure an impartial jury. There were 33 persons examined as to their qualifications as jurors, covering 222 pages of this record. The friction and hostile feeling between the court and the attorneys for the defendant, which appears at various times during the progress of the trial, as shown by this record, first manifested itself and became acute because, in this examination of prospective jurors, the attorneys for the defendant would take the information and the list of witnesses which it contained and ask each man examined concerning his relationship with each of the witnesses, and propound assumed instructions which the court would give, asking the jurors whether, if so instructed, they would be governed by such instructions. Several times the court suggested that they should not at that time assume what his instructions would be. Finally the

court urged that such prolonged examination cease, culminating in the conflict complained of between the court and the attorneys for the defendant, relating to the examination of Juror Brown, who had before that time been examined at great length, and, as probably appeared to the court, to a sufficient extent. The court then announced that he could and would take the examination out of the hands of the attorneys for the defendant, and refused to allow them to ask this juror further questions, as follows:

"Q. You understand that that (reasonable doubt and presumption of innocence) is a valuable and legal right which the law extends to a defendant, and that the jury or juror has no right to withhold from him, do you?"

"By the Court: I think you gentlemen go into the law and argument, and I am going to limit this time on the examination—the law doesn't give you any right to do this, and unless you abbreviate it, I am going to limit the time. You go into the law and arguments, and have no business of doing so in this examination. It is rather in the nature of grand-standing, and you get out here and take up too much time; if you gentlemen want to do any advertising, anything of that kind, you can do so in the newspapers.

"By Mr. Gleason: We except to the ruling of the court and the remarks of the court.

"By the Court: I really have the right to take it out of your hands, and that is what I will do if you don't take up less time. I will just examine these jurors myself. I can examine the whole of them in 30 minutes. Let's abbreviate this; if you want to examine, let's get through with it.

"By Mr. Gleason: Well, if the court please, I confess my inability to examine in accordance with any one but my own ideas. I am willing—

"By the Court (interrupting): I think you have asked this fellow enough questions, both sides, for the examination of him have asked him about everything that could possibly be connected with the case in any way.

"Q. (addressing Mr. Brown). You would follow the instructions in connection with this case, would you, Mr. Brown? A. Yes, sir.

"Q. And base your opinion solely on the law and evidence, as your verdict? A. Yes, sir.

"Q. You would come to no conclusion until the case was finally submitted to you? A. No, sir.

"Q. You have no preconceived opinion of this case that will interfere with your verdict? A. No, sir.

"By the Court: I don't see that there is anything else that amounts to anything in connection with this examination here.

"By Mr. Gleason: The defendant excepts to the remarks of the court, criticizing counsel for defendant and further excepts to the remarks of the court—to the action of the court in taking from the defendant the right to interrogate — (Addressing the court:) We have not completed our examination of the witness, if the court please.

"By the Court: Yes; you have and you ain't going to examine him any more.

"By Mr. Gleason: We except to this, and ask

the right to further examine. (Addressing the court:) Does the court refuse our right?

"By the Court: Yes, sir.

"By Mr. Gleason: Note our exception."

[2] It has often been held that the manner and length of such examinations rest in the sound discretion of the trial judge. The length, latitude, and manner of such examinations will necessarily vary in different cases, and it would be impossible for this court to prescribe a definite and unyielding rule to be followed in future cases. 24 Cyc. 346; 16 R. C. L. 281, § 97.

[1] The record discloses that hypothetical questions had been propounded to this juror, assuming questions of law and of fact, in which the juror was asked what his decision would be. It is generally held that a party examining a venireman has no right to assume the facts of the case on trial, and to ascertain the juror's opinion on them in advance; and that a hypothetical question put to a venireman, calling for his decision on a question of law and for a statement by him as to the party in whose favor he would decide it in a supposed state of the evidence, calls for a prejudgment of the case, and that the sustaining of an objection to such a question is not error. *State v. Huffman*, 86 Ohio St. 229, 99 N. E. 295, Ann. Cas. 1913D, 677, and cases cited in notes and annotations.

We think that the examination of this juror, as a whole, showed that he was qualified, and an examination of the 222 pages of this record relating to the qualifications of the jurors shows that the jury, as finally obtained, possessed the requisite qualifications, and was fair to both sides, and that no objectionable juror, from the standpoint of the defendant, was retained.

We by no means approve of the manner and attitude of the court in limiting the examination of this juror, but we hold that, under the circumstances in this case, there was no such abuse of the court's discretion in so limiting this examination as would amount to prejudicial error. Indeed, in view of all that had transpired previously, the hostile attitude of the court and the attorneys for the defendant may have had, and probably did have, a tendency to operate to the advantage of the defendant. The disparaging remarks of the court at this time, in connection with those appearing later in the record, will be treated further in another paragraph of this opinion.

Second. After the unfriendly attitude between the trial judge and counsel for the defendant was manifested in the examination of the jurors, and immediately after the jury was selected and qualified, the county attorney proceeded to make his opening statement to the jury. From this part of the record we get the impression that defendant's attorneys, instead of making an effort

to pour oil on the troubled waters, repeatedly interrupted the county attorney's opening statement to the jury by making unnecessary and frivolous objections to portions thereof, to such an extent that he was unable to make to the jury a connected, orderly statement of the state's theory of the case. Frequently the county attorney, the court, and counsel for defendant were all talking at the same time. The opening statement of the county attorney was short, but, so near as we can tell from the dialogue that took place during these interruptions, there were 14 objections made and argued to portions of this statement, several of which were without merit, as will be seen from the excerpts following:

"The evidence will further show that, just immediately after the shot, Tillman Jones was permitted, and we believe the evidence will show that he was aided, to escape. (Objection; overruled; exception.)"

"Gentlemen of the jury, the evidence will show that, after the officers were notified, that they went to the Jones home and that an effort was made to conceal the identity of the murderer in this case. (Objection; overruled; exception.)"

The county attorney then modified his statement by changing the word "murderer" to the expression, "the man who did the shooting in this case."

"The evidence will show that this defendant became a fugitive from justice, and that the sheriff and other officers of this county made a search for him in many different states, and the evidence will show that the Governor of this state put a price upon the head of this defendant. (To this an objection was sustained, as to the Governor's offer of a reward, and the jury admonished not to consider it.)"

"The evidence will further show that the defendant on trial here is a man who carried a gun, and especially so at public occasions. (Objection; overruled; exception.)"

"The evidence will show that Paul Herzog (the deceased) knew that this defendant, Tillman Jones, carried a gun. (Objection; overruled; exception.)"

"The evidence will show that prior to the occurrences of this day the defendant had threatened the life of Paul Herzog.

"By the Court: The statement will not be taken from the jury at this time."

"The evidence will further show that Paul Herzog was a law-abiding citizen. That he was a peaceful man, and a man above the ordinary in his habits of life. That he never drank liquor or used tobacco, and in fact prided himself on his personal habits.

"By the Court: Well, I don't know that the tobacco part cuts any figure. The liquor proposition I will not eliminate for the present."

At the close of the opening statement, the court instructed the jury as follows:

"The county attorney is no witness in this case. His statement is simply an outline of what he expects to prove in the case, and no

proof, in any sense of the word, and not to be taken as such against the defendant."

It is sometimes difficult, and often impossible for the representative of the state to state in advance definitely what the testimony will be. At this stage of the proceedings the county attorney may not know whether all the witnesses for the state will be present, or whether he will be able to develop the case in strict accordance with his theory. There is always the possibility of newly discovered evidence during the course of the trial, and that the defendant may inject into the case some issue not anticipated. An opening statement is made to enable the jury to understand the issues before them, to more readily see the relation of the testimony introduced as affecting the issues presented. Subject to the control of the trial judge, the county attorney may state the facts which he expects to prove. At this stage it may be impossible for the trial judge to know whether certain purported facts are or will be admissible as evidence for the jury.

If the defendant requests it, or on his own motion, the court may at the close of the opening statement admonish the jury that the statements of the county attorney are not to be considered as evidence in the case, but that the statement made by him is merely for the purpose of giving them a clear conception of the issues about to be tried. *Boucher v. State*, 4 Okl. Cr. 576, 111 Pac. 1006; 26 R. C. L. 1031.

In this case, at the close of the opening statement of the county attorney, the jury were admonished by the court that the county attorney was not a witness in the case, and that his statements were not proof, in any sense of the word, and should be taken simply as an outline of what the state expected to prove. We have examined this opening statement in detail, and the various objections to the parts complained of, and, applying the rule above stated, we are of the opinion that these objections are without substantial merit, and that the overruling of them was not prejudicial error.

In order to throw some further light on the attitude of the court and the attorneys for the defendant towards each other, extracts of the examination of witnesses are given below.

The first witness for the state was Mrs. Herzog, widow of the deceased. After referring to the day of the tragedy, the witness was asked:

"Well, what happened that day? (Objection.) What did you notice about your husband's appearance that was unusual, if anything? (Objection.) State to the jury what you noticed about the condition of Tillman Jones, if anything, when he came up the road with your husband. (Objection.) Did you notice anything peculiar about his walk? (Objection.)"

After the witness had testified that she went to her husband after he was shot, she was asked these questions:

"Now state what was done on that occasion, and who was present? (Objection.) What was the condition of your husband when you saw him? (Objection. Withdrawn.) State in detail what you noticed. (Objection.) What was his condition? (Objection.) Did you see spot where the bullet penetrated his body? Yes, sir; after the operation. Describe that entrance to his body—where was it? (Objection.) How long did your husband, Paul Herzog, live? (Objection.)"

The next witness examined was Augusta Hoeckendorf. During the course of her examination these hostilities became acute. An extract from her testimony is as follows:

"By the Court: Q. Did he state anything to you with reference to his condition, as to whether— A. (interrupting). Yes, sir; he did.

"Q. Well, you may tell as to that.

"By Mr. Gleason: Objected to as incompetent, irrelevant, and immaterial. Objected to on the further ground that it calls for a conversation out of the presence of the defendant; and objected to on the further ground that it is hearsay.

"By the Court: It don't make any difference, whether the defendant was present or not, that kind of a declaration.

"By Mr. Gleason: Note our exception, and we except to the remarks of the court.

"By the Court: Q. If he stated anything with reference as to his condition—as to whether or not he realized his condition—you may state that.

"By Mr. Gleason: The same objection to that question.

"By the Court: Same ruling.

"By Mr. Gleason: Note our exception.

"By the Court: Go ahead.

"A. Well, I asked him how that came he was laying—

"By Mr. Gleason (interrupting): Now, if the court please, that is not answering the question.

"By the Court: I am going to let her go ahead anyway.

"By Mr. Gleason: Note our exception.

"A. Then he told me that Mr. Jones came to his place and got him, and he says, 'Mr. Jones had two guns with him, and he was drunk,' and Mr. Jones wanted him—

"By the Court (interrupting): Mrs. Hoeckendorf, before going further, I want you to tell me if he said anything with reference to his condition.

"By Mr. Gleason: If the court please, I would like permission—

"By the Court (interrupting): You are not going to talk while I am, young man—

"By Mr. Gleason (interrupting): Well—

"By the Court (interrupting): I will fine you \$10. You are going to stop that shooting off your mouth while I am talking. You understand I am trying to run this thing without your assistance, and while I am talking I want you to keep your mouth shut; do you understand? If you don't understand, you will do it before you try any more cases here in this courthouse.

"By Mr. Gleason: We except to the remarks of the court. Now, if the court please, may I ask permission, or may I not have permission, to ask leave to strike out that portion of the witness' testimony in which she attempted to answer your question. May I have the permission—

"By the Court: You may do that at this time.

"By Mr. Gleason: I now move the court to strike out that portion of the witness' testimony in which she undertook to detail what Paul Herzog had stated to her as to the defendant going to his place on that day, and having two guns on his person, and being drunk, on the ground that it is not responsive to the question; on the further ground that it is hearsay, no proper foundation having been laid.

"By the Court: Q. Now, Mrs. Hoeckendorf—

"By Mr. Gleason: Will the court rule on that?

"By the Court: I will after a little. (Continuing:) Q. In this conversation you are talking about, did Mr. Herzog say what his condition was? Did he say anything with reference as to how he was getting along, or whether or not he realized? A. He said to me that he was shot, and that he was bleeding.

"Q. Well, did he say anything else?

"By Mr. Gleason: If the court please—

"A. (interrupting). And that he—

"By Mr. Gleason (interrupting and continuing): May I enter the same request?

"A. (continuing). That he didn't know whether he would get through—

"By the Court (interrupting): I will strike this if there is not—

"A. (interrupting and continuing). He said he was bleeding, and that he thought he wouldn't get through, and I told him then that he should tell his wife about things, that she would know how she was standing.

"By the Court: Q. He told you then that he was bleeding, and that he thought he wouldn't get well? A. Yes; and I told him that he should tell his wife, so that she would know the things, and how she was standing."

This synopsis of portions of the record is given to show that there was more or less continued provocation on the part of the defendant's attorneys to irritate the court and call forth the disparaging remarks of which the defendant complains, leading up to the imposition of the fine or threatened fine of one of the defendant's attorneys for contempt of court. Whether or not the fine was actually imposed and paid does not appear from the record.

The situation here may be likened to incidents that sometimes occur in our national sport of baseball, where it sometimes happens that it will be to the advantage of one side or the other to make the umpire mad so as to excite him and disturb his mental poise.

[3] A trial in a court of justice should not be permitted to degenerate into a contest of wits or skill between the court and the attorneys, or between the attorneys themselves. The court should be more than a mere umpire to sit and watch the contest. In the interests of justice, and for the full develop-

ment of the facts, he has a right to interrogate witnesses, and generally to see that both sides have a fair and impartial hearing. While doing this the court should not do anything to humiliate any attorney in the discharge of his duty. Neither should any attorney in the case do anything to indicate that it is his purpose to irritate the court into the commission of error. *McSpadden v. State*, 8 Okl. Cr. 489, 129 Pac. 72; *Miller v. Oklahoma*, 149 Fed. 334, 79 C. C. A. 268, 9 Ann. Cas. 389; *Thompson on Trials*, § 355; *Wigmore on Evidence*, § 2484; *Wharton on Evidence*, p. 947.

After this the trial seems to have progressed with less friction. Fewer objections were interposed, and the defendant was given wide latitude in the cross-examination of witnesses and in the introduction of his own testimony. Throughout the course of this trial the court seems to have decided many doubtful questions in favor of the defendant. The court assumed no hostile attitude towards the defendant or his side of the case, but such hostile feeling as was manifested was directed towards his attorneys, and that the reason for such feeling was personal was probably considered by the jury; so that, under all the circumstances disclosed by this record, we hold that the rights of the defendant were not prejudicially affected by the remarks and conduct of the court.

[4] We next notice the objections to the alleged prejudicial remarks of counsel for the state and the alleged incompetent testimony reflecting on the character of the defendant. The defendant went on the witness stand in his own defense, reciting facts tending to show that he took the life of the deceased in his own necessary self-defense. Up to this time nothing relating to the character or reputation of the defendant had been developed in the evidence, until on cross-examination, over the objections of the defendant, the state was permitted to ask the following questions:

"Did you at any time threaten to shoot Fred Crispens and pull a gun on him?"

"Is it not true that you were wearing a gun and belt at the Liberal fair?"

"Is it not true that you shot your wife?"

"Isn't it true that you shot and killed Lum Hickey?"

"Did you at any time pull a gun and threaten to shoot Tom McNarney?"

These questions were all answered by the defendant in the negative, and it was brought out that at this time the defendant's wife and Lum Hickey were living. No effort was made by the state to prove these charges.

It is not admissible to show the bad character of the defendant until after the defendant himself puts his good character in issue, and then only by showing his general reputation, and not by particular acts. Evidence of other criminal acts not in issue in

the case should be excluded; such testimony has a tendency to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the charge at issue, or to take proof of it as justifying the defendant's condemnation, irrespective of his guilt of the crime for which he is being tried. Moreover, the use of alleged particular acts, ranging over the entire period of the defendant's life, makes it impossible for him to prepare to refute the charges, any or all of which may be mere fabrications. The rule as above stated has received the judicial sanction of the courts of this country for more than a century. Underhill on Evidence, § 82; 1 Wigmore on Evidence, 233; 10 R. C. L. 963; Porter v. State, 8 Okl. Cr. 64, 126 Pac. 699; Corliss v. State, 12 Okl. Cr. 526, 159 Pac. 1015.

[5] Applying this rule of the inadmissibility of evidence as to offenses not in issue, the propounding to the defendant on cross-examination of the questions above quoted was error. It then becomes the duty of this court to determine whether, under all the circumstances in this case, this error was prejudicial.

This court has many times construed our statute of harmless error (section 6005, R. L. 1910) with reference to the admission of incompetent testimony. In a number of cases this court has held that the admission of testimony tending to show that the defendant was guilty of other specific offenses was prejudicial error. *Watson v. State*, 7 Okl. Cr. 590, 124 Pac. 1101; *Rogers v. State*, 8 Okl. Cr. 226, 127 Pac. 365; *Reams v. State*, 12 Okl. Cr. 363, 157 Pac. 273; *Scott v. State*, 13 Okl. Cr. 225, 163 Pac. 553; *Byars v. State*, 15 Okl. Cr. 308, 176 Pac. 253. On the other hand, in a number of cases this court has held that the propounding of such questions or the admission of such testimony was not prejudicial error. *Byers v. Territory*, 1 Okl. Cr. 698, 100 Pac. 261, 103 Pac. 532; *White v. State*, 4 Okl. Cr. 143, 111 Pac. 1010; *Fulkerson v. State*, 189 Pac. 1092.

[6] The test of whether such testimony is prejudicial or not may be stated thus:

"Before this court can reverse a conviction upon the ground that the trial court erred in the admission or rejection of evidence, or in its instructions to the jury, we must further find, from an inspection of the entire record, that appellant was injured thereby; and to determine this issue the court must consider the question as to whether the appellant is guilty * * * of the offense charged." *Fowler v. State*, 8 Okl. Cr. 130, 126 Pac. 831.

In order better to comprehend the scope and purpose of the harmless error statutes of this and other states, and the federal statute covering the same subject, it will be well to read the history of these enactments brought about by the American Bar Association, a portion of which appears in *Byers v. Territory*, supra.

In this case the testimony of the defendant himself, if believed by the jury, shows no justification for the homicide. On his testimony alone the jury would have been justified in rendering a verdict for murder, and upon an examination of the whole record, applying the test above given, we hold that the error in permitting these improper questions to be propounded to defendant was not prejudicial, under all the circumstances in this case. We by no means approve of the conduct of the court and the prosecuting attorney in this regard, and, while we hold in this case that the asking of these improper questions did the defendant no harm, the admission of such testimony in subsequent cases might be prejudicial in the extreme, and be reversible error.

[7] Third. The court arbitrarily instructed the jury that, in the event they found the defendant guilty of murder, they should fix his punishment at imprisonment for life in the state penitentiary. Section 2319, Revised Laws of Oklahoma 1910, provides as follows:

"Any person convicted of murder shall suffer death, or imprisonment at hard labor in the state penitentiary for life, at the discretion of the jury. Upon trial of an indictment for murder, the jury, if they find the defendant guilty, must designate in their verdict whether he shall be punished by death or imprisonment for life, at hard labor, and the judgment of the court shall be in accordance therewith. But upon a plea of guilty the court shall determine the same."

The court, in a criminal case, has no right to assume the functions of legislation. If the jury should find the defendant guilty of murder, as they did in this case, it was for the jury, under the provisions of the statute above quoted, to fix the punishment at death or life imprisonment, at their discretion, and the court's instruction depriving them of this discretion was error. But of this the defendant will not be heard to complain, since it operated to the advantage of the defendant, and was prejudicial only to the rights of the state. *Hunter v. State*, 6 Okl. Cr. 446, 119 Pac. 445; *Carter v. State*, 6 Okl. Cr. 232, 118 Pac. 264.

Fourth. There were 11 different witnesses who testified concerning the dying declarations of the deceased. This character of evidence came up at intervals all through the trial, without there having first been laid a proper predicate for its admission, in the absence of the jury. It would serve no good purpose to set out in detail the evidence offered, the numerous objections interposed, and the controversies and dialogues indulged in by the court and counsel.

The admissibility of such evidence is ordinarily a question of law for the court, and the court should require the necessary preliminary proof to be first made in the absence of the jury. If this rule had been adhered

to in this case, it would have eliminated much of the controversy and friction that manifested itself from time to time between the court and counsel, as shown by this record. But, since the competency of such declarations, under our practice, is ultimately for the jury, and since the record in this case shows that there was ample evidence to justify the admission of these dying declarations, the irregular manner of their admission, under the circumstances, was not prejudicial. *Hawkins v. U. S.*, 3 Okl. Cr. 651, 108 Pac. 561; *Morris v. State*, 6 Okl. Cr. 29, 115 Pac. 1030; *Elliott v. State*, 194 Pac. 267; *Beason v. State*, 195 Pac. 792, decided but not yet officially reported.

[8] Defendant complains of the following instruction:

"You are further instructed that, while a person need not be in actual imminent peril of his life being taken, or of great personal injury being done to him, yet, if the jury believe that the defendant had reasonable grounds to believe, and did believe, from the facts as they reasonably appeared to him at the time, that the danger was so urgent and pressing or apparently so urgent and pressing that the defendant could not avoid taking such steps as he did to protect himself, then it was justifiable, and you should find the defendant not guilty."

It is contended that this instruction is erroneous, in that it required the jury to believe this state of facts before the defendant could be acquitted. We do not think that this instruction is susceptible of such interpretation, and that the question of apparent danger and self-defense was sufficiently, if not correctly, stated. *Ostendorf v. State*, 8 Okl. Cr. 360, 128 Pac. 143; *Johns v. State*, 8 Okl. Cr. 585, 129 Pac. 451.

[9] Sixth. Reverting again to the imposition of a fine, or threatened fine, for contempt upon one of the attorneys for the defendant, in the presence of the jury, the record shows that one of the state's witnesses had testified that, after the effects of the surgical operation performed on the deceased had passed, to such an extent that he had regained consciousness, the deceased then told the witness how the tragedy came about. In the course of the many questions, interruptions, and objections, an attempt was made to have the witness state whether the deceased said anything indicating that he knew that his wounds were fatal, or that he did not expect to recover. The court interrupted the examination, as before quoted, culminating thus:

"By the Court (interrupting): I will fine you \$10. You are going to stop that shooting off your mouth while I am talking. You understand I am trying to run this thing without your assistance, and while I am talking I want you to keep your mouth shut; do you understand? If you don't understand, you will do it before you try any more cases here in this courthouse."

Further than this the record does not show whether a fine for contempt was in fact imposed or enforced. From all that preceded and all that followed this incident, as shown by this voluminous record, we are led to believe—and the jury must have believed—that the attorneys for the defendant made little effort to assist the court in conducting this trial in an orderly manner. The remarks of the court were unfortunate, but the attitude of the attorneys was in some measure responsible for this. The defendant and his attorneys cannot be heard to complain of matters brought on by their own wrong. If the rule were otherwise, any defendant in a criminal case would have it within his power to inject reversible error into his case and so defeat the ends of justice. We hold, under all the circumstances in this case, that the conduct of the court complained of was not prejudicial.

The judgment of the trial court is affirmed.

DOYLE, P. J., and MATSON, J., concur.

STATE v. HARDY. (No. A-2887.)

(Criminal Court of Appeals of Oklahoma.
Nov. 16, 1921.)

(Syllabus by the Court.)

1. Intoxicating liquors \S 238(3)—Whether apple cider is intoxicating is a fact question for the jury.

Construing the provisions of our Constitution, prohibiting the sale of intoxicating liquor, together with sections 3605 and 3606, Rev. Laws 1910, the question of whether or not any particular apple cider is in fact an intoxicating liquor is a question of fact for the jury.

(Additional Syllabus by Editorial Staff.)

2. Criminal law \S 1181—Indictment and information \S 153—Where county attorney did not request resubmission of accusation after sustaining of demurrer, no further orders can be made.

Upon the state's appeal from an order sustaining a demurrer to an information where the county attorney made no request to resubmit the accusation according to Rev. Laws 1910, \S 5796, 5796, the Court of Criminal Appeals and the trial court are without authority to make further orders affecting accused.

Appeal from County Court, Woods County;
R. M. Chase, Acting Judge.

Charles Hardy was informed against for the unlawful sale of intoxicating liquors and his demurrer to the information was sustained, and the State appeals. Order sustaining demurrer overruled.

The Attorney General, R. McMillan, Asst. Atty. Gen., and Sandor J. Vigg, Co. Atty., for the State.

E. W. Snoddy, of Alva, for defendant in error.

BESSEY, J. [1] This is an appeal by the state from an order sustaining a demurrer to the information, the charging part of the information being as follows:

" * * * On or about the 14th day of August, 1916, at and in the county of Woods, state of Oklahoma, Charles Hardy, then and there being, did then and there willfully and unlawfully sell certain intoxicating liquor, to wit, one gallon of cider, to one Mermenegildo Castillo at and for the sum of \$1.25, which said cider so sold as aforesaid then and there contained 6.2 per cent. of alcohol, measured by volume, and which said cider was then and there capable of being used as a beverage. * * * "

It will be seen that the information charges that this cider was intoxicating; that it contained 6.2 per cent. of alcohol, measured by volume; that it was capable of being used as a beverage; and that it was willfully sold by the person charged.

The demurrer to this information may have been sustained by the court on the theory that the information should have stated that the cider was subject to a special tax under the revenue laws of the United States, and that it did not comply with the pure food laws. Section 3606, R. L. 1910, provides:

"*Sale of Apple Cider Lawful.*—It shall be lawful to sell in this state apple cider manufactured either within or without the state from the unadulterated juice of apples, if the same is of such a character as not to be subject to a special tax under the internal revenue laws of the United States, and shall comply with the requirements of the pure food laws of the United States, and of this state."

By the enactment of this section it was not the intention of the Legislature to authorize the sale of intoxicating cider. Indeed, it was beyond the power of the Legislature to authorize the sale of any intoxicating beverage of any kind or character. That is forbidden by our Constitution. This court held, in the case of *Coury v. State*, 200 Pac. 871, in an opinion filed September 21, 1921, as follows:

"It was the intention of the Legislature to prohibit the sale and disposal of wines, ale, beer and * * * near-beer, containing more than one-half of one per cent. of alcohol, measured by volume; but * * * it was the intention of the Legislature to except cider from such provision, making it a question of fact for the jury to determine whether or not any particular cider, sold or kept for sale, contained sufficient alcohol to make it intoxicating when used as a beverage."

In order to guard against artifice and fraud, the Legislature, in section 3605, R. L. 1910, in effect said that any liquor or compound, including wine, ale, beer, and near-beer, containing more than one-half of 1 per cent. of alcohol, measured by volume, should be considered an intoxicating liquor. The Legislature arbitrarily said all such liquors are intoxicating. But by the enactment of section 3606, supra, cider was excepted from this list, thus making the question of whether or not any particular cider is intoxicating a question of fact for the jury, not to be determined arbitrarily and alone by the alcoholic content or one-half or 1 per cent. measured by volume.

The information charged that this cider was in fact intoxicating. The alcoholic content of 6.2 per cent., as charged, was greatly in excess of the statutory test provided in the case of other liquors. In cases where it is charged that apple cider is sold in violation of the prohibitory law, it is for the jury to say whether or not the cider, as a matter of fact, is intoxicating. If any cider is intoxicating in fact, as a matter of law, its sale is prohibited.

We think the information in this case was sufficient and that the court erred in sustaining the demurrer to the information.

[2] Since there was no request made by the county attorney to resubmit the accusation, according to sections 5795 and 5796, R. L. 1910, this court and the trial court are without authority to make any further orders affecting the accused.

DOYLE, P. J., and MATSON, J., concur.

McKINNEY v. STATE. (No. A-3757.)

(Criminal Court of Appeals of Oklahoma. Nov. 16, 1921.)

(*Syllabus by the Court.*)

1. Criminal law §511(2)—Accomplice testimony must be corroborated by evidence connecting defendant with the crime.

A conviction cannot be had upon the testimony of an accomplice or accomplices, unless he or they be corroborated by such other evidence as tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

2. Criminal law §742(2)—Where evidence conflicts, whether witness is an accomplice is for the jury; but where facts are admitted, it is a question for the court.

Where the evidence is conflicting as to whether or not a witness participated in committing the offense charged, the question as to whether or not such witness is an accom-

plice is one of fact for the jury; but where the acts and conduct of the witness are admitted, it becomes a question of law for the court to say whether or not those acts and facts makes the witness an accomplice.

3. Criminal law §780(2)—Where one of state's witnesses was accomplice as matter of law, and the jury were to determine as to the other, appropriate instructions should have been given.

Under the undisputed facts shown in this record, one of the state's witnesses, T., as a matter of law was an accomplice. As to whether another witness, G., was an accomplice, the facts are disputed, and are reasonably susceptible of either interpretation, in which case there is an issue of fact for the jury; and under the circumstances here these issues as to both witnesses, on request of defendant, should have been covered by appropriate instructions to the jury.

(Additional Syllabus by Editorial Staff.)

4. Criminal law §507(1)—"Accomplice" defined.

An "accomplice" is one culpably implicated in the commission of a crime of which the defendant is accused, or one who knowingly and voluntarily co-operates, aids, or assists in the commission of a crime.

[Ed. Note. For other definitions, see Words and Phrases, First and Second Series, Accomplice.]

5. Criminal law §507½—Jury warranted in concluding that witness participated in crime under duress of her husband, and was not an accomplice.

Where the wife of one who participated in the crime with defendant also participated therein, held that the jury would be justified in drawing an inference under Rev. Laws 1910, § 2099, that she was not an accomplice, but acted under duress of her husband.

Appeal from District Court, Pittsburg County; Harve L. Melton, Judge.

Calvin McKinney was convicted of bank robbery, and was sentenced to serve a term of 10 years in the state penitentiary, and he appeals. Reversed and remanded.

Wilkinson, Scott & Hudson, of McAlester, for plaintiff in error.

S. P. Freeling, Atty. Gen., and E. L. Fulton, Asst. Atty. Gen., for the State.

BESSEY, J. Calvin McKinney, plaintiff in error referred to in this opinion as the defendant, was convicted at the November, 1919, term of the district court of Pittsburg county of the crime of bank robbery, committed August 14, 1918, and his punishment was by the jury fixed at 10 years' imprisonment in the state penitentiary, and he appeals.

In order to intelligently make the proper legal deductions involved, it will be necessary to recite the facts in narrative form, at some length. The defendant was not present

at the robbery, and was convicted on the theory that he conspired with the actual perpetrators to commit the crime, and furnished them with a horse, gun, and saddle.

It was the theory of the state that this defendant, Simeon Lewis, Ernest Gregory, Milton Spears, and Bill Tidwell, from time to time during a period of two weeks before the crime was committed, conspired together to rob the bank of Crowder; that during this time these parties met frequently at and near the house of Ernest Gregory, a neighbor of this defendant, and discussed and agreed upon ways and means of robbing the bank. That it was agreed that the defendant, Lewis, and Gregory were to furnish two horses and two saddles, guns, and ammunition to Spears and Tidwell, who were to perform the physical acts of robbery so soon as all the arrangements were completed, and the time and circumstances seemed favorable to successfully obtain and get away with the booty. It was agreed that Lewis and Gregory should first go to Crowder and see if the officers were there, and whether there were many automobiles in sight. If the prospects looked promising, Tidwell and Spears were then to appear and consummate the robbery.

It is claimed by Tidwell and Mrs. Gregory, witnesses for the state, that the plans to rob the bank were discussed and agreed upon in the presence of Mrs. Gregory on eight or ten different occasions before the robbery; that Tidwell was a fugitive from justice, in hiding at or near the home of the Gregorays for two weeks prior to the robbery, and that Mrs. Gregory helped conceal him and furnished him with food and sustenance while he was so in hiding, awaiting a favorable opportunity to rob the bank. The evidence disclosed no overt threats or coercion on the part of any one to compel or induce Mrs. Gregory to furnish him with food, or to assist in keeping him hid, but under the provisions of section 2099, R. L. 1910, hereafter quoted, an inference may be drawn that Mrs. Gregory was acting under duress on the part of her husband.

The testimony of Tidwell and other state's witnesses shows that the first attempt to rob the bank, made one week previous to the actual robbery, was abandoned, and Spears and Tidwell were intercepted by their confederates, Lewis and Gregory, and turned back on account of the presence of officers and a large number of other persons in Crowder on that day. One week later the second attempt was successfully made. Lewis and Gregory were in Crowder on that forenoon, and at the noon hour Tidwell and Spears entered the bank, and with drawn guns forced the cashier and a bank examiner, the only persons then in the bank, to put several hundred dollars in money into sacks brought for that purpose, after which they forced the cashier and the bank

examiner into the bank vault and closed the door, and made their escape on horseback, carrying the sacks of money with them. Presently an alarm was given, and the officers pursued the robbers and captured Spears. Later Tidwell abandoned his horse and escaped on foot, and returned to his hiding place in the bottoms, near the Gregory home, where it is claimed that the loot was divided equally among Tidwell, Gregory, Lewis, and the defendant. For some days after the robbery Mrs. Gregory helped to conceal Tidwell, and again furnished him with food and sustenance. Mrs. Gregory finally purchased another horse, with which Tidwell made his escape. Tidwell and Gregory fled together, and about a year later Tidwell was apprehended and arrested in Arkansas and brought back to Pittsburg county, where he plead guilty to a charge of manslaughter in the first degree, and was sentenced to a term of 30 years in the state penitentiary. After he was sentenced on this manslaughter charge, he confessed to this and other crimes, for which he was given a further sentence in the penitentiary. So far as this record shows, Gregory has never been apprehended or brought to trial. Simeon Lewis, one of the other alleged conspirators, was tried and acquitted of this crime.

Mrs. Gregory claimed that this defendant owed her husband some money for a team of horses purchased from him some time before the robbery. After the robbery she made several attempts to collect, but the defendant denied the obligation, claiming that he had paid Ernest Gregory for the horses. There is some testimony tending to show that this caused ill feeling between Mrs. Gregory and the defendant, and she had threatened to get even with him.

The testimony is undisputed that at Tidwell's invitation Mrs. Gregory visited him at the penitentiary on two occasions, after the preliminary and before the trial of this defendant, which took place more than three years after the preliminary.

The proof shows that the horse ridden by Tidwell belonged to the defendant. The defendant claimed that the horse was stolen from him and taken without his knowledge or consent. The state claimed that it was furnished the robbers, in accordance with their previous agreement, as shown by the confessions made by Tidwell and Mrs. Gregory. The state claims further that a gun and saddle used by Spears belonged to or were furnished by this defendant. The defendant denied the ownership of the gun or saddle, or that he furnished them to these parties, and there is no independent evidence from disinterested sources that the gun and saddle found belonged to the defendant.

[1] It is claimed by the defendant that his conviction rests wholly upon the testimony of hostile accomplices; that Mrs. Gregory ac-

tively participated in carrying out the common plans to perpetrate the robbery before and after it was accomplished.

There are 43 assignments of error urged in this case. If it should appear that Tidwell and Mrs. Gregory were accomplices, and that this conviction rests wholly upon their testimony, without material corroboration, then the other assignments of error need not be noticed. Section 5884, R. L. 1910, is as follows:

"A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely show the commission of the offense or the circumstances thereof."

We quote from the record as follows:

Testimony of Mrs. Gregory.

"Q. Before that bank was robbed, Mrs. Gregory, did you hear any conversation with reference to the proposed robbing of the bank?

A. Yes, sir.

"Q. Where was that conversation had? A. It was at our house.

"Q. Who was there? A. Well, Spears, Ernest Gregory, Calvin McKinney, Sim Lewis, and Bill Tidwell.

"Q. How long before the bank was robbed? A. Well, I don't know—about a couple of weeks Tidwell came there before the bank was robbed.

"Q. Did Calvin McKinney take part in that conversation? A. Yes, sir.

"Q. Tell what was said in that conversation. A. Well, they figured on what bank they would rob; whether it would be the Crowder bank or the Kinta bank, which would be the best to get away on.

"Q. What did Calvin McKinney say in that conversation? A. Well, he told them he would furnish them with a gun and a horse and saddle for a portion of the money. * * *

"Q. Just tell the jury about the conversation. A. Well, they just decided what bank they would take. Said they needed some money; they all needed some money, and Tidwell told them that if they would furnish him and this here Spears horses and ammunition they would go get the money and divide with them, and they agreed to do that.

"Q. Who agreed? A. Sim Lewis, Ernest Gregory, and Calvin McKinney."

Cross-Examination.

"Q. He (Bill Tidwell) stayed at your house two weeks before the bank was robbed? A. Something about that.

"Q. And they stayed there after the bank was robbed? A. Not at the house. They stayed in the field.

"Q. Well, you fed him? A. Yes, amongst us we did.

"Q. You knew he was being fed down there? A. Yes, sir.

"Q. And you did the cooking? A. Not all of it.

"Q. You sent him his meals? A. Yes, sir; I

sent him grub. I knew better than not to. I certainly did. * * *

"Q. How many times did those five meet together there (at your house) before the robbery? A. I don't know; I didn't put it down.

"Q. As many as 10 times? A. That many or more. They met there quite a number of times. * * *

"Q. Did you go to see Bill while he was over there in the pen? A. Yes, sir; I've been there twice to see him."

With reference to procuring a horse for Tidwell and her husband, with which they made their escape, there appears the following:

"Q. And you went and bought a horse for Tidwell out of the money? A. Yes, sir; I bought a horse out of the money."

Testimony of Bill Tidwell.

"Q. Where did you stay down there in that bottom? A. Just sat around down there.

"Q. In whose field? A. Sim Lewis' field.

"Q. Mrs. Gregory sent your meals down there? A. Yes, sir.

"Q. And she knew you were going to rob this bank? A. I suppose she did. She heard us talk about it.

"Q. Then for a week or 10 days before you robbed the bank Mrs. Gregory sent your meals down to you at the creek in the woods? A. Yes; and afterwards too.

"Q. And at the time she knew you were scouting; she knew that? A. Yes; I guess she did.

"Q. Well, you had told her—talked about it in the presence of her—hadn't you? A. Yes; we talked about everything in front of her.

"Q. Talked about robbing the store at Crowder in front of her, didn't you? A. Ernest was telling her pretty near everything."

[4] An accomplice is one culpably implicated in the commission of a crime of which the defendant is accused; one who knowingly and voluntarily co-operates, aids, or assists in the commission of the crime. *Hendrix v. State*, 8 Okl. Cr. 530, 129 Pac. 78, 43 L. R. A. (N. S.) 546; *Baldock v. State*, 16 Okl. Cr. 203, 182 Pac. 265.

[2, 5] Whether or not Mrs. Gregory, under the testimony here, was an accomplice, and whether or not she was acting under duress, were questions of fact for the jury. The jury may have concluded, under the instructions given by the court, that Mrs. Gregory was or was not an accomplice. If the part taken by Mrs. Gregory in these transactions was done under duress of her husband, there was no culpable, criminal, intent on her part. In that case she would be neither a principal nor an accomplice. Section 2009, R. L. 1910, provides as follows:

"A subjection sufficient to excuse from punishment may be inferred in favor of a wife from the fact of coverture whenever she committed the act charged in the presence and with the assent of her husband," etc., excepting certain crimes among which this is not included.

The jury, under the provisions of the statutes, would be justified in drawing an inference that Mrs. Gregory acted under duress of her husband, and was not an accomplice. But this is a rebuttable inference. These issues should have been submitted to the jury under appropriate instructions.

On the contrary, Tidwell, without doubt, as a matter of law, was an accomplice. Indeed, he was admitted by both parties to be the chief actor and author of the conspiracy, and it was error for the court, over the objections of the defendant, to submit that as an issue of fact to the jury. Where the evidence is conflicting as to whether or not a witness participated in committing the offense charged, the question as to whether or not such witness is an accomplice is one of fact for the jury, but where the acts and conduct of the witness are admitted, it becomes a question of law for the court to say whether or not those acts and facts make the witness an accomplice. *Moore v. State*, 14 Okl. Cr. 292, 170 Pac. 519.

[3] The defendant requested the following instruction, which was refused:

"The court instructs the jury that under the law you cannot convict the defendant upon the testimony of an accomplice, unless their testimony has been corroborated by some person who is not an accomplice to the commission of the crime, and you are instructed that witness Bill Tidwell, under his testimony, is an accomplice, and you are instructed that the witness, Mrs. Ernest Gregory, under her testimony, is an accomplice, and you are further instructed that their testimony has not been sufficiently corroborated to base a verdict of guilty, and you are therefore instructed to find the defendant not guilty."

The law embodied in the instruction requested was nowhere covered in the instructions given by the court. This instruction as requested was faulty, because of the fact that it included Mrs. Gregory as well as Tidwell, and amounted to a peremptory instruction for the defendant. However, it was sufficient to call the court's attention to the fact that, where the evidence showing that persons are accomplices is undisputed, the issue is one of law, and not of fact. *Cudjoe v. State*, 12 Okl. Cr. 246, 154 Pac. 500, L. R. A. 1916F, 1251.

The only instruction given by the court touching upon the competency of evidence given by accomplices was instruction No. 7, as follows:

"You are further instructed that an accomplice is a person involved either directly or indirectly in the commission of a crime. To render a person an accomplice he must in some manner aid or assist or participate in the criminal act, and by that connection he becomes equally involved in such offense. You are further instructed that a conviction cannot be had upon the testimony of an accomplice unless he or they be corroborated by such other evidence as tends to connect the defendant with

the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof; but you are further instructed that it is not necessary that the corroborating evidence go so far as to establish by itself and without the aid of the testimony of an accomplice or accomplices that the defendant committed the crime as charged. And if there be sufficient corroborating evidence outside of that given by the accomplice or accomplices which, when considered, together with that the testimony of such accomplice will justify, satisfy the minds of the jury of the guilt of the defendant beyond a reasonable doubt, then the guilt of the defendant is sufficiently established."

This instruction was duly excepted to by defendant.

After the verdict was rendered, the defendant filed a motion for a new trial. This motion was supported by the affidavit of Milton Spears, who pleaded guilty and was sentenced to the penitentiary for participating in this crime. In this affidavit Spears says that he and Tidwell rode two bay horses that they stole from a pasture about a mile south of Ernest Gregory's house, and that Calvin McKinney did not furnish any horses, saddles, or guns; that the gun or Winchester said to belong to McKinney was stolen from a man who lived near the old No. 2 mine at Hartshorne; that he (Milton Spears) stole one of the saddles and Bill Tidwell stole the other one. This ex parte affidavit may be entitled to but little weight; it nevertheless confirms the theory of the defendant, to some extent, as shown by the testimony in this record.

It is not sufficient corroboration to merely connect a defendant with the accomplice in the crime. The evidence, independent of the testimony of the accomplice, must tend to connect the defendant with the crime itself, and not simply with the perpetrators. *State v. Wilks*, 187 Pac. 813.

Independent of the testimony of Tidwell, there is no evidence of a convincing character that the defendant had anything to do with this robbery. If the jury believed that Mrs. Gregory was an accomplice, we think the corroboration of Tidwell by Mrs. Gregory, after the two conferences in the penitentiary was of doubtful probative value. Excepting the testimony of Tidwell and Mrs. Gregory, every independent circumstance shown is entirely consistent with the innocence of the defendant.

For the error of the court in failing to instruct the jury, as a matter of law, that Tidwell was an accomplice, and for failing to give appropriate instructions as to whether or not Mrs. Gregory was an accomplice, this case is reversed and remanded.

DOYLE, P. J., and MATSON, J., concur.

BONFILS et al. v. HAYES. (No. 9638.)

(Supreme Court of Colorado. May 2, 1921.
Rehearing Denied Nov. 7, 1921.)

1. Corporations \S 254—Stockholders held not entitled to escape liability for tort committed during year for extending term, on theory that corporation remained such *de jure*.

Where the existence of a corporation had expired under Rev. St. 1908, $\S\S$ 847, 854, and the power given by sections 891, 892, to extend the term had not been exercised within a year, as required by the statute, stockholders conducting the business could not escape liability for a tort committed during the year on the theory that the corporation remained such *de jure*.

2. Corporations \S 28(1)—Elements of "corporation *de facto*" stated.

To constitute a corporation *de facto* there must be a law under which it may lawfully be formed, a bona fide attempt to form it according to law, and a user or attempt to use its corporate powers.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, *De Facto Corporation*.]

3. Corporations \S 28(1)—No *de facto* corporation in absence of certificate of renewal of, or attempt to renew, expired term.

In absence of a certificate of renewal of the term of existence of a corporation, the term of which had expired, or a bona fide attempt to renew within the period of one year allowed under Rev. St. 1908, $\S\S$ 891, 892, there is no corporation *de facto*, though the company in good faith intended to renew; the corporation dying with expiration of its charter.

4. Corporations \S 29(2) — In suit for tort against individuals claiming to act for corporation plaintiff could put them on proof of its existence at time of tort.

In an action for a tort against stockholders and directors of a corporation, the term of existence of which had expired, where defendants claimed they were acting for the corporation, plaintiff could put them on proof of the existence of such corporation at the time of the tort, since one claiming to be a mere agent to avoid liability must produce a principal.

5. Joint adventures \S 7—Partnership \S 174 —Torts \S 22—Persons co-operating in business enterprise are liable for torts in connection therewith.

Persons actively co-operating in a business enterprise are liable for torts committed by them in connection therewith, whether they are partners, coadventurers, or joint tort-feasors.

6. Corporations \S 254—Stockholders not liable as such, though their corporation proves not to be such.

Stockholders are not liable, as such, for acts of their ostensible corporation, though it proves not to be a corporation.

7. Corporations \S 325—Estoppel of corporation to deny existence does not relieve directors conducting business of individual liability if it does not exist.

Estoppel of an ostensible corporation to deny its existence does not relieve its directors, who were conducting the business of the corporation, of their individual liability for its tort if the corporation does not exist.

8. Jury \S 131(6)—Questions as to whether jurors would be willing to intrust their case to one who had like prejudice against them held immaterial on challenge for cause.

An objection to questions to prospective jurors as to whether they would be willing to trust a man to try their case who had the same amount of prejudice against them that they had against defendants held properly sustained, what would satisfy the juror if he were a litigant being immaterial on challenge for cause, in absence of claim that the questions were asked to draw out proof of enmity.

9. Jury \S 131(2)—Propriety of questions on which to base peremptory challenge within trial court's discretion.

The propriety of questions on which to base a peremptory challenge is within the discretion of the trial court.

10. Municipal corporations \S 706(7) — Contributory negligence held for jury.

In an action for the death of plaintiff's daughter, who was run down by a delivery wagon driven by defendants' servant, contributory negligence held for the jury.

Department 2.

Error to District Court, City and County of Denver; Clarence J. Morley, Judge.

Action by Anna Hayes against F. G. Bonfils and others. Judgment for plaintiff, and defendants bring error. Affirmed.

John T. Bottom, of Denver, for plaintiffs in error.

F. W. Sanborn, Herbert M. Munroe, Jacob V. Schaezel and Walter E. Schwed, all of Denver, for defendant in error.

DENISON, J. Anna Hayes, defendant in error, brought suit against Bonfils, Tammen, and Litzenberger, and had a verdict and judgment for the death of her daughter by the negligence of their servant. They bring error.

The defendants were stockholders and directors of a corporation and were actively engaged in its business of printing and publishing the Denver Post. After the expiration of its 20 years of existence according to the statute, which was November 4, 1915, they continued business under the corporate name, and while they were doing so, September 16, 1916, a boy, driving a delivery wagon about the said business, ran down plaintiff's daughter and killed her.

[1] 1. One point of defense was that the

boy was the servant of the corporation. Notwithstanding the statutory provisions that the certificate of incorporation shall state the period of existence, "not exceeding twenty years" (R. S. 1908, \S 847) and that corporations "shall be bodies corporate and . . . have succession for the period for which they are organized" (Id., \S 854), plaintiffs in error insist that the corporation was a corporation de jure at the last-named date. The argument seems to be that the statute (R. S. \S 891-2) which gives power to a corporation, at any time within 1 year from the expiration of its term of existence, to extend that term for another 20 years, ipso facto creates such extension for 1 year, since if it were dead it could not be brought to life, and so the privilege of extension at any time within 1 year must imply a continuance for that year. The argument seems unsound. Its conclusion is against the plain terms of the statute, which limits the life of corporations. The Legislature which creates them may revive them or provide methods of revival at will, and may give them life for this purpose when they are dead for that. 1 Black. Com. 435; *La Grange & Memphis R. Co. v. Rainey et al.*, 7 Coldw. (Tenn.) 420, 421.

The revival of a corporation may, if the Legislature so provides, relate back to the date of its expiration, and so the corporation be held to have been alive during a time when it was legally dead. This is a fiction, but so is the corporation, and analogies to natural persons are misleading. The effect of a revival after an injury, inflicted, as in the present case, within one year from the expiration, is not before us, because the term of the corporation now in question has never been extended.

[2] 2. It is claimed that at least there was a corporation de facto. To constitute a corporation de facto there must be three elements: (1) A law under which it may lawfully be formed; (2) a bona fide attempt to form it according to law; (3) a user or attempt to use its corporate powers. *Jones v. Aspen Hdw. Co.*, 21 Colo. 263, 269, 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. Rep. 220; *Duggan v. Colo. M. & S. Co.*, 11 Colo. 113, 115, 17 Pac. 105; *Fisher v. Pioneer Co.*, 62 Colo. 538, 546, 163 Pac. 851; *Tulare Irr. Dist. v. Shepard*, 185 U. S. 1, 22 Sup. Ct. 531, 46 L. Ed. 773; *Clark v. Am. C. Coal Co.*, 165 Ind. 213, 73 N. E. 1083, 112 Am. St. Rep. 217; brief, 40, 14 O. J. 214, and cases there collected.

[3] As in forming the corporation the certificate of incorporation, so in renewal the certificate of renewal is the causa sine qua non. *Merges v. Altenbrand*, 45 Mont. 355, 123 Pac. 21, 24, 14 O. J. 226. Therefore without the certificate of renewal or a bona

fide attempt thereto there is no corporation de facto. The company now in question did not make, within the year following its expiration, and has never made, any attempt by certificate or otherwise to renew its life.

It is argued that the company has shown no bad faith and in good faith intended, but forgot, to renew. The answer is that it is not charged with bad faith, and an intention is not equivalent to an attempt.

The cases that a company dies with the expiration of its charter are numerous. Clark and Marshall say (section 805) that—

"According to the better opinion * * * a body of men has not even a de facto corporate existence after expiration of the time for which its corporate existence is limited by its charter."

[4] 3. Something is said that the corporate capacity cannot be questioned collaterally. We know of no principle which forbids such question in a case like the present. A woman sues three men for a tort. They answer that they were acting for a corporation. Is it possible that she may not put them on proof that there was such a corporation in existence at the time of the tort? He who, to avoid liability, claims to be a mere agent, must produce a principal. *Fay et al. v. Noble*, 7 Cush. (Mass.) 188, 194.

[5] 4. Some argument is made that the defendants are not partners even if there was no corporation; but if they were actively co-operating in a business enterprise, and in connection therewith committed the tort in question, they are liable whatever the title of their combination—partners, co-adventurers, joint tort-feasors, or what. *Jones v. Aspen Co.*, 21 Colo. 263, 270, 271, 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. Rep. 220; *Fay et al. v. Noble*, 7 Cush. (Mass.) 188, 194.

Their active co-operation in the business, there being no corporation, makes them responsible for its liabilities, and able to demand its dues. *Ward v. Brigham*, 127 Mass. 24; *Jones v. Aspen, etc., Co.*, 21 Colo. 263, 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. Rep. 220; *Roberts, etc., Co. v. Schlick*, 62 Minn. 332, 64 N. W. 826; *Johnson v. Corser*, 34 Minn. 355, 25 N. W. 799; *Rutherford v. Hill*, 22 Or. 218, 29 Pac. 546, 17 L. R. A. 549, 29 Am. St. Rep. 596; *Fuller v. Rowe*, 57 N. Y. 23; *Medill v. Collier*, 16 Ohio St. 599; *Fay et al. v. Noble*, 7 Cush. (Mass.) 188, 194.

[6] Numerous cases are cited to the effect that stockholders are not liable, although their ostensible corporation proves not to be a corporation. That may be left unquestioned. The defendants are not charged because they are stockholders.

[7] 5. It is said that the corporation could not have denied its corporate existence if it were sued for this tort because it was doing business as a corporation, and therefore

would have been liable for its tort, and therefore the defendants are not.

This argument would necessitate the conclusion that no natural person could ever be liable for the debt or default of an ostensible corporation. If it is sound, then all the countless cases upholding such liability under this and that set of facts are wrong, and all the discussion of the subject for the past half century has been futile. It is not true that estoppel of the corporation to deny its existence relieves its operators of their liability if it does not exist.

[8] 6. It is claimed that the court erred in overruling the challenge for cause of the juror Chipman. This juror's voir dire shows nothing to justify challenge for cause under our statute. Among the grounds set forth in section 199, Civil Code 1908, the seventh, the only one that approaches fitness to this case, is as follows:

"The existence of a state of mind in the juror evincing enmity against or bias to either party."

No bias in favor of the plaintiff, nor enmity toward the defendants, was shown. The challenge for cause was therefore properly overruled.

[9] 7. An objection to the following question, put to the juror Chipman was sustained:

"Would you be willing to trust a man to try your case who had the same amount of prejudice against you that you have against the proprietors of the Denver Post?"

If this question was asked as a basis of a challenge for cause, it was immaterial unless it was to draw out proof of enmity, which is not claimed. If it was intended to secure information by which to determine the expediency of a peremptory challenge, it would seem that counsel had already obtained that information by other questions. Be that as it may, the matter of these questions upon which to base a peremptory challenge is within the discretion of the trial court. *Railway Co. v. Jones*, 21 Colo. 340, 40 Pac. 801.

8. The juror Hackstaff said that he had a prejudice against the Denver Post as a newspaper, but not against the proprietors. His voir dire showed no ground for challenge for cause. He was asked, however, this question:

"If you were trying a case and were interested in it, and you knew that a man had the same amount of prejudice that you have in this case as against the defendants, would you be satisfied to have him try your case?"

An objection was sustained. This is assigned as error, but it cannot be so considered for the reasons stated concerning a similar question above. What would satis-

fy the juror if he were a litigant is immaterial upon challenge for cause.

[10] 9. It is claimed that there was contributory negligence, but that question was properly left to the jury.

10. The claim that the damages were excessive is not sustained. It is reasonably possible, under the evidence, to compute a pecuniary loss to the plaintiff greater than the amount of the verdict.

Judgment affirmed.

TELLER, C. J., and WHITFORD, J., concur.

GIBSON v. INTERIOR REALTY & INVESTMENT CO. (No. 9750.)

(Supreme Court of Colorado. March 7, 1921.)

1. Taxation \S 793—Tax deed holder not in possession cannot quiet title against original owner.

A tax deed holder, not in actual possession, the land being vacant and unoccupied could not quiet title against the owner of the fee under Code, \S 274, which requires that plaintiff be in possession, actual or constructive.

2. Taxation \S 793—Holder of tax deed to vacant land in irrigating district cannot quiet title against fee owner within five years after recording of deed.

Laws 1915, p. 317, \S 1, providing that the invalidity or insufficiency of a tax deed shall not be a sufficient defense to an action to quiet title to land in an irrigation district under a tax deed after the expiration of five years from the recording thereof, is inapplicable where defendant, in an action by a tax deed holder within such period to quiet title to vacant and unoccupied land in such a district, seeks no affirmative relief, the purport and effect of the act being, not to give the holder of a tax deed to land so located any enlarged or different rights or remedies than obtain generally, but merely to limit the circumstances and conditions under which the fee holder may make a defense.

Error to District Court, Alamosa County; J. C. Wiley, Judge.

Suit by the Interior Realty & Investment Company against Charles E. Gibson to quiet title. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with directions to dismiss complaint.

John F. Mall, of Denver, for plaintiff in error.

Fillius, Fillius & Winters, of Denver, and George M. Corlett, of Monte Vista, for defendant in error.

BAILEY, J. Suit by the Interior Realty & Investment Company against Charles E. Gibson to quiet title to certain real property under section 274 of the Code. Judgment

was for the company. Gibson assigns error, and brings the cause here for review.

The complaint alleged that plaintiff is the owner and in possession of the land involved. It set out the adverse claim of defendant, and prayed that the title be quieted. The answer admits that defendant claims an interest, and alleges it to be ownership in fee. No replication was filed; neither did defendant ask affirmative relief.

[1] Plaintiff claims under a tax deed, recorded on July 1, 1918. It is urged that such deed is irregular in several respects not appearing on its face, but in deciding the case it is unnecessary to consider or determine the validity of this deed, as it is stipulated that the land is vacant and unoccupied. Under such conditions the case is ruled by Morris and Thombs v. St. Louis National Bank, 17 Colo. 231, 29 Pac. 802. There this court, in discussing the question of whether constructive possession follows a tax deed, said (17 Colo. at page 239, 29 Pac. 804):

"Furthermore, while the statute provides that a tax deed properly executed and recorded, prima facie, conveys the title, it nowhere provides that such deed shall give the purchaser possession of the property conveyed. It certainly does not give him an actual adverse possession such as would compel the original owner to resort to an action in the nature of ejectment to recover possession of the premises. On the contrary, the original owner being in possession by virtue of a perfect legal title, such possession is to be deemed sufficient for purposes of remedy and to continue until interrupted by an actual entry and adverse possession taken by another. [Citing authorities.]"

Also the following cases from this jurisdiction announce and approve this rule, and this, too, whether such deed is fair on its face, or otherwise: *Muntzing v. Harwood*, 25 Colo. App. 292, 137 Pac. 71; *Phillippi v. Leet*, 19 Colo. 248, 35 Pac. 540; *Mitchell v. Titus*, 33 Colo. 385, 80 Pac. 1042; *Keener v. Wilkinson*, 33 Colo. 445, 80 Pac. 1043; *Empire Co. v. Bender*, 49 Colo. 522, 113 Pac. 494; *Lambert v. Murray*, 52 Colo. 156, 120 Pac. 415; *Empire v. Lanning*, 53 Colo. 156, 124 Pac. 579.

In *Chilcott v. Hart*, 23 Colo. at page 45, 45 Pac. 393, 35 L. R. A. 41, this court declared:

"To give jurisdiction of any action fairly embraced within [section 274 of the Code], the plaintiff must be in possession, actual or constructive."

Plaintiff was not in actual possession, as it put flatly into the record the fact that the land is vacant and unoccupied, nor was it in constructive possession, as under our decisions constructive possession follows the legal title, so when plaintiff's proof was in, it had thereby put itself out of court, and instead

of a decree quieting title there should have been a judgment of dismissal.

[2] Plaintiff seems to claim some special right or favor under the provisions applying to land in an irrigating district taken under tax deed. Chapter 109, Session Laws of 1915, p. 317. Under the facts of this case the rights of plaintiff are wholly unaffected by this provision. There is nothing therein which, in any event or at all, gives the holder of a tax deed to land so located any enlarged or other or different rights or remedies in a suit to quiet title under a tax deed than obtain generally. The purport and effect of the provision is merely to limit the rights of the fee holder as to the circumstances and conditions under which he may make a defense. Since, however, in this case the defendant seeks no affirmative relief whatever, this provision has no application, either as affecting the rights of plaintiff or defendant. All the defendant urges is that plaintiff be not allowed a decree to which it has by its proof shown itself not to be entitled. Had Gibson not appeared at all it would have devolved upon the court to have permitted plaintiff to take nothing except that which under the law it had a right to take.

Plaintiff, claiming under a tax deed recorded July 1, 1918, seeks to quiet title to vacant and unoccupied land, an action which, under all of our decisions, cannot be maintained. If the five-year statute of limitation had run in favor of the deed, a different question would be here for decision.

Judgment reversed and cause remanded, with directions to the trial court to dismiss it.

TELLER, J., sitting for SCOTT, C. J., and BURKE, J., concur.

SKLAR v. BELCHER. (No. 4495.)

(Supreme Court of Montana. Oct. 24, 1921.)

Corporations §432(12) — Evidence held to show contract with buyer as individual, and that corporation not bound.

In an action to recover money paid for undelivered wool under a contract reciting the sale thereof to plaintiff "of L. H. & F. Co.," evidence held to show that the contract was made with plaintiff in his individual capacity, that the money was paid by the company for

his use and benefit, and that the words "of the L. H. & F. Co." were merely descriptive, and not intended to indicate that the company was bound.

Appeal from District Court, Fergus County; Jack Briscoe, Judge.

Action by Jacob Sklar against James C. Belcher. Judgment for plaintiff, and defendant appeals. Affirmed.

E. K. Cheadle, of Lewistown, for appellant.

E. K. Matson and R. J. Anderson, both of Lewistown, for respondent.

HOLLOWAY, J. Plaintiff recovered a judgment against the defendant for \$350 and interest, and defendant appealed therefrom, and from an order denying him a new trial.

The only question involved is whether the contract in question, for the sale of 3,500 pounds of wool by defendant, was made with the plaintiff or with the Lewistown Hide & Fur Company. The contract recites that defendant "has sold to Jacob Sklar, of Lewistown Hide & Fur Co.," etc. Upon the trial each party proceeded upon the theory that the contract is ambiguous, and by the introduction of evidence sought to show the relationship existing between Sklar and the company at the time the contract was made. The evidence is not satisfactory, but we are of the opinion that it is sufficient to warrant the trial court in concluding that Sklar was operating under an agreement with the company by which he was to purchase hides, pelts, and wool on his own account, and resell to the company at the prevailing market price; that, in order to enable him to conduct his business, the company advanced money to him on his several contracts; and that the \$350 received by defendant was paid by the company for the use and benefit of Sklar, and that Sklar had repaid the amount to the company upon defendant's failure to deliver the wool. Upon this theory the conclusion is warranted that the contract was made with Sklar in his individual capacity, and that the words "of the Lewistown Hide & Fur Co." are merely descriptive, and were not intended to indicate that the company was bound. We find no error in the record.

The judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and REYNOLDS, COOPER, and GALEN, JJ., concur.

KOZASA v. NORTHERN PAC. RY. CO. et al.
(No. 4494.)

(Supreme Court of Montana. Oct. 27, 1921.)

1. Pleading \S 8(3)—Threats \S 10—Allegation that defendant extorted money held a conclusion and insufficient.

Under Rev. Codes, §§ 6532, 8663, 8664, complaint, alleging that on a certain day defendants by coercion, threats, and intimidation and by putting plaintiff in fear extorted from plaintiff property and money of the worth and value, etc., stated only a conclusion, and did not give defendants any intimation of the facts they would be called upon to meet, and did not state a cause of action.

2. Payment \S 89(4)—Complaint to recover involuntary payment must state facts.

In action to recover money paid involuntarily, the complaint must state the facts which constitute a legal basis for the charge of involuntary payment, so that the court may be able to determine whether the pleader's conclusion is justified.

Appeal from District Court, Sanders County; Asa L. Duncan, Judge.

Action by K. Kozasa against the Northern Pacific Railway Company and another. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Gunn, Rasch & Hall, of Helena, and C. M. Jeffery, of Pocatello, Idaho, for appellants.

HOLLOWAY, J. [1] The complaint in this action consists of three paragraphs. In paragraph 1 it is alleged that the defendant railway company is a corporation organized under the laws of Wisconsin, and doing business in Sanders county, Mont. Paragraph 2 reads as follows:

"That on or about the 27th day of October, 1917, the defendants above named, by coercion, threats, and intimidation and by putting plaintiff in fear, did extort from plaintiff property and money of the worth and value of \$829.75."

In paragraph 3 it is alleged that since October 27, 1917, defendants have wrongfully detained the property and money without plaintiff's consent. Then follows the prayer. A general demurrer to the complaint was interposed but overruled, and, at the opening of the trial, counsel for defendants objected to the introduction of any evidence on the ground that the complaint does not state facts sufficient to constitute a cause of action. The objection was overruled, and exception reserved. The trial resulted in a verdict and judgment in favor of the plaintiff for the amount claimed, and defendants appealed therefrom and from an order denying them a new trial.

The gravamen of the plaintiff's cause of action must be found, if at all, in paragraph 2 of the complaint, quoted above. Section 6532, Revised Codes, provides that a complaint must contain "a statement of the facts constituting the cause of action." Paragraph 2 states but a bald, legal conclusion. Whether defendants obtained plaintiff's property by extortion depends upon certain facts. Sections 8663 and 8664, Revised Codes, read as follows:

"8663. Extortion is the obtaining property from another with his consent induced by wrongful use of force or fear or under color of official right.

"8664. Fear, such as will constitute extortion, may be induced by a threat either—

"1. To do an unlawful injury to the person or property of the individual threatened, or to any relative of his, or member of his family; or,

"2. To accuse him or any relative or member of his family of any crime; or,

"3. To expose or impute to them or him any deformity or disgrace; or,

"4. To expose any secret affecting him or them."

[2] In an action to recover money paid involuntarily, the complaint must state the facts which constitute a legal basis for the charge of involuntary payment, so that the court may be able to determine whether the pleader's conclusion is justified. *Kamenitsky v. Corcoran*, 177 App. Div. 605, 164 N. Y. Supp. 297; *Kraemer v. Deustermann*, 37 Minn. 460, 35 N. W. 276; *Hanford Gas & Water Co. v. City of Hanford*, 163 Cal. 108, 124 Pac. 727; *Grant v. Williams*, 54 Mont. 426, 171 Pac. 276.

"The object of pleading is to notify the opposite party of the facts which the pleader expects to prove, and so it is that the allegation of such facts must be made with that certainty which will enable the adverse party to prepare his evidence to meet the alleged facts." 21 R. O. L. 436.

This complaint does not give to the defendants the slightest intimation of the facts which they would be called upon to meet at the trial, and for this reason it does not state a cause of action, and will not sustain a judgment.

Whether it is possible for plaintiff to state a cause of action, in view of the testimony given by him upon the trial of this case, is a question we do not determine. He has not appeared in this court or furnished any brief, and we reserve our opinion until the matter has been presented fully.

The judgment and order are reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

BRANTLY, C. J., and REYNOLDS, COOPER, and GALEN, JJ., concur.

FIRST NAT. BANK OF REEDER v. MIDDLETON, Sheriff, et al. (No. 4454.)

(Supreme Court of Montana. Oct. 27, 1921.)

1. Judgment ¶256(1)—General verdict held sufficient to support a judgment for recovery of animals or their value.

In an action in claim and delivery by mortgagee of animals against sheriffs who seized them on execution, where there was no dispute as to their value, a general verdict is sufficient to support a judgment for their recovery or a recovery of their value on the bond given by the mortgagee to gain possession of them from the sheriffs.

2. Judgment ¶243—Against sureties on bond held invalid.

In an action in claim and delivery by a mortgagee against sheriffs who seized mortgaged property on levy of execution, a judgment against the sureties on a bond of the mortgagee, given to gain possession of the mortgaged property, is unauthorized, as they were not before the court.

3. Evidence ¶317(1)—Admission in evidence of what one not a party to the trial said was error.

In action in claim and delivery by a mortgagee against sheriffs who seized mortgaged property on levy of execution, the admission in evidence of a conversation of the mortgagor, not a party to the suit, and who had not been called as a witness, was hearsay, and its admission was erroneous.

4. Appeal and error ¶1050(1)—Error in admission of hearsay not cured by same evidence being given on cross-examination.

Where a witness in direct examination gave hearsay evidence, the error in its admission was not cured by the same matter being brought forward on cross-examination of the same witness.

Appeal from District Court, Custer County; Roy E. Ayers, Judge.

Action by the First National Bank of Reeder, N. D., against A. B. Middleton, Sheriff of Custer County, Mont., and another. From judgment for defendants and order denying new trial, plaintiff appeals. Reversed and cause remanded.

George W. Farr and H. E. Herrick, both of Miles City, for appellants.

Sharpless Walker and W. H. O'Connell, both of Miles City, for respondents.

JACKSON, C. Action in claim and delivery to recover possession of cattle and horses, or the value thereof, by claim of special ownership and right to immediate possession, based on mortgages to plaintiff by Belle Shirley, dated November 19, 1915, to secure notes aggregating \$3,337, past due and owing to plaintiff.

It is alleged that defendants, having ac-

tual knowledge of the mortgages, on August 9, 1916, unlawfully and without consent of the plaintiff, and the mortgages being in full force and effect and valid and prior liens on the horses and cattle, seized the same and held possession at the time of the commencement of the action, and that plaintiff was entitled to immediate possession as holder and owner of the notes.

The defendants denied the material allegations of the complaint and set up that in an action on a promissory note, dated December 6, 1913, in which John M. Henry was plaintiff and Co. Shirley, defendant, they attached the cattle and horses mentioned in the complaint on November 11, 1915, and afterwards, by virtue of judgment for the plaintiff, took possession of the cattle and horses; that on September 15, 1915, Co. Shirley executed a bill of sale for the animals to Belle Shirley, his wife, fraudulently, without consideration, and not accompanied by immediate delivery and actual and continued change of possession. Issue was joined by reply. Plaintiff, before trial, by filing the bond required by law, took the animals into its possession.

The cause was tried to a jury, which returned a general verdict for the defendants, and judgment was entered thereon. From the judgment and an order denying a new trial, plaintiff appeals.

The language of the verdict is:

"We, the jury in the above-entitled action find the issues herein in favor of the defendants and against the plaintiff."

The judgment rendered thereon recites:

"And it appearing that the property described in the plaintiff's complaint was delivered to the plaintiff, and that an undertaking has been filed herein on the part of the plaintiff, and H. F. Lee and G. N. Miles are its sureties who signed the undertaking in the sum of ten thousand dollars (\$10,000.00), pursuant to statute, to the effect that they were bound as therein required for the delivery of said property to defendants, if such delivery be adjudged, and for the payment of such sum to defendants as might for any cause be recovered against the plaintiff; Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed: That the defendant A. B. Middleton, as sheriff of Custer county, Mont., and M. E. Jones, as sheriff of Fallon county, Mont., do have and recover of and from the plaintiff, First National Bank of Reeder, N. D., and H. F. Lee and G. M. Miles, its sureties, the possession of the property described in plaintiff's complaint, as follows, to wit: * * * And in case delivery cannot be had of said property, then said defendants do have and recover of the said plaintiff, and its said sureties, the sum of five thousand dollars (\$5,000.00), the value of said property, together with defendants' costs and disbursements herein incurred, taxed at \$92.10, and that the defendants have execution therefor."

The record shows without material conflict the different transactions as laid in the pleadings; the validity of the sale between Co. Shirley and his wife, Belle, being the point of balance between the rights of the plaintiff and defendants herein. The evidence on this issue was sufficient to warrant its submission to the jury.

[1, 2] It is contended the judgment is erroneous and is not supported by the verdict. In view of the fact that there was no dispute in the evidence as to the value of the animals, the general verdict is sufficient to support the judgment in the alternative against the plaintiff. But the judgment cannot, in this character of action, order execution against the sureties on plaintiff's bond. They are not before the court.

[3, 4] During the course of the trial in direct examination, defendants' witness related a conversation which Co. Shirley had in the witness' presence. The question was opportunely objected to, overruled by the court, and an exception duly noted. On cross-examination of the same witness, the conversation was repeated. The substance of it was an admission on the part of Co. Shirley that he had made the transfer to his wife in order to prevent Henry from getting the cattle for debt. Plaintiff assigns error on the ruling of the court admitting this testimony.

Co. Shirley had not been on the stand, and therefore could not be impeached. He was not a party to the action, and it was neither pleaded nor shown that he and plaintiff acted in concert or conspiracy. This testimony is purest hearsay and utterly incompetent; appearing as it does in the record, it is viciously prejudicial to plaintiff and patently improper. Defendants contend that since plaintiff cross-examined the witness and elicited a repetition of the testimony objected to, the error, if any, is cured. Not so. While there are a few authorities to the contrary, the circumstances are all different, and the overwhelming mass of adjudication favors plaintiff's position herein.

We have carefully analyzed the cases cited by defendants and find that, while they state a rule of curing error by cross-examination, yet from the facts and circumstances of each case it is plainly evident that they are in no sense applicable to the point as it is involved here.

In *Stewart & Co. v. Hermon*, 108 Md. 446, 70 Atl. 333, 20 L. R. A. (N. S.) 228, the action was for personal injuries, and over defendant's objection plaintiff was permitted to prove that shortly after the accident complained of, wherein the plaintiff, a janitor, suffered injuries to his hands by the breaking of a large pane of glass as he closed a window, a glazier was seen to nail strips on the window frame. The witness was cross-examined on the same matter, and the court even

though holding the evidence of events transpiring after the happening of an accident is usually inadmissible, goes on to state that, "in the view we take of the case, the evidence is not important." No other construction can be put on this ruling save that the action of the court would have been different had the evidence been important.

Spears v. Black, 190 Mich. 693, 157 N. W. 382, is likewise cited by defendants. The objectionable matter in this case was admitted as part of the *res gestae* and was afterwards made indisputably competent by the evidence of the defendant, who testified to the same effect.

In *Brownell v. Moorehead* (Okla.) 165 Pac. 408, the testimony sought to be stricken and not objected to until after given was directly responsive and admissible for impeachment, and although admitted before a foundation was laid and improper when admitted, still the foundation was laid later and the error cured. The reason for this ruling was that counsel had no right to sit quietly by until the answer given directed his action.

In *Bliss v. Waterbury*, 27 S. D. 429, 131 N. W. 731, a document was admitted over defendant's objection as incompetent and immaterial. The objection should have been sustained at the time it was offered, but since the fact it tended to prove was disclosed by cross-examination, and it was both relevant and material, the error was cured.

On the other hand, we find it strongly, and, we think, properly, laid down that plaintiff's position herein is correct.

"Nor can it matter, in the result, that the defendant's counsel, on cross-examination, asked the witness to repeat his account of the interview with the conductor. That course did not amount to a waiver of the right to urge the exception already saved to the ruling of the court in admitting the interview. Counsel might properly conform to that ruling for the purposes of the trial, without thereby waiving the right to review the admission of incompetent evidence that had come in, over his objection. After that evidence was before the jury, he might then combat it or meet it, as best he might, without waiving the exception already taken." *Barker v. St. Louis, I. M. & S. R. Co.*, 126 Mo. 143, 28 S. W. 866, 26 L. R. A. 843, 47 Am. St. Rep. 646, and cases cited.

"Where an exception is duly taken to the admission of illegal testimony, it is not waived by mere cross-examination of the witness respecting it." *Marsh v. Snyder*, 14 Neb. 237, 15 N. W. 341.

"There are cases holding that objections to testimony are waived when the objecting party on cross-examination subsequently goes into the same matter, but this is clearly against the weight of authority. It would indeed be a strange doctrine, and a rule utterly destructive of the right and all the benefits of cross-examination, to hold a litigant to have waived his objection to improper testimony, because, by further inquiry, he sought on cross-examination to break the force or demonstrate the untruthful-

ness of the evidence given in chief, in the event, as would most usually occur, that the witness should on his cross-examination repeat or restate some or all of his evidence given on his direct examination." 28 R. C. L. Trial, 1052; Cathey v. Missouri, etc., Ry. Co., 104 Tex. 39, 133 S. W. 417, 33 L. R. A. (N. S.) 103, and note.

The instruction given and complained of is correct. It is admitted by counsel to be the law wherein good faith as to sales between husband and wife is involved, and in our opinion good faith in the sale between Co. Shirley and his wife is of the very essence of this controversy.

For the reasons stated above, we recommend that the judgment and order be reversed and the cause remanded to the district court, with directions for a new trial.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment and order be reversed and the cause remanded to the district court, with directions for a new trial.

LARSON v. MARCY et al. (No. 4449.)

(Supreme Court of Montana. Oct. 3, 1921.)

1. Pleading \S 364(6)—Unnecessary counts to be stricken.

Where one count set forth a cause of action on a note executed and delivered by the defendants to the plaintiff under a common or trade name, another count, alleging that one of the defendants, acting for himself and as agent for the other defendants, borrowed the money from the plaintiff and agreed to pay the same, should have been stricken, since any evidence supporting the latter count would establish the former.

2. Appeal and error \S 927(3) — Evidence viewed most favorably to plaintiff on appeal from judgment after nonsuit.

On appeal from a judgment entered after nonsuit, evidence is to be viewed from the standpoint most favorable to plaintiff, and every fact will be deemed to be established which it tends to prove.

3. Trusts \S 96—Novation \S 1—No reliance on trust after novation.

Where a father executed a note to plaintiff, then conveyed all of his property to defendants, his children, under an agreement that they pay his indebtedness, and thereafter defendants, instead of paying plaintiff, executed a new note for the indebtedness, there was a novation, and plaintiff could not thereafter rely upon an implied or constructive trust, or enforce the same, under Rev. Codes, \S 4959.

4. Associations \S 16—Members of voluntary association jointly and severally liable on contracts executed in trade-name.

Several persons may conduct business as a voluntary association, using a common or

trade name, and in that name be held jointly and severally liable upon contracts, and one of them, as agent, may be authorized to sign a negotiable instrument, and all will be bound thereby, under Rev. Codes, $\S\S$ 5866, 5867.

5. Associations \S 16—Execution of note by member in common name may be ratified.

Where general manager of a voluntary association, consisting of tenants in common of property conveyed by their father, executes a note under the common name, such act may be ratified by the other members, and, if ratified, the note becomes binding as of the date of its execution, under Rev. Codes, \S 4994.

6. Principal and agent \S 169(2)—Ratification by acts tending to show intent to ratify.

Ratification of act of agent in executing note may be effected by express declaration or by implication, and may be implied from any acts or conduct on the part of the principal which reasonably tends to show an intention on his part to make the act of the agent his own.

7. Principal and agent \S 173(1)—Slight circumstances sufficient to raise presumption of ratification.

Where agency is shown to exist, facts will be construed liberally in favor of the approval of the principal of acts of the agent, and very slight circumstances and small matters will suffice to raise the presumption of ratification in favor of a third party who has dealt with the agent upon the assumption that he possessed the authority and has surrendered substantial right upon the faith of such assumed power.

8. Principal and agent \S 170(3) — Principal should repudiate unauthorized act of agent within reasonable time.

While mere acquiescence on the part of the principal is not necessarily conclusive evidence of ratification of act of agent, it is to be considered as evidence of ratification upon the theory that it is the duty of the principal to repudiate the unauthorized act of his agent within a reasonable time after discovery, unless he intends to be bound by it, and such repudiation must be brought home to the party affected.

9. Trial \S 139(1)—When cause should be taken from jury.

No cause should be taken from the jury unless it appears as a matter of law that recovery cannot be had in any view which can reasonably be drawn from the facts which the evidence tends to establish.

Appeal from District Court, Rosebud County; Geo. P. Jones, Judge.

Action by Hans J. Larson against Claude O. Marcy and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Henry C. Smith, of Helena, for appellant.
Donald Campbell, of Forsyth, for respondents.

HOLLOWAY, J. This action was brought to recover \$2,582, and interest thereon from April 27, 1909. Plaintiff states his cause of action in four counts. By the first it is sought to charge the defendants as trustees and to impress certain property owned by them with a lien in plaintiff's favor. The second count sets forth the cause of action as upon a promissory note executed and delivered by the defendants to the plaintiff. The third count is like the second, except that it is alleged that the defendants, as copartners, executed and delivered the note in question. In the fourth count it is alleged that the defendant C. O. Marcy, acting for himself and as agent for the other defendants, borrowed the money from the plaintiff and agreed to repay the same. Issues were joined and the cause tried, with the result that the court directed a verdict against C. O. Marcy and granted a nonsuit in favor of each of the other defendants. Judgment was entered accordingly, and plaintiff appealed. After the appeal was perfected, defendant Harding died, and her personal representative was substituted.

[1] Appellant insists that he made out a prima facie case against all of the defendants upon at least one, if not more, of the several theories of liability indicated by the different counts of his complaint. We may eliminate counts 3 and 4 at once, since the evidence does not tend to prove a partnership, and any evidence which supports the fourth count will establish the second, and therefore the fourth count should have been stricken out. 31 Cyc. 121.

[2] The judgment in favor of the defendants who are sought to be held was entered after nonsuit, and therefore the evidence is to be viewed on this appeal from the standpoint most favorable to plaintiff, and every fact will be deemed to be established which it tends to prove. *Lackman v. Simpson*, 46 Mont. 518, 129 Pac. 325.

[3] In 1906, H. R. Marcy, the father of these defendants, executed and delivered to plaintiff his promissory note for \$2,100. At that time Marcy resided in Forsyth and owned a large amount of property in Rosebud county. In 1907 he conveyed his personal property to C. O. Marcy and all of his real estate to the five defendants as tenants in common, share and share alike, and removed to the state of California. For four or five years thereafter the property was managed by the defendants in the name of "C. O. Marcy & Co.," with C. O. Marcy, the active manager in charge. In April, 1909, plaintiff visited Forsyth to make investigation concerning the indebtedness then due to him from the elder Marcy, and was informed by C. O. Marcy that he had money from his father for the plaintiff. C. O. Marcy then commenced to fill a blank check to make payment of the amount due on the note—

which amount had been ascertained to be \$2,582—but before completing the task, inquired of plaintiff what he intended to do with the money, to which plaintiff replied that he did not have in mind any particular investment for it, and C. O. Marcy then solicited plaintiff to let him and his sisters have the use of the money at the same rate of interest (8 per cent.) which the note of the elder Marcy bore. The request was acceded to, and a new note for \$2,582 was then executed, signed "C. O. Marcy & Co." Within 10 days or 2 weeks thereafter, the other defendants were apprised of the transaction, and, though they complained of the act of their brother, nothing further was done by them until in 1913, when a division of the property was made between the several defendants. Upon such settlement the indebtedness to plaintiff, evidenced by the note for \$2,582, was taken into consideration. It was estimated that the amount then due was \$3,000, and one-fifth thereof was charged against each distributee, some of them receiving specific property free from any charge for the indebtedness, and others receiving property of a greater value and assuming responsibility for the indebtedness. In addition to the foregoing, plaintiff sought to show that the elder Marcy conveyed his property to these defendants under an agreement that the grantees should pay his indebtedness, including the indebtedness to this plaintiff, but this offered evidence was excluded. We may assume that this evidence, if received, would have established an implied or constructive trust capable of being enforced by this plaintiff in the first instance (3 Story's Eq. Jurisprudence, [14th Ed.] § 1651); but since the transaction of April 27, 1909, constituted a novation (section 4959, Rev. Codes; *Kinsman v. Stanhope*, 50 Mont. 41, 144 Pac. 1083, L. R. A. 1916C, 443), he could not thereafter rely upon the trust or enforce the same. We have then to consider whether the evidence tends to support the allegation of the second count that the note for \$2,582 was executed and delivered by the five defendants.

[4] To defeat liability so far as the sisters are concerned, counsel for respondents invoked the provisions of section 5866, Revised Codes, as follows:

"No person is liable on the instrument whose signature does not appear thereon, except as herein otherwise expressly provided. But one who signs in a trade or assumed name will be liable to the same extent as if he had signed in his own name."

The section does not extend the protection contended for. It is elementary that several persons may conduct business as a voluntary association, using a common or trade-name, and in that name be held jointly and severally liable upon contracts (5 C. J. 1335); and it is equally true that a person may sign a

negotiable instrument by an agent. Section 5867, Rev. Codes.

[5] Assuming that the evidence establishes the facts which it tends to establish, it may be said, then, that these five defendants constituted such a voluntary association for the conduct of the business incident to the management of the property conveyed to them by their father. They employed the trade-name "C. O. Marcy & Co.," and constituted C. O. Marcy manager for the association. However, considering the nature of the business conducted, we think it cannot be said that C. O. Marcy had implied authority to execute the note for \$2,582 and bind the several members of the association thereby, and the evidence shows that he did not have express authority to do so. He was, however, the agent of the association, and even though he exceeded his authority, and the resulting contract—the note in question—was voidable at the election of his sisters, the other members thereof, such contract could be ratified by them (section 4994, Rev. Codes), and, if ratified, it became binding as of the date of its execution so far as this plaintiff is concerned (31 Cyc. 1283).

[6-8] Ratification may be effected by express declaration or by implication, and it may be implied from any acts or conduct on the part of the principal which reasonably tends to show an intention on his part to make the act of the agent his own. And where the agency is shown to exist, the facts will be construed liberally in favor of the approval of the principal, and very slight circumstances and small matters will suffice to raise the presumption of ratification in favor of a third party who has dealt with the agent upon the assumption that he possessed the authority and has surrendered a substantial right upon the faith of such assumed power. While mere acquiescence on the part of the principal is not necessarily conclusive, it is to be considered as evidence of ratification upon the theory that it is the duty of the principal to repudiate the unauthorized act of his agent within a reasonable time after discovery unless he intends to be bound by it, and such repudiation must be brought home to the party beneficially affected. The numerous authorities supporting these propositions need not be cited. They are general rules, and are stated in 31 Cyc. 1245 and following pages.

[9] Assuming the existence of the facts which the evidence tends to establish, it follows that the acquiescence of the sisters in the act of the brother in executing and delivering the note for \$2,582, coupled with their subsequent recognition of the indebtedness evidenced by it, and the provision made for its discharge, constituted a ratification, and gave to the note the same binding force and effect as though express au-

thority to execute it had been conferred in the first instance. No cause should be taken from the jury unless it appears as a matter of law that recovery cannot be had in any view which can reasonably be drawn from the facts which the evidence tends to establish. *Stewart v. Stone & Webster Eng. Corp.*, 44 Mont. 160, 119 Pac. 568.

The court erred in granting the nonsuit, and for that reason the judgment is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

BRANTLY, C. J., and REYNOLDS, COOPER, and GALEN, JJ., concur.

STATE, for Use and Benefit of BROADWATER FARMS CO. et al., v. BROADWATER ELEVATOR CO. et al. (No. 4482.)

(Supreme Court of Montana. Oct. 27, 1921.)

1. Evidence \S 397(2)—Parol evidence statute held not to exclude evidence of circumstances.

The provisions of Rev. Codes, § 7873, providing that when an agreement has been reduced to writing it is presumed to contain all the terms, and evidence varying or contradicting the writing is not admissible except in cases of mistake or imperfection, or where the validity of the agreement is in dispute, do not, in proper cases, exclude evidence of the circumstances under which an agreement was made, or to which it relates.

2. Evidence \S 441(15)—Acceptance of receipt completes binding written contract not subject to contradiction by parol evidence.

Where elevator issued and delivered receipts to persons delivering wheat, their acceptance completed binding contracts, and elevator, being prohibited by Laws 1915, c. 93, § 31, from inserting such a provision in a receipt, cannot prove a prior parol or contemporaneous agreement converting the storage receipt into a bill of sale or limiting its liabilities to that of a purchaser.

3. Sales \S 4(5)—Instrument delivered by grain elevator held bailee's receipt.

Instruments issued by grain elevator to persons delivering wheat to it, containing on their face the word "advanced," followed by a statement in figures of an amount of money paid to the owner at the time of the delivery of the wheat, held to be storage receipts and not bills of sale.

4. Warehousemen \S 25(7)—Elevator could not sell stored wheat to itself.

A grain elevator was agent of a company storing wheat with it, and could not legally make a sale to itself without full knowledge by the principal of the facts.

5. Warehousemen §25(7)—Sale by elevator to itself of stored grain held void.

Where grain elevator sold all grain stored with it immediately after its receipt without calling in warehouse receipts, there remained in existence no subject-matter with reference to which elevator and depositors of grain could contract, and on an order to sell wheat by a depositor, the elevator could not claim that there was a legal sale of the wheat to itself, especially where the books of the elevator contained no entry of the purchase of the wheat as required by Laws 1915, c. 93, § 39.

6. Customs and usages §8—Statutes prevail over custom.

Specific provisions of the statutes control as against usage and custom.

7. Compromise and settlement §20(2)—Promise to pay certain amount not settlement in absence of payment.

The law will not permit one to convert the property of another and escape liability by simply agreeing to pay a stated sum, and then not making payment when it is to be a cash transaction; payment of consideration being necessary to the consummation of a settlement, unless time is given.

8. Warehousemen §34(8)—Rule of damages for wrongful conversion of grain.

As prescribed by Rev. Codes, § 6071, measure of damages for wrongful conversion of personal property is the value of the property at the time of its conversion with interest, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict without interest, at the option of the injured party, and this rule is not changed as to liability of a grain elevator for conversion of wheat stored with it by Laws 1915, c. 93, § 32.

9. Trover and conversion §49—Notice held sufficient demand of statutory measure of damages.

In an action for conversion of wheat stored with defendant elevator, a notice by plaintiffs, at the trial and before the introduction of any evidence, that they demanded the highest market price of wheat between the date of the conversion and the date of the decision and judgment of the court, was a sufficient election by the plaintiffs under Rev. Codes § 6071, giving injured party the option of recovering the value of property at time of conversion or the highest market value at any time between conversion and verdict; but the time should terminate with the submission of the cause for verdict or decision, where there was no evidence taken after that time.

10. Warehousemen §34(8)—Measure of damages for conversion of stored grain held not inequitable.

In an action against elevator for wrongful conversion of stored wheat, it was not inequitable to require defendant to pay plaintiffs more than the amount they were willing to accept prior to the institution of the suit, and which was then the prevailing price of wheat, where

they were prevented by the wrongful act of the defendant from selling to other parties or holding for a higher price, in view of Rev. Codes, § 6071, and Laws 1915, c. 93.

11. Warehousemen §25(1)—Have option to return grain on demand or pay market price.

If the provisions of Rev. Codes, § 6086, are binding in actions of conversion, a public grain warehouseman, notwithstanding the positive mandates of Laws 1915, c. 93, by operation of law is given an option to return the grain on demand or to pay the market price at that time, for that would be the measure of his liability.

12. Appeal and error §907(2)—In absence of evidence judgment presumed reasonable.

Rev. Codes, §§ 6086, 6087, are general provisions declaratory of principles of law already existing, and if complaint is made that a judgment is "unreasonable," "unconscionable," or "grossly oppressive," the appellate court will determine the matter from the evidence, and if there is no evidence the presumption of reasonableness governs.

13. Damages §62(3)—No obligation on bailor of converted grain to purchase other grain to minimize damages.

There is no legal obligation resting on a bailor of grain to purchase other grain in order to minimize damages for which a public warehouseman may be liable in case of wrongful conversion under Laws 1915, c. 93, and Rev. Codes, § 6071, since the market is open to the warehouseman and he may return the grain in kind.

14. Trover and conversion §49—Action held prosecuted with diligence permitting statutory rule of damages.

Where wheat was deposited in elevator in fall of 1915 and receipts issued, and demand for the wheat was not made until the spring and summer of 1916, and a great deal of that summer was spent in attempted settlement, and there was temporizing and delay, and on October 30, 1916, plaintiffs filed action for wrongful conversion of the grain, and on February 13, 1917, answer of defendants was filed, and on February 17, 1917, replication of plaintiffs was filed, and on February 28, 1917, defendants filed an amendment to their answer, and on that day trial was had, there was no lack of reasonable diligence on the part of the plaintiffs, either in commencing or prosecuting the action, and they were entitled to recover the highest market value of the grain between the date of conversion and the date of verdict, in view of Rev. Codes, § 6071.

15. Trover and conversion §9(2)—Time fixed by demand and refusal.

Ordinarily the date of demand and refusal is the date of conversion, but, if an actual conversion has previously occurred, demand and refusal as evidence of the time of conversion relates back to that event.

16. Warehousemen §18—Sureties liable if warehouseman is liable.

The purpose of Laws 1915, c. 93, in requiring a bond of a public warehouseman, is

to protect the bailors from wrongful acts of the warehouseman, and if the principal is liable, the sureties are liable, and a release or attempted release or withdrawal of the bondsmen without the agreement of the injured party is of no avail as a defense in an action for damages flowing from wrongful acts already done, and a sale by the warehouseman of his interest in the property stored does not affect such liability.

Appeal from District Court, Broadwater County; John A. Matthews, Judge.

Action by the State of Montana, for the use and benefit of the Broadwater Farms Company and others similarly situated, against the Broadwater Elevator Company and others. From a judgment in their favor deemed inadequate, and from an order denying their motion for a new trial, the plaintiffs appeal. Order affirmed and cause remanded, with instructions to modify judgment.

James A. Walsh and O. P. Cotter, both of Helena, for appellants.

Walsh, Nolan & Scallon, of Helena, and Kanouse & Schmitz, of Townsend, for respondents.

POORMAN, C. C. This is an appeal by plaintiffs from a judgment in their favor, made and entered by the court sitting without a jury, and also from an order denying plaintiffs' motion for a new trial. The ground of the appeal is that the judgment is inadequate in amount and that the bondsmen were held not liable as to a part of the judgment.

The Broadwater Elevator Company was a corporation and a public warehouseman, licensed to do business under the provisions of chapter 93 of the Laws of 1915, and owned and operated an elevator at Townsend and also one at Toston, Mont. The defendants Whaley, Faltemeyer, Geehan, Dixon, and Hayes were the bondsmen of the defendant company. In the fall of 1915, the plaintiffs delivered to the defendant elevator company certain wheat and received storage receipts therefor. These receipts contained the facts required to be stated by section 31 of said chapter, and also by indorsement contained the provisions of section 36, relating to the limitation of charges, are substantially in the same form, and we quote one of them here and the indorsements, in so far as material to this case:

"Montana Storage Receipt Approved June, 1915.

"Broadwater Elevator Company No. 14.

"Townsend, Montana, Nov. 15, 1915.

"Operated as a Public Warehouse under License Issued by the State Grain Inspection Department of the State of Montana.

"Received in store from Broadwater Farm

Co. Four thousand nine hundred twenty-six bushels No. W. H. M. (kind or grade of grain).

"Weighed and graded by Thos. Sheehan.

"Gross lbs.

"Tare.

"Net lbs.

"Gross bus, 4,967.50.

"Dockage, 41.50.

"Net bus. 4,926.00.

"This lot of grain has been stored with grain of the same kind and grade and a similar quantity and grade is deliverable upon the return of this receipt properly indorsed by the person to whose order it was issued and the payment of the proper charges for storage and handling.

"This grain is insured for the benefit of the owner.

"Dockage on wheat and rye is in pounds per bushel; on flax in percentage of the gross amount. No dockage is permitted on other grain.

"Broadwater Elevator Company,

"By A. W. Finch, Manager.

"Advanced—

"60c per bushel."

Indorsed on back thereof:

"Subject to the following charges and conditions:

"1. [Relates to the limitation of charges.]

"2. [Relates to cleaning of the grain.]

"3. Our account for seed, bags, merchandise or cash that we may have furnished or become responsible for, with interest due thereon until paid."

The remainder of the indorsements have no relation to the questions presented on this appeal.

The particular questions presented are:

(1) Was the original transaction a sale or a bailment, and incidentally involving the admissibility of certain oral evidence?

(2) Did the transactions subsequent to the issuance of the storage receipts constitute a sale of the wheat to the elevator company?

(3) What is the measure of damages?

(4) Are the bondsmen liable?

The respondents admit that, not having taken any appeal, they cannot be heard to question the sufficiency of the judgment or to assail it in any manner, but insist that inasmuch as the appellants ask to have the judgment set aside and a new final judgment entered, they have the right to urge what they deem as errors committed by the trial court in combating the new condition that would be thus thrust upon them, and in support of this position cite: 4 C. J. 695, 696; Landrem v. Jordan, 203 U. S. 56, 27 Sup. Ct. 17, 51 L. Ed. 88; Phila. Casualty Co. v. Fechheimer, 220 Fed. 401, 135 C. C. A. 25, Ann. Cas. 1917D, 64; MacGinniss v. B. & M. Co., 29 Mont. 446, 75 Pac. 89.

Whatever the rule may be, in the present case the entire record has been examined, and necessarily so from the questions above enumerated.

1. At the trial of the action the defendants, over the objection of the plaintiff, in-

roduced evidence to the effect that prior to and at the time of the issuance of the warehouse receipt an oral agreement was entered into between the parties which amounted to a sale of the wheat to the elevator company instead of a bailment. The appellant maintains that this evidence was incompetent.

[1] The provisions of section 7873, Rev. Codes, are well known. Where an agreement has been reduced to writing, it is presumed to contain all the terms, and evidence varying or contradicting this writing is not admissible except in cases of mistake or imperfection, or where the validity of the agreement is the fact in dispute. The provisions of this section do not, in proper cases, exclude evidence of the circumstances under which an agreement was made, or to which it relates. *Sathre v. Rolfe*, 31 Mont. 88, 77 Pac. 432; *Gardner v. McDonogh*, 147 Cal. 318, 81 Pac. 964. However, none of these exceptions appear to be present in this case.

The respondents, in support of their contention, cite *Gafford v. Globe Transfer & Storage Co.*, 71 Wash. 204, 128 Pac. 228; *Windell v. Readman Warehouse Co.*, 30 Wash. 469, 71 Pac. 56; *McCurdy v. Wallblom Furniture, etc., Co.*, 94 Minn. 326, 102 N. W. 873, 3 Ann. Cas. 468. An examination of those cases discloses a different state of facts from that appearing in the instant case. In the *McCurdy* Case the plaintiff had stored certain goods with the defendant company and "was given a warehouse receipt in conventional form, which provided for storage generally, but did not specify where the goods were to be kept." Subsequently, the bailee, without the knowledge or consent of the bailor, removed the goods to another place, where they were destroyed or damaged by fire. Oral evidence was admitted for the purpose of showing that the goods were to be stored and kept at the place where they were delivered by the bailor. In the *Gafford* and *Windell* Cases the goods were left for storage and not any receipts given at the time to the bailors, but were subsequently made out by the bailee and mailed to the bailors. In the actions brought for damage to the goods the bailors were permitted to introduce oral evidence of the contract of storage entered into between the parties at the time, on the theory that the receipts which had been subsequently made out by the storage companies and mailed to the bailors did not express the contract of storage, but were simply unilateral agreements on the part of the storage companies, which were not binding upon the other party until accepted by him. In the *Windell* Case the court sustained an instruction given to the jury to the effect that if the warehouse receipt was delivered to the plaintiffs, and they understood it at the time and it expressed the contract of storage, then the written contract contained in it

was controlling and could not be varied or contradicted in any manner by an oral agreement or any evidence thereof.

[2, 3] The receipts in the present case were prepared by the defendant company, signed by it, and by it delivered to the plaintiffs. The defendant company thus knew of their contents and provisions; they were accepted at the time by the other parties and retained by them, and no claim is made by plaintiffs that they did not know the contents. Hence they became binding contracts on all of the parties, for it would be an idle provision of law to require a receipt to be issued which was not binding. The law specifically prohibits a public warehouseman from inserting "in any storage receipt any language limiting or modifying his liabilities or responsibilities as imposed by law." Section 31, c. 93, Laws 1915. The warehouseman being prohibited by law from inserting such a provision in the receipt, he cannot read it therein by proving a prior parol or contemporaneous agreement, converting the storage receipt into a bill of sale or limiting his liabilities to that of a purchaser. The receipts issued and outstanding are binding contracts, and it was error to admit this evidence. A bill of sale, not a bailee's receipt, is the proper instrument in case of a sale. Some of the receipts issued contain on their face the word "advanced," followed by a statement in figures of the amount of money paid to the owner at the time of the deposit. Plaintiffs admit that the money advanced was to be taken out of the sales price of the wheat when sold, but deny that there was any agreement as to when or to whom a sale would be made. Plaintiffs also admit that they could not demand the return of the wheat without the payment of charges and tendering the money advanced, with the interest. Defendants admit that this was done, and the bailee is fully protected by the provisions of the third indorsement on the back of the receipts. The receipts on their face show that the grain stored is charged with the amount of "cash * * * furnished," and neither the original holder nor his assignee could compel the return of the grain without returning the money so advanced, with interest thereon.

[4-6] 2. It is claimed by respondents that the transactions subsequent to the issuance of the warehouse receipts constitute a sale. The wheat was delivered to the defendant company in November and December, 1915. The evidence of plaintiff is that demand for the return of the wheat was made by and on behalf of the *Crowley* and *D'Arcy* interests in the latter part of May or the fore part of June, 1916, and that there was at that time an effort made to effect a money settlement, but the same was not consummated and no money was paid nor wheat delivered. Defendant denies any demand for the wheat

at that time and claims that a fixed price was agreed upon, but admits that nothing was paid and that prior to that time it had sold all of the wheat in its possession. On June 9, 1916, the plaintiff Broadwater Farms Company wired the defendant company from Chicago:

"Sell our wheat immediately at Mpls price and send draft to me. Wire price today at which sold."

On the same date the defendant company replied:

"Sold your wheat as your wire. Our market here today Basis Mpls eighty-three cents. Mail storage ticket to State Bank Townsend and will take up at once."

On June 20, 1916, the Broadwater Farms Company wrote the defendant company requesting that they be paid 85 cents for their wheat. A. W. Finch, manager of the defendant company and called as a witness for defendant, in answer to questions asked him on cross-examination, testified:

"Q. Had you made arrangements with the State Bank of Townsend to take up this wheat certificate that was delivered there? A. No, sir.

"Q. Did you have any money in the bank to take it up? A. I wasn't doing business at the State Bank of Townsend; it was simply a matter of business that I presumed they would want to—

"Q. Did you expect the bank would take it up? A. No, sir."

The witness further stated that at the time the defendant company did not have any elevator in Townsend or elsewhere, but had previously sold its elevators; that the wheat had been sold and the proceeds lost in the purchase of options, on grading, or in shipment; that he expected to raise money by having the bondsman sign a note, but failed. Witness further testified that at the time he sent this wire he did not deliver any wheat to the alleged purchaser nor receive any money from it; that there was no wheat there to deliver or to sell; that the company was at that time unable to pay its debts, although it had not been declared a bankrupt. The appellant maintains that the defendant company was the agent of the Broadwater Farms Company for the sale of wheat, and for that reason could not legally make a sale to itself. Under the facts in this case, the position of the appellant is well taken. *Jensen v. Williams*, 36 Neb. 869, 55 N. W. 279, 281, 20 L. R. A. 207; 4 R. C. L. § 25, pp. 276, 277. But this alleged sale is void for another reason. There was not at that time, nor afterwards, in existence any subject-matter with reference to which the parties could contract. As early as May 10, 1916, the defendant company sold its elevator and all the few bushels of grain it then had. In fact, the wheat of all of these plaintiffs was sold

immediately after its receipt at the elevator in November and December, 1915. Had the wheat been returned in kind, the plaintiffs could not have complained. At no time were these warehouse receipts called in, but were at all times and are yet outstanding, nor is there any evidence here that the books of the company contain any entry of the purchase of this wheat, as the law requires. Section 39, c. 93, Laws 1915. It is claimed by defendant company that it followed the usage and custom of elevators, but the specific provisions of the law furnish the guide, and not usage and custom.

[7] The Minnesota Supreme Court held that, although the warehouse receipt contained a provision giving the warehouseman the option to purchase upon the return of the receipts, he was guilty of a violation of law if he disposed of the wheat prior to the return of the receipt. The statute in that state may not be the same as the statute here, but the court nevertheless gave to the act a strict construction, for the protection of those who parted with the possession of their property and intrusted it to the honesty of others. *State v. Rieger*, 59 Minn. 151, 60 N. W. 1087. Under these facts we are impelled to the conclusion that there never was any sale of this grain to the defendant elevator company, and that it actually converted the same long prior to the demand made by the bailors. To epitomize—the owners attempted to recover their grain or the money therefor and did not get either. The law will not permit one to convert the property of another and to escape liability by simply agreeing to pay a stated sum and then not making payment when it is to be a cash transaction. The payment of the consideration is necessary to the consummation of a settlement unless time is given, and if payment is not made the entire effort fails.

[8] 3. Section 6071, Rev. Codes, prescribes the rule of damages to be assessed in actions of wrongful conversion, and in so far as it has relation to the questions here presented is as follows:

"The detriment caused by the wrongful conversion of personal property is presumed to be: (1) The value of the property at the time of its conversion, with the interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party."

The statement contained in section 32, c. 93, Laws 1915, does not change this rule of damages.

[9, 10] At the trial, and before the introduction of any evidence, plaintiffs served notice that they demanded the highest market price of wheat between the date of the conversion and the date of the decision and

judgment of the court. This seems to be sufficient to raise the question, unless the plaintiff has otherwise limited himself by his pleading. *Potts v. Paxton*, 171 Cal. 493, 153 Pac. 957, 959; *Funk v. Hendricks*, 24 Okl. 837, 105 Pac. 353. However, the time should terminate with the submission of the cause for verdict or decision, for there was not any evidence taken after that time. The respondents contend that in equity and good conscience they ought not to be required to do more than to pay to plaintiffs the amount plaintiffs were willing to accept prior to the institution of the suit, and which was then the prevailing price of wheat, with interest on that amount. In ordinary cases there would be force to this contention. The wheat was undoubtedly stored as the first step toward reaching a market. It was held for high prices. Although the owners may have been willing to accept a much lower price prior to the suit than that which afterwards prevailed, they did not receive it, and the attempted settlement failed and the wheat was not returned; hence they were prevented by the wrongful act of the defendant company from selling to other parties or of holding for a higher price, which they had the legal right to do. Prior to the enactment of this statute the rule for the measurement of damages appears to have been very uncertain. *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462.

In considering the rule of damage under a section identical in language with that just quoted, the Supreme Court of North Dakota said:

"In *Pickert v. Rugg* the court took occasion to call attention to the injustice which will necessarily follow in many cases by an application of the rule promulgated by the Legislature in the section just quoted, by giving to the injured party, not merely compensation for the injury he has suffered, but a right to recover the highest market value up to the time of the verdict, however fictitious that value may be. In the case at bar the recovery for the wheat converted bears no just relation to the damage which the plaintiff suffered. It is a misnomer to call it 'compensation.' It is largely punishment. But, however averse we may be to the rule, it is the rule which governs; and the plaintiff has an absolute right to recover the highest market price, if it so elects, provided only that it has prosecuted its action with reasonable diligence. Counsel for defendant contends that the court erred in determining that the facts show reasonable diligence in prosecuting the action. In *Pickert v. Rugg*, supra, it was held, in accordance with the prevailing opinion of the courts, that, where the facts upon the question of diligence are not in dispute, the question as to whether reasonable diligence has been exercised is ordinarily to be determined by the court, as a question of law; further, that the reasonable diligence required of a suitor relates both to the commencement of the action and the subsequent prosecution." *First National Bank of Fargo v. Red River*

Valley National Bank of Fargo, 9 N. D. 319, 323, 83 N. W. 221, 223.

In considering the rule of damages, under a similar statute, the California court said:

"With the equitableness of this rule of damage we cannot here be concerned. Nor can any arguments, however potent, touching the hardship of the law and its invitation to unjust speculation upon the part of the plaintiff against the defendant, who should only be called upon to make good the loss which the plaintiff has sustained, have any effect to modify the plain provisions of the law as written. Our cases support the right of a plaintiff to a recovery such as plaintiff claims. *Douglass v. Kraft*, 9 Cal. 563; *Hamer v. Hathaway*, 33 Cal. 119, *Tulley v. Tranor*, 53 Cal. 280; *Dent v. Holbrook*, 54 Cal. 145." *Potts v. Paxton*, supra; *Smith v. Caldwell*, 22 Mont. 331, 56 Pac. 590; *Ferrat v. Adamson et al.*, 53 Mont. 172, 181, 163 Pac. 112; *Funk v. Hendricks*, supra.

[11, 12] If the provisions of section 6086 are binding in actions of conversion, the public warehouseman, notwithstanding the positive mandates of said chapter 93, by operation of law is given an option to return the grain on demand or to pay the market price at that time, for that would be the measure of his liability. Both sections 6086 and 6087 are general provisions declaratory of principles of law already existing and if complaint is made that a judgment is "unreasonable," "unconscionable," or "grossly oppressive," the appellate court will determine the matter from the evidence, and if there is no evidence the presumption governs. *Ferrat v. Adamson et al.*, supra.

[13] Nor is there any legal obligations resting on the bailor of grain to purchase other grain in order to minimize the damages for which the warehouseman may be liable in case of wrongful conversion. The market is open to the warehouseman, and he may return the grain in kind.

[14] The only question for determination by this court on this branch of the case is whether this action was commenced and prosecuted with reasonable diligence. The wheat was deposited in the fall of 1915 and receipts issued. The receipts do not prescribe any time within which the demand for return of the wheat must be had. These demands were not made until the spring and summer of 1916, and a great deal of that summer was spent in attempted settlement. There was temporizing and delay. On October 30, 1916, the complaint in this action was filed. On February 13, 1917, the answer of the defendants was filed. On February 17, 1917, the replication of plaintiffs was filed. On February 26, 1917, defendants filed an amendment to their answer and on that day the trial was had. There was not any evidence introduced here as to lack of diligence (*Wilson v. Mathews*, 24 Barb. [N. Y.] 295), and as a matter of law it appears from the

record that there was not any lack of diligence, either in commencing or prosecuting the action. This being the case, the rule of the statute is binding upon this court, and the highest market price of the wheat between the date of the conversion and the time of the trial must be the measure of damages. The precise date of this conversion is difficult to fix. It appears from the evidence that the defendant company disposed of all of its holdings, including its elevators, at a date not later than May 10, 1916.

[15] It is stated as a general rule that—

"Ordinarily, the date of demand and refusal is the date of the conversion. If an actual conversion has previously occurred, demand and refusal as evidence of the time of conversion relates back to that event." (80 Cyc. 2032, and note 74.)

The trial court fixed June 1st as the date of conversion as to the Crowley and D'Arcy interests, and it appears that the demand and refusal of the farms company interest was August 2, 1916. For the purpose of this decision, these dates will be considered as the dates of the conversion.

[16] 4. The purpose of the law in requiring a bond is to protect the bailors from wrongful acts of the warehouseman, and if the principal is liable the sureties are liable. The release, or attempted release, or withdrawal of the bondsman without the agreement of the injured party is of no avail as a defense in an action for damages following from wrongful acts already done. The transaction by which Mr. Wilson disposed of the interest he had in the wheat in storage by the Crowley brothers does not affect the merits of this controversy.

For the reasons herein stated, we recommend that the order appealed from be affirmed; that the cause be remanded to the district court, with instructions to modify the judgment appealed from by entering judgment in favor of the plaintiffs and against all of the defendants for the highest market price of the wheat prevailing, as appears from the evidence, between the date of the conversion as herein fixed and the date of the trial of the action, less the storage charges due in each case, less also the money advanced, with 8 per cent. interest thereon from the time the same was advanced up to the time of the demand and tender.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed; the cause is remanded to the district court, with instructions to modify the judgment appealed from by entering judgment in favor of the plaintiffs and against all of the defendants for the highest market price of the wheat prevailing, as appears from the evidence, between the date

of the conversion as herein fixed and the date of the trial of the action, less the storage charges due in each case, less also the money advanced, with 8 per cent. interest thereon from the time the same was advanced up to the time of the demand and tender.

IN RE STINGER'S ESTATE.

STINGER et al. v. KEITH.

(No. 4477.)

(Supreme Court of Montana. Oct. 24, 1921.)

1. New trial ~~§ 79~~—Granted for misapplication of law to facts.

Under Rev. Codes, § 6793, defining a "new trial" as a re-examination of an issue of fact, and section 6794, allowing a new trial for insufficiency of the evidence, on the ground the verdict is against the law, or for error in law, a motion for new trial will lie when an error of law has been committed by misapplication of the law to the facts, though the decision was based solely on a question of law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, New Trial.]

2. New trial ~~§ 79~~—Where issue of fact raised by formal pleadings in probate proceedings, new trial may be granted, though case decided on law point only.

While Rev. Codes, §§ 6793, 6794, relative to new trials and appeals, apply generally to probate proceedings (section 7712), controversies not arising on written pleadings do not fall within them, a new trial being a re-examination of an issue of fact, which under section 6723 arises on formal pleadings, so that, where an issue of fact is thus raised, a motion for new trial will lie, though the court decided the case on a law point only.

3. New trial ~~§ 2~~—On determination of issues of fact pleaded in probate proceedings, aggrieved party may move for new trial as in other civil cases.

Under Rev. Codes, §§ 7712, 7714, 7715, issues of fact in probate proceedings must be tried in conformity with the Code as to the contest of wills, and, when formal pleadings are filed presenting issues of fact, the parties should proceed to a formal trial, and on determination of the issues by the court the aggrieved party may move for a new trial on the same grounds and in like manner as in other civil cases.

4. Affidavits ~~§ 2~~—Guardian proper person to make affidavit in behalf of incompetent minor.

Where a minor is incompetent to make an affidavit, his guardian is the proper person to make it in his behalf.

5. Executors and administrators ~~§ 221(1)~~—Guardian's claim against another estate is presumably in behalf of ward's estate.

A claim against an estate made by a guardian as such is presumably in behalf of his ward's estate, of which he is the representative.

6. Executors and administrators \S 227(3)—Guardian's affidavit as individual in support of ward's claim against estate held sufficient.

An affidavit in support of a claim purporting to be that of affiant, guardian of a minor, against an estate, is not insufficient because it makes no reference to his official capacity as guardian, does not allege that the ward is a creditor or claimant, and contains no verification by her or in her behalf, as required by Rev. Codes, \S 7526, there being no distinction between affidavits made by the same person as a guardian and as an individual covering the same subject-matter in the same form, the individual who makes the oath being responsible for false statements in either case.

7. Affidavits \S 12—Made prior to statute requiring notary to affix seal not defective because such seal not affixed.

An affidavit made prior to the statute, requiring the notary to affix his seal to the jurat, is not defective because of the notary's failure to affix such seal, Rev. Codes, \S 320, subd. 6, then in force, not requiring the affixing thereof.

8. Courts \S 200 $\frac{1}{4}$ —District court sitting as probate court cannot determine equitable questions.

Since the district court, sitting as a probate court, has only those powers expressly granted by the statute or necessarily implied to give effect to those granted, it cannot generally entertain proceedings to determine equitable questions, which must be brought before the district court exercising such equitable jurisdiction.

9. Courts \S 27—May determine all questions of law necessary to decision of issues involved.

Generally a court has power to hear and determine all questions of law necessary to an ultimate decision of the issues involved.

10. Courts \S 201—Probate court may determine equitable matters necessary in exercise of granted powers.

The probate court may consider equitable matters, the determination of which becomes necessary in the exercise of powers expressly granted to it.

11. Courts \S 200 $\frac{1}{4}$ —Probate court cannot determine validity of assignment of allowed creditor's claim against estate.

The probate court cannot determine the validity of an assignment of an allowed creditor's claim against an estate.

12. Executors and administrators \S 283—Probate court may direct payment of claims allowed against estate.

The probate court, in the course of administration, may direct the payment of claims allowed against an estate.

13. Executors and administrators \S 283—Where there was no dispute as to title of claim against estate, probate court may determine rights between claimant and subrogee.

Where there was no dispute as to the title to an allowed creditors' claim against an estate as between those to whom it was allowed and the one asking for its payment, the probate court, in the exercise of its powers to direct

the payment of claims, could determine whether the latter, a former guardian of the former, was subrogated to their rights and entitled to an order directing payment of the claims to him.

14. Courts \S 200 $\frac{1}{4}$ —Probate court's determination of claim of subrogation to allowed creditors' rights held not barred on theory hearing on equitable defenses prevented.

Where obligations represented by unequivocal promissory notes, the consideration for which was undisputed, and the maker's obligation unquestioned, were allowed by the administrator of the maker's estate and approved by the judge, and the guardian of the minor payees of such notes paid to them all they were entitled to under the court's decree, thereby extinguishing their interest in the notes, the determination by the probate court whether such guardian was subrogated to his wards' rights and entitled to an order directing payment of the claims to him was not barred on the theory that a hearing on the equitable defenses to such claim of subrogation would be prevented, there being no equitable defenses as between such claimant and the estate nor as between him and his former wards.

15. Subrogation \S 41(3)—Guardian subrogated to wards' rights in claim against another not barred from recovering by delay in accounting.

A former guardian who became subrogated to his former wards' rights in the amount of their allowed claims against an estate was not barred from recovering such amount because of laches in his guardianship accounting, nor by his failure to sue promptly, where he did settle fully, and the administration was also delayed.

16. Subrogation \S 31(5)—Former guardian, by settling with wards in full amount of their allowed claims against estate, became subrogated to their rights in notes representing such claim; "subrogation."

A guardian who made full and complete settlement with his wards by paying to them cash in lieu of notes given for loans made from their funds to a decedent, against whose estate the amounts thereof were allowed, became entitled to an assignment of the notes, but, no assignment being made, became subrogated to his wards' rights therein, such settlement, though it extinguished the wards' claim to the notes, not destroying them nor extinguishing the claim allowed against the estate, the rule of "subrogation" being that, even though a formal assignment was not made, the law, which in equity and conscience will not permit one party to be benefited by a double exaction will not require the other to suffer the penalty thereof, but will treat the transaction as though that was done which should have been done.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Subrogation.]

17. Subrogation \S 10(4)—Guardian satisfying obligation to wards arising from unwarranted investment of their funds is subrogated to their rights against others primarily liable.

A guardian, who uses his own funds to satisfy an obligation to his wards arising from his

having loaned their funds to individuals without an order of the court, is subrogated to their rights against others primarily liable.

18. Indians \S 24—May make valid contracts unless prohibited by statute.

Indians, unless prohibited by U. S. Comp. St. \S 4087, with respect to the execution and approval of contracts involving services for them relative to their lands or claims, in reference to annuities, installments, or other moneys, claims, etc., under laws or treaties with the United States or official acts of its officers, etc., may make valid contracts.

19. Indians \S 24—Notes executed by deceased Indian, not involving property rights, allowable, though not executed in accordance with statute.

Though deceased, at the time of signing promissory notes presented for allowance from her estate, was an Indian ward of the government, and such notes were not executed and approved in accordance with U. S. Comp. St. \S 4087, with respect to contracts involving services for Indians relative to their lands or claims growing out of or in reference to annuities, installments, etc., under laws or treaties with the United States or acts of federal officials or in any way connected with, or due from the United States, such claim was allowable where the notes did not involve the property rights mentioned in the statute.

20. Bills and notes \S 49—Accommodation maker held primarily liable.

One signing a note on its face as a maker is primarily liable for its payment, even though an accommodation maker.

21. Limitation of actions \S 56(3)—Action against estate of maker of promissory note not barred by running of statute as against comaker.

A claim against an estate based on promissory notes executed by deceased is not barred by the running of the statute as against deceased's comakers, since neither deceased's nor her estate's right to reimbursement from the principal debtor depended on such fact, for the limitation of her or its action against such debtor would commence to run from the date she or it paid the notes, and not before.

Appeal from District Court, Missoula County; Asa L. Duncan, Judge.

Petition by J. M. Keith for order directing payment of claims by Andrew Stinger, administrator of the estate of Louise Stinger, deceased. Petition denied, and from an order granting a motion for new trial, the administrator and other objectors appeal. Affirmed.

William Wayne and E. C. Mulroney, both of Missoula, B. K. Wheeler, of Butte, John P. Swee, of Ronan, and Frank Woody, of Billings, for appellants.

Murphy & Whitlock and Thos. Marlowe, all of Missoula, for respondent.

REYNOLDS, J. Louise Stinger died November 25, 1905, and Andrew Stinger her

widower, was appointed and qualified as administrator of her estate. Notice to creditors was given, and time for presentation of claims expired. Within the time limited for presentation of claims, J. M. Keith, as guardian of Eva May Allard and Louise Anna Allard, minors, presented two claims, each in the sum of \$7,000, and based upon a promissory note dated May 10, 1902, payable on demand to J. M. Keith, guardian. These two notes were signed by Louise Stinger, decedent, Charles Allard, Andrew Stinger, and L. J. B. Jetta. These claims were allowed by the administrator and approved by the judge of the court. On September 7, 1916, Keith filed a petition praying for an order of the court directing the administrator to pay to him personally these two claims, insisting that for reasons hereinafter stated he had become subrogated to the rights of the estate of the minor children as to the title to the notes and the claims. At that time all other claims had been paid, and there were more than sufficient funds with which to pay these claims. Formal objections, in the nature of answers, were filed to the allowance of this petition by the administrator officially, and also personally, by Leon Bishop, as guardian of the minor children of Louise Stinger, deceased, and by Eva May Allard as an heir at law of Louise Stinger, deceased. These several answers expressly deny the jurisdiction of the district court sitting in probate to grant the relief prayed for in the petition, for the reason that the right of the petitioner depends upon his claim of subrogation, which presents an issue that can be determined only by a court of equity. The answers also raise some issues of fact upon the merits. To these answers replies were filed by the petitioner. The matter came on for hearing before the court without a jury, evidence was taken in support of and in opposition to the petition, and decision was rendered by the court denying the petition on the sole ground that it did not have jurisdiction in that proceeding to determine the equitable claim of subrogation upon which plaintiff's petition was founded. A motion for new trial was granted, and appeal has been taken from the order by all the parties filing objections to the petition.

The assignments of error present two questions for determination: First, was a motion for new trial permissible in a probate proceeding of this kind? Second, if motion for new trial was permissible, was the order granting the new trial justified upon the merits?

It is urged by appellants that in a probate case of this kind a motion for new trial will not lie, because the petition was not disposed of by a determination of facts, but was

disposed of solely upon a question of law; that a new trial is authorized only for the re-examination of issues of fact, and that in this case, the question involved being only an issue of law, there could not be a re-examination of issues of fact.

[1] A new trial is defined by the Code as follows:

"A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court, or by referees." Rev. Codes, § 6793.

A new trial may be granted on the application of the party aggrieved for the following causes, among others: (1) Insufficiency of the evidence to justify the verdict or other decision, or that it is against law; (2) error in law occurring at the trial and excepted to by the party making the application. Rev. Codes, § 6794. Under this statute it is evidently contemplated that a re-examination of the facts may be had when the court is satisfied that an error of law has been committed by reason of misapplication of the law to the facts, for if otherwise, how then could a new trial be granted because of insufficiency of the evidence, or because the decision is against law, or on account of error in law occurring at the trial, since these questions are purely law questions? This interpretation of the law has been made in a number of instances involving judgments of the court upon sustaining motion of defendant for nonsuit or motion for directed verdict. In each of these cases the decision is a determination of a question of law, and not a determination of a question of fact, but it has been held uniformly by this court that a motion for a new trial will lie in such cases. *Old Kentucky Distillery v. Stromberg-Mullins Co.*, 54 Mont. 285, 160 Pac. 734; *St. Paul, M. Mfg. Co. v. Bruce*, 54 Mont. 549, 172 Pac. 330; *Nelson v. Northern Pac. Ry. Co.*, 50 Mont. 516, 148 Pac. 388. The new trial involves a re-examination of the facts with opportunity to make a different application of the law to the facts if the court conceives that it has committed error in its former ruling.

[2] Respondents misinterpret the situation when they contend that there is nothing in this case to review but a question of law. It is true that the court decided the case upon the law point that it did not have jurisdiction to grant the relief prayed for, but whether or not the review is a re-examination of facts does not depend upon the reason given by the court for its decision, but rather upon the question whether or not the pleadings as made present issues of fact. It has been determined by this court that—

"While the provisions of the Codes relative to new trials and appeals apply generally to probate proceedings (Rev. Codes, § 7712), controversies which do not arise upon written

pleadings authorized or required by statute do not fall within them, because a 'new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court, or by referees' (Rev. Codes, § 6793), and an issue of fact for the purpose of a trial arises upon formal pleadings (Rev. Codes, § 6723)." *In re Antonioli's Estate*, 42 Mont. 219, 111 Pac. 1033; *State ex rel. Heinze v. District Court*, 28 Mont. 227, 72 Pac. 613.

The real question, then, is whether or not an issue of fact is presented in this case upon formal pleadings authorized or required by the statute. If such issue of fact is thus raised, then a motion for new trial will lie; otherwise not.

[3] In the title of the Code relating to probate proceedings appear the following sections:

"The provisions of part II of this Code, relative to new trials and appeals—except in so far as they are inconsistent with the provisions of this title—apply to the proceedings mentioned in this title." Rev. Codes, § 7712.

"All issues of fact joined in probate proceedings must be tried in conformity with the requirements of article II, chapter II, of this title, and in all such proceedings the party affirming is plaintiff, and the one denying or avoiding is defendant. Judgments therein, on the issue joined, as well as for costs, may be entered and enforced by execution or otherwise, by the court or judge, as in civil actions." Section 7714.

"If no jury is demanded, the court or judge must try the issues joined. If on written demand a jury is called by either party, and the issues are not sufficiently made up by the written pleadings on file, the court or judge, on due notice to the opposite party, must settle and frame the issues to be tried, and submit the same, together with the evidence of each party, to the jury, on which they must render a verdict. Either party may move for a new trial, upon the same grounds and errors, and in like manner, as provided in this Code for civil actions. * * *" Section 7715.

Article 2, c. 2, referred to in section 7714, deals with contests of wills, and therefore, under this section, issues of fact must be tried in conformity with the requirements of the Code as to the contest of wills. This applies to all issues of fact joined in probate proceedings. If no jury is demanded, the court or judge must try the issues joined, and either party may move for a new trial upon the same grounds and errors, and in like manner as provided in the Code for civil actions. In this case, issues of fact were joined by formal pleadings consisting of the petition by Keith, the answers of the appellants and the reply by Keith. While not denominated complaint, answer, and reply, respectively, as in the trial of the ordinary civil action, nevertheless the pleadings are just as formal and just as effectual in presenting the issues of fact involved therein. The clear meaning of the probate statutes is that, when formal pleadings are filed presenting issues of fact,

the parties should proceed to a formal trial, and, upon the determination of the issues of fact by the court, the aggrieved party may move for a new trial the same as in other cases.

Appellants contend that, by reason of the decisions of this court in the cases of *In re Antonelli's Estate*, and *State ex rel. Heinze v. District Court*, *supra*, motion for new trial cannot be made in probate proceedings. In the former case two applications for letters of administration were heard together and issue was not joined in formal pleadings as to any fact alleged in either petition. Under these circumstances, the case would not come within the rule as to issues being embodied within formal pleadings, and therefore is not in point. In the latter case, action was brought to compel relator to pay to a receiver the amount of allowances granted to him in an order allowing his final account as receiver. The court entered an order against the relator for the payment of these allowances. There was no issue of fact arising upon formal pleadings, and the court held that a motion which does not ask for a decision of an issue of fact arising upon formal pleadings is not the subject of a motion for new trial. Neither of the cases is inconsistent with the contention here that a motion for a new trial will lie by reason of the fact that there were formal pleadings presenting issues of fact.

This court had occasion to pass upon this question in *Re Davis' Estate*, 27 Mont. 235, 70 Pac. 721. After quoting the sections of the Code relative to trials of issues of fact in probate proceedings above set forth, it stated that—

"Contests of this kind must be conducted with the formalities and procedure applicable to ordinary actions, with the aid of all the court machinery necessary for that purpose. If this is the correct theory—and we think it is—then, whenever an issue of fact is made, and the trial is had in the ordinary way, a motion for a new trial will lie, and a re-examination of the issues may be had. 'It would be impracticable to enumerate the cases in which a motion for a new trial is appropriate in probate proceedings, but it may be stated generally that whenever the action of the court which is invoked is dependent upon the existence of certain extrinsic facts which are presented to it for determination in the form of pleadings, and are to be decided by it in conformity with the preponderance of the evidence offered thereon, an issue of fact arises, which, after its decision, may be re-examined by the court upon a motion for a new trial.' *In re Bauquier's Estate*, 88 Cal. 302, 26 Pac. 178, 532."

As a motion for a new trial in civil actions can be made upon the ground of the insufficiency of the evidence to sustain the verdict or judgment that the decision is against the law, and that errors in law occurred upon the trial, so in probate proceedings, where issues have been joined in formal pleadings, motion

for new trial can be made upon these grounds. As these were the grounds assigned for a new trial in the motion in this case, respondents were within their rights in making such a motion.

[4-6] Appellants insist that the claims as filed were not in compliance with the statute requiring verification by the creditor or some one in his behalf. The claims were identical in form, and therefore a consideration of the one filed as guardian of Eva May Allard, minor, will dispose of both of them. The claim on its face purported to be the claim of J. M. Keith, guardian of Eva May Allard. The verification was made by John M. Keith without any reference whatever to his official capacity as guardian. It is contended that, if this was intended as the presentation of the claim of the minor, it was insufficient, because it does not purport to be presented as such, contains no allegation that she is a creditor or claimant, and contains no affidavit or verification by her or purported to be made in her behalf. The requirement of the statute as to the affidavit is as follows:

"Every claim which is due, when presented to the executor or administrator, must be supported by the affidavit of the claimant, or some one in his behalf, that the amount is justly due, that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of the affiant. * * * Section 7526, Rev. Codes.

The verification omitting the caption, was in the following form:

"John M. Keith, whose foregoing claim is herewith presented to the administrator of said deceased, being duly sworn, says: That the amount thereof, to wit, the sum of eight thousand four hundred sixty-two and 50/100 (\$8,462.50) dollars is justly due to said claimant; that no payments have been made thereon which are not credited, and that there are no offsets to the same, to the knowledge of said affiant. [Signed] J. M. Keith.

"Subscribed and sworn to before me this 10th day of September, 1907. Henry C. Stiff, Notary Public in and for Missoula County, Montana."

Presumably a minor may be incompetent to make an affidavit, and in such event there must be some one authorized to make an affidavit in his behalf. It is hardly open to dispute that in such case the guardian is the proper person to make such affidavit. 2 C. J. 321, par. 16. As the guardian is the representative of the estate, a claim made by him as such guardian is presumably in behalf of the estate. By this verification it appears that John M. Keith is the identical person referred to as J. M. Keith, guardian, but the affidavit is an individual affidavit. However, we cannot understand that there can be any distinction between an affidavit made by a person as a guardian and another as an individual covering identically the same subject-matter in identically the same form. If there

is, it is a distinction without a difference. In either case, it is the individual, that is making the oath, and it is the individual that is responsible for any false statements contained therein, and who is liable for prosecution for perjury if perjury has been committed. *Wade v. Roberts*, 53 Ga. 26. We are therefore of the opinion that the point made by the appellants that the affidavit is insufficient in the respects mentioned is not well taken.

[7] Objection is also made to the affidavit for the reason that the seal of the notary public was not affixed to the jurat. However, it appears that, at the time the affidavit was made, the present statute requiring the notary public to affix his seal to authenticate his official acts had not been enacted then, and that the provisions of the law then in force did not require him to authenticate with his official seal an affidavit to be used in this state in any of its courts, or in any manner whatever. *Rev. Codes, § 320, subd. 6.*

[8] Appellants insist that the trial court, sitting as a court in probate, had no jurisdiction to grant the relief prayed for in the petition, for the reason that petitioner relies upon the claim of subrogation to the rights of his former wards that the right of subrogation is equitable in its nature, and that such equitable right cannot be determined in a probate proceeding, but can be determined only in a proceeding in equity. This contention is based upon a line of decisions consistently holding that the district court sitting as a probate court is of limited jurisdiction, and that its powers are only those which are expressly granted by the statute or necessarily implied to give effect to those expressly granted. It is uniformly held that such power does not confer jurisdiction generally to entertain proceedings to determine equitable questions, but that such cases must be brought in the district court exercising such equitable jurisdiction. It is conceded by all parties to this case that such is the general rule, but respondent contends that there exists a well-defined exception to that rule to the extent that it may become necessary for the probate court to determine an equitable question as a necessary incident to the carrying out of the powers expressly granted to the probate court.

In support of appellants' contention, a number of Montana cases are cited, but each one of them may be distinguished from the case under consideration. In the case of *Chadwick v. Chadwick*, 6 Mont. 566, 13 Pac. 385, an action was brought in the probate court for construction of a will. This proceeding was brought independently of any other proceeding in the administration of the estate, and therefore the jurisdiction to hear the petition depended upon whether or not the power to construe a will was expressly granted by the statute. It was held that the court did not have jurisdiction to entertain such an action. In *Re Dolenty's Estate*, 53

Mont. 33,¹ it was held that the probate court did not have jurisdiction to determine the question of title as to real estate between the estate and the widow of the deceased claiming the real estate adversely. In *Davidson v. Wampler*, 29 Mont. 61, 74 Pac. 82, it was held that the probate court was not empowered, under the statute as it then existed, to authorize a guardian to mortgage the real estate of his ward. In *State ex rel. Bartlett v. District Court*, 18 Mont. 481, 46 Pac. 259, it was held that a special administrator had no authority other than to collect and preserve the estate, and did not have any authority to pay claims. In *State ex rel. Eisenhauer v. District Court*, 54 Mont. 172, 168 Pac. 522, it was held that the probate court has no authority to allow a fee to an attorney for services rendered the administrator in the settlement of the estate, but that the matter of attorney fee was a question between the administrator and the attorney, and that the only function of the court in regard to it was the allowance or disallowance to the administrator of an attorney fee paid for which credit is claimed in the administrator's final account. In *Re Higgins' Estate*, 15 Mont. 474, 39 Pac. 506, 28 L. R. A. 116, there is a general discussion of the limitation of the jurisdiction of the probate court, but it does not decide any specific point material to the determination of this case. It is to be noted that in each one of the cited cases the jurisdiction of a probate court was denied, for the reason that in each case the relief sought was not included within the express powers granted the probate court, nor was it necessarily incidental to the exercise of such expressly granted powers.

[9-13] The real question to be determined here is whether or not the power to make determination of the right of the petitioner to subrogation was necessarily implied from the fact that the court, in the exercise of its probate jurisdiction, does have express authority to direct the payment of claims. As a general proposition, a court must necessarily have power to hear and determine all questions of law which are necessary to an ultimate decision of the issues involved. *Ross on Probate Law and Practice*, 217. In California the probate statutes are substantially the same as our own, and in that state a number of decisions have been handed down illustrating the right of the probate court to consider matters equitable in nature, the determination of which becomes necessary in the exercise of the powers expressly granted. In the case of *In re Clary*, 112 Cal. 292, 44 Pac. 569, it was held that after a decree of distribution the probate court had jurisdiction to compel an accounting from the executor to one of the heirs. In the case of *Estate of Burton*, 93 Cal. 459, 29 Pac. 36, the question arose as to whether or not the purchaser of the rights of an heir to land before distribution could maintain his peti-

¹ 161 Pac. 524.

tion in the probate court for determination of his title, and for an order assigning to him the share of his vendor. An excerpt from the opinion in that case sets forth concisely the theory upon which such jurisdiction is vested, as follows:

"It will not be denied that the decree of distribution and the order discharging the executor or administrator are within the scope of 'matters of probate,' in the sense of the Constitution, from which it necessarily follows that the court must have the incidental power, in some mode, to ascertain and determine who are entitled, as distributees, to the residue of the estate, even though such determination should involve a question as to title or possession of real property."

In *Re Warner's Estate*, 6 Cal. App. 361, 92 Pac. 191, it was held that, in a contest on a petition for appointment of administrator, the probate court had jurisdiction to determine the validity of an antenuptial contract which was involved, it being claimed that the contract was void because of fraud. In the case of *In re Cummin's Estate*, 143 Cal. 525, 77 Pac. 479, it was held that the assignee of an allowed creditor's claim may petition the probate court for payment thereof to himself. This involved, of course, the validity of the assignment which is not within the general powers of the probate court to determine, but it was held to be within its jurisdiction inasmuch as that was incidental to the power of the court to order the payment of the claim. That case, in principle, is very similar to the one at bar. Other states have gone even farther than the California courts in holding that the probate court has jurisdiction to determine equitable questions where necessary to the proper disposition of its probate business. *Browder v. Phinney*, 30 Wash. 74, 70 Pac. 264; *Hayden v. Hargan*, 202 Ill. App. 544; *State v. Probate Court*, 133 Minn. 124, 155 N. W. 906, 158 N. W. 234. This court, in considering the right of the contestants of a will to share in the estate, sets forth in general terms the jurisdiction of the probate court to dispose of questions necessarily incidental to the exercise of the powers expressly conferred, in pertinent language as follows:

"This argument proceeds upon the theory that, though the district court is one of general jurisdiction, yet, when exercising its probate jurisdiction, its powers are limited by the statute from which they are derived, and unless express authority can be found in the statute for the particular order, or part of it, which is called in question, it is void, citing *State ex rel. Bartlett v. District Court*, 18 Mont. 481, 46 Pac. 259; *State ex rel. Shields v. District Court*, 24 Mont. 1, 60 Pac. 489; *Burns v. Smith*, 21 Mont. 252, 53 Pac. 742, 69 Am. St. Rep. 653; and *State ex rel. Kelly v. District Court*, 25 Mont. 33, 63 Pac. 717. Speaking generally, the soundness of this proposition is not controverted. The foregoing cases fully support it; but they are not inconsistent with

another proposition of equal weight and importance; that, though the jurisdiction of the court when exercising its probate powers is, in a sense, special and limited, and depends upon the statute, yet, by implication, it also possesses all powers incidentally necessary to an effective exercise of the powers expressly conferred. This must be the case. Otherwise the court would be unable to discharge its very important functions. Touching its powers in respect of executors and administrators, the proper function of the court is the control of the devolution of property upon the death of its owner. All questions of law and fact which necessarily arise from the inception of the proceeding down to and including the distribution of the property must necessarily fall within the purview of this power of control." *Estate of Davis*, 27 Mont. 490, 71 Pac. 757.

Applying the principles of the decisions hereinbefore referred to to the case under consideration, can it be said that the determination of the question whether or not Keith was subrogated to the rights of his former wards in the matter of the claims in question could be had in a probate proceeding upon his petition for an order directing payment of these claims to himself? Under the probate statutes, there can be no question whatever but that it is within the jurisdiction, of the probate court, in the course of administration, to direct the payment of claims that have been allowed against the estate. It is certain that it cannot direct the payment of an allowed claim unless it is advised as to whom the payment of that claim should be made. If there is no dispute as to the title of the claim as between the one to whom it is allowed and the one who asks for its payment, as in this case, it would seem to this court that there could be no question but that the court could, in the exercise of its granted powers, determine that the claim should be paid to the one claiming title thereto. In case there is a substantial dispute between two or more claimants as to the title, a different question would be presented, which we do not decide at this time. In this case, the probate court would be within its jurisdiction in determining whether or not Keith was subrogated to the rights of its former wards and entitled to an order directing payment of the claims to him.

[14] It is urged by appellants that the determination of this question in the probate proceeding, prevents a hearing on the equitable defenses that might be made to his claim of subrogation. As between Keith and the estate, there could be no equitable defenses because the obligations were unequivocal promissory notes which had been allowed by the administrator and approved by the judge; the consideration for the notes was undisputed, and the obligation of the makers of the notes unquestioned. There could be no equities as between the former

wards and Keith, because there had been a full and complete settlement between him and them, as hereinafter set forth, whereby they had received everything from him that under the decree of the court they were entitled to receive, by which settlement all their interest in the notes was necessarily extinguished.

[16] Appellants also urge that Keith should not be entitled to recover in this proceeding because of laches consisting of his failure to make more prompt settlement of his guardianship accounts, and also to take action sooner in the court to have his claim paid. His delays in settlement of his guardianship accounts are immaterial as between him and the estate of the deceased, and even though there may have been unreasonable and inexcusable delays in his accounting as guardian, yet, a full and complete settlement having been made by him with his former wards, it must be held that such settlement is a satisfaction of all his obligations to them. So far as any laches in taking action in the court to have his claim paid is concerned, we are unable to see wherein the obligation rested upon him to take such action at all. The obligation to settle the estate and pay the claims rested upon the administrator, and while the owner of the claim may take action to expedite payment of his claim where there has been unreasonable delay in the administration, yet that is not obligatory upon him, but he has a right to assume that the administrator will pay claims in the due course of administration when the estate is in a condition for such payment.

[18] Appellants also contend that Keith was not entitled to subrogation on the merits. The facts are undisputed that Keith, as guardian of his former wards from whose funds he made the loans evidenced by the promissory notes, made full and complete settlement with his wards, turning over to them cash in lieu of these notes. By that settlement the wards received all moneys and property which they were entitled to receive from him as guardian, and therefore it is inconceivable that they could have any further interest in or claim to the notes. They cannot receive from their former guardian cash in lieu of the notes and at the same time claim the notes. Their claim to the notes was extinguished by the payment to them of the money for which the notes were given. Such settlement, however, did not destroy the notes nor extinguish the claim that had been allowed against the estate of the deceased. The estate could have no interest or concern in the ownership of the notes, for it could make no difference to it to whom the payment was made, provided, however, that it did not make payment to the wrong person, and thereby incur the danger of being obliged to

pay the claims twice. The interest of the minors was extinguished, and the notes were still in full force and effect as against the makers thereof. The title must have been lodged in some one, and under the circumstances no one could have any interest in them except Keith, who had turned over to his wards money instead of the notes upon the latter being rejected by them. If he had been required to surrender the notes to the wards after having made settlement with them, they would have received the \$15,000 with interest twice, while he would have been compelled to make payment of that amount twice, which, from any standpoint, would be unjust and inequitable.

The principle of subrogation is intended to relieve against just such inequities as this would be. Upon making payment to his wards of cash in lieu of the notes representing money of his wards which he had loaned, he was entitled to an assignment to him of the notes, but the assignment was not made. The law, by the rule of subrogation, supplies the defect, and, in principle, says that, even though a formal assignment was not made, yet, as in equity and good conscience the law will not permit one party to be benefited by a double exaction, so will it not require the other party to suffer the penalty of double exaction. It will treat the transaction the same as though that was done which should have been done, and hold that Keith shall, by the right of subrogation, be held to be the owner of the notes.

[17] Appellants urge that subrogation should not be allowed in this case because Keith made an unwarranted investment of his wards' funds by loaning them to individuals without an order of the court, and was compelled to account for such funds, and therefore does not come into court with clean hands. They cite several cases to that effect, but those cases seem to be based upon the principle that one acting in a fiduciary relation, making unwarranted investment of the funds of the beneficiary, cannot reap a profit by reason of his wrongdoing or place himself in a more advantageous position by reason of his perpetration of a fraud. *Rowley v. Towsley*, 53 Mich. 329, 19 N. W. 25; *Bank v. United States*, 148 U. S. 573, 13 Sup. Ct. 702, 37 L. Ed. 564; *Guckenheimer v. Angevine*, 81 N. Y. 395; *Brown v. Sheldon State Bank*, 139 Iowa, 83, 117 N. W. 293. But no one of these cases goes to the extent of holding that such a person would not have an interest in the unwarranted investment to the extent of reimbursement for moneys expended by him in accounting therefor. We believe the general rule to be that when one acting in a representative or fiduciary capacity uses his own funds to satisfy an obligation for the benefit of his trust, he is subrogated to the rights of his principal against others primarily liable, and that

such general rule is applicable in this case. 37 Cyc. 439, 440, 442; *Smith v. Moore*, 109 S. C. 196, 95 S. E. 351; *Franzell v. Franzell*, 153 Ky. 171, 154 S. W. 912; *Buskirk v. Sanders*, 70 W. Va. 363, 73 S. E. 937; *Flowers v. Reece*, 92 Ark. 611, 123 S. W. 773; *Earle v. Coberly*, 65 W. Va. 163, 64 S. E. 628, 17 Ann. Cas. 479.

[18, 19] It is urged that the claim should not be allowed for the reason that the deceased was, at the time of signing the notes, an Indian and a ward of the government, and that, as such, she could not bind herself to pay the notes unless they were executed and approved in accordance with the requirements of the United States Compiled Statutes 1916, § 4067, reading as follows:

"No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

"First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

"Second. It shall be executed before a judge of a court of record, and bear the approval of the Secretary of the Interior and Commissioner of Indian affairs indorsed upon it.

"Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

"Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

"Fifth. It shall have a fixed limited time to run which shall be distinctly stated.

"Sixth. The judge before whom such contract or agreement is executed shall certify officially the time, when and place where such contract or agreement was executed, and that it was in his presence, and who are the interested parties thereto, as stated to him at the time; the parties present making the same; the source and extent of authority claimed at the time by the contracting parties to make the contract or agreement, and whether made in person or by agent or attorney of either party or parties.

"All contracts or agreements made in violation of this section shall be null and void, and

all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the treasury for the use of the Indian or tribe by or for whom it was so paid."

It is unquestioned that the notes were not executed and approved in accordance with the requirements of this statute, and appellants insist that by reason thereof they were absolutely void and nonenforceable. It is to be noted that the statute limits the kind of contracts to be executed by Indians to contracts which must be executed and approved in accordance with the statute, namely: Contracts involving "services for said Indians relative to their lands, or to any claims growing out of, or in reference to annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States." Appellants have cited a number of cases in support of their contention, but it is sufficient to say that in each one of the cited cases it appears that the contract involved was one relating to some one of the matters above set forth. In the case at bar the notes had nothing whatever to do with any of the items mentioned in this statute.

In the case of *Postoak v. Lee*, 46 Okl. 477, 149 Pac. 155, the court gives what we conceive to be a proper interpretation of this statute, in the following language:

"It is, however, contended by the plaintiff in error that Jack Postoak had no right to enter into this contract because he was a full-blood Mississippi Choctaw Indian. This contention is not well taken. The fact that one of the parties to the contract was a full-blood Indian did not incapacitate him or impair his right to enter into this contract. He had the same right as other persons to make contracts generally. The only restriction on this right peculiar to an Indian, was in regard to contracts affecting his allotment. These he could not make without the consent and approval provided by law. The contract above set out was not within the restricted class."

There can be no question but that Indians, unless prohibited by this statute, may make valid contracts. 22 Cyc. 115. In our opinion, this statute is insufficient to reach a case such as this (*Smith & Steele v. Martin*, 28 Okl. 836, 115 Pac. 866; *Green v. Tribe*, 233 U. S. 588, 34 Sup. Ct. 706, 58 L. Ed. 1093), and therefore it must be held that, even though Louise Stinger was an Indian and a ward of the government, yet she had the

right to sign a promissory note such as the ones in question which did not involve the property rights mentioned in the cited statute.

[20] It is also urged that this claim cannot be allowed against the estate for the reason that deceased was merely an accommodation maker, and that the principal debtor was released by Keith's failure to bring action against him within the time limited by the statute of limitations. It is undisputed that she did not sign on the back of the note as an indorser, but that she signed the note on its face as a maker, the same as the others. The evidence is contradictory as to whether or not she was an accommodation maker, but that is immaterial. She was one of the makers of the note, and she was primarily liable for its payment, even though an accommodation maker.

[21] The fact that the statute of limitations was allowed to run as against Louise Stinger's comakers did not prejudice her or her estate any, as her or its right to reimbursement from the principal debtor does not depend on that fact. The limitation of any action by her or it against the principal debtor would commence to run from the date that she or it paid the notes, and not before. *Spencer on Suretyship*, pars. 119, 122, 124, 154, 155, 185; *Oppman v. Steinbrenner*, 17 Mont. 369, 42 Pac. 1015; *Northwestern Nat. Bank v. Opera House Co.*, 23 Mont. 1, 57 Pac. 440.

The order granting the motion for new trial is affirmed.

Affirmed.

BRANTLY, C. J., and COOPER, HOLLO-WAY, and GALEN, JJ., concur.

METTLER v. AMES REALTY CO. (No. 4475.)

(Supreme Court of Montana. Oct. 24, 1921.)

1. Waters and water courses ¶42—Common-law doctrine of riparian rights stated.

Under the common-law doctrine of riparian rights, the right to the use and flow of waters of a stream is an inherent incident to the ownership of the riparian lands, a right annexed to the soil, not as an easement or appurtenance, but as a part and parcel of the land itself, and is not created by use or affected by disuse.

2. Waters and water courses ¶42—Under common law the right of each proprietor is qualified by corresponding rights of others upon same stream.

Under common-law doctrine of riparian rights, every riparian proprietor upon the same stream has the same right of reasonable use; the rights of each being qualified by the corresponding rights of the others.

3. Waters and water courses ¶39—"Riparian" and "littoral" defined.

A riparian proprietor is one whose land borders upon a natural stream or through whose land such stream flows; the term "littoral" being used to characterize lands bordering upon a lake or the sea.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, *Littoral* and *Aquatic Rights*, *Riparian*.]

4. Waters and water courses ¶47—Riparian owner cannot, under common-law doctrine, divert water to nonriparian lands.

Under the common-law doctrine of riparian rights, a riparian owner cannot divert to nonriparian lands the water which he has the right to use upon riparian lands.

5. Waters and water courses ¶144—"Appropriation" may extend to use on nonriparian land.

The doctrine of appropriation extends the right to the use of water flowing in a natural stream to riparian and nonriparian lands alike, and sanctions the right of an appropriator to the use of the water to the exclusion of riparian proprietors and junior appropriators, if the entire flow of the stream has been appropriated by him; the only limitations upon the extent of his appropriation being his needs and facilities for use.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, *Appropriate*, *Appropriation*.]

6. Waters and water courses ¶140—Superiority of right dependent on priority of appropriation.

Under the doctrine of appropriation, priority of appropriation confers superiority of right without reference to the character of the use, whether natural or artificial.

7. Waters and water courses ¶144—Doctrine of appropriation, and not common-law doctrine of riparian rights, obtains in Montana.

In view of Const. art. 3, § 15, and the history of water right legislation, and in view of the necessity for artificial irrigation within the state, owner of nonriparian land may by priority of appropriation acquire the right to use all of the water of a stream if necessary to his use and if actually used by him for a lawful purpose, regardless of whether the water is used for natural or artificial purposes; the doctrine of appropriation, and not the common-law doctrine of riparian rights, obtaining in Montana.

8. Waters and water courses ¶127—Use of waters flowing in natural streams subject to state regulation and control.

An appropriator derives his right from the state, and not from the national government; the use of waters flowing in natural stream being subject to state regulation and control.

9. Waters and water courses ¶130—Right of appropriation not confined to waters flowing in streams upon public lands.

The right to appropriate water is not confined to waters flowing in streams on public

land, but may be made from a stream flowing through privately owned land by invoking the aid of eminent domain proceedings, if necessary, under Const. art. 3, § 15.

10. Waters and water courses \Rightarrow 133—Government to acquire water right, must make appropriation in same manner as individual.

The United States government, to acquire the right to the use of waters flowing in natural streams, must make an appropriation in compliance with the laws of the state in the same manner as an individual.

Appeal from District Court, Lewis and Clark County; W. H. Poorman, Judge.

Action by Anna E. Mettler against the Ames Realty Company. From judgment of dismissal and from order denying an injunction, plaintiff appeals. Judgment and order affirmed.

F. M. Mettler, of Helena, for appellant.

HOLLOWAY, J. Prickly Pear creek, a tributary of the Missouri river, flows through agricultural lands belonging to the plaintiff, and for many years plaintiff and her predecessors in interest have used such amount of the waters flowing in the creek as was necessary for household purposes and watering live stock. The defendant company also owns agricultural lands in the same vicinity, and, by virtue of an appropriation heretofore made, is entitled to use the waters from the same creek for irrigation purposes. Originally defendant diverted the waters used by it at a point on the creek below plaintiff's ranch, but on May 2, 1919, it changed the place of diversion to a point on the creek above plaintiff's lands, and since then has conveyed all of the waters of the creek around and away from plaintiff's ranch and upon its own lands, thereby depriving plaintiff of any use of the waters during the irrigation season of each year, and threatens so to continue diverting and using the water. These facts are set forth somewhat more in detail in the complaint, upon which an injunction pendente lite and a permanent injunction after trial was sought.

The lower court sustained a general demurrer to the complaint and denied the application for a temporary injunction. Plaintiff elected to stand upon her pleading, suffered a judgment of dismissal to be entered, and appealed therefrom and from the order denying the injunction.

Plaintiff does not claim that she has appropriated any of the waters of Prickly Pear creek, and does not complain that defendant diverted more water than the amount of its appropriation.

[1, 2] It is axiomatic that, if plaintiff is not entitled to have the waters of Prickly Pear creek flow down its natural channel through her land, she is not injured by the

acts of the defendant in changing the place of diversion, and, if not injured, she cannot complain. But it is urged vigorously that, because of the relative situation of her land and the creek and her ready access to the water, plaintiff is entitled to assert the common-law doctrine of riparian rights under which every proprietor of land on the bank of a natural stream has an equal right to have the waters of the stream continue to flow in its natural course as it was wont to do, without diminution in quantity or deterioration in quality, except so far as either of these conditions may be affected by the reasonable use of the waters by upper riparian proprietors. Under that doctrine the right to the use and flow of the waters of a stream is an inherent incident to the ownership of riparian lands, a right annexed to the soil, not as an easement or appurtenance, but as part and parcel of the land itself (*Smith v. Denniff*, 24 Mont. 20, 60 Pac. 398, 81 Am. St. Rep. 408), and it follows from the very nature of the right that it is not dependent upon user to any extent. Use does not create it and disuse cannot affect it adversely. If the riparian proprietor does not care or need to use the waters, he still has the right to have them flow in their accustomed channel (*Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674), though he cannot insist upon an absolute and exclusive right to the flow of all the waters in the stream, for every such riparian proprietor upon the same stream has the same right of reasonable use, and the right of each is qualified by the corresponding rights of the others. (*McEvoy v. Taylor*, 56 Wash. 357, 105 Pac. 851, 28 L. R. A. [N. S.] 222). As between riparian right claimants, the use of water for the so-called natural purposes, household and domestic use, drinking and watering live stock, is held to be paramount to artificial uses, irrigation and other industrial purposes. *Smith v. Corbit*, 116 Cal. 587, 48 Pac. 725.

[3, 4] Some confusion has arisen over the proper use of the term "riparian," but there cannot be any occasion for it. A riparian proprietor is one whose land borders upon a natural stream or through whose land it flows. *Black's Law Dictionary*. The term "littoral" is used to characterize lands bordering upon a lake or the sea. *Bouvier's Law Dictionary*. Under this doctrine one who does not own any land adjoining upon a stream cannot claim riparian rights and a riparian owner cannot exercise such rights in respect to lands which are not riparian. In other words, he cannot divert to nonriparian lands the water which he has a right to use upon riparian lands. *Crawford Co. v. Hathaway*, 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 106 Am. St. Rep. 647.

[5, 6] The doctrine of appropriation extends the right to the use of the waters flow-

ing in a natural stream to riparian and non-riparian lands alike (Long on Irrigation, § 125), and it is immaterial whether the lands to which the waters are applied are within or without the watershed of the stream from which the waters are taken (1 Wiel on Water Rights, § 353). Furthermore, this doctrine sanctions the right of an appropriator to the use of all the waters of a stream, to the exclusion of riparian proprietors and junior appropriators, if the entire flow of the stream has been appropriated by him (Long on Irrigation, § 132), and the only limitations imposed upon the extent of his appropriation are his needs and facilities for use. If his needs exceed the capacity of his distributing system, then the capacity of his means of diversion measures the extent of his right. If the capacity of his distributing system exceeds his needs, then his needs limit the extent of his appropriation. *Bailey v. Tintinger*, 45 Mont. 154, 122 Pac. 575. Another rule peculiar to the doctrine of appropriation as distinguished from the doctrine of riparian rights, finds expression in the maxim, "First in time, first in right," or, in other words, priority of appropriation confers superiority of right (1 Wiel on Water Rights, § 299), and that, too, without reference to the character of the use, whether natural or artificial (*Id.* § 378).

In California a dual system of water right law has been recognized almost from the time of the first settlement after the gold discovery. The common-law doctrine of riparian rights, modified from time to time to suit natural conditions, has been applied wherever the lands have been reduced to private ownership, except as against rights acquired by prior appropriation while the lands were a part of the public domain; and the doctrine of appropriation has been applied to waters upon the lands belonging to the state or to the United States. The California rule has been followed, in whole or in part, by Oregon, Washington, North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, and Texas. Colorado early rejected the common-law doctrine as unsuited to the natural conditions in that state and adopted the doctrine of appropriation as providing the only means for securing the right to use water for agricultural, mining, and other beneficial purposes, and that rule has been followed generally in Arizona, Idaho, New Mexico, Utah, Wyoming, and in Nevada since the decision in *Vansickle v. Haines*, 7 Nev. 249, was overruled in *Jones v. Adams*, 19 Nev. 78, 6 Pac. 442, 3 Am. St. Rep. 788, and in *Reno S. M. & R. Works v. Stevenson*, 20 Nev. 269, 21 Pac. 817, 4 L. R. A. 60, 19 Am. St. Rep. 364.

Controversies between appropriators and riparian proprietors without appropriations have given rise to almost endless litigation in the Western States. Numerous cas-

es before the courts of last resort are cited and analyzed somewhat in Long on Irrigation (2d Ed.) and Wiel on Water Rights (3d Ed.), and no useful purpose would be served by further reference here. It is to be observed that in applying the doctrine of riparian rights the Supreme Court of California proceeded upon the theory that the United States, as the original owner of the public lands and the streams bordering upon or flowing through them, had the common-law rights of a riparian proprietor; that, whenever a grant of public riparian lands was made without reservation, the patentee succeeded to the same riparian rights which the United States had enjoyed; and that any right acquired by appropriation of water on public land was founded in grant from the United States in virtue of the congressional enactments of 1866, 1870, and later statutes. On the other hand, the courts affirming the Colorado doctrine have proceeded upon the theory that the use of water in natural streams, whether upon public or private lands, is subject to state regulation and control; that in respect to public and privately owned lands lying in the same state the United States, as landowner, has no greater rights than the individual landowner; that the common-law doctrine of riparian rights is unsuited to the conditions prevailing in the arid or semiarid states of the Rocky Mountain region, and for that reason, never prevailed, or, if ever recognized, was thereafter repudiated, and therefore neither the United States nor the patentee has such rights, and that it is competent for any state so situated to adopt the doctrine of appropriation as the only means through which the beneficial use of water flowing in the natural streams may be enjoyed, and that the appropriator derives his right from the state in the exercise of local sovereignty.

Under the California doctrine the rights of parties who claim under grants from the federal government must be determined by reference to laws enacted by the Congress pursuant to the provisions of section 3, art. 4, of the Constitution of the United States, and a patentee under a grant without reservations acquired vested rights which a state cannot impair. Under either doctrine the corpus of running water in a natural stream is not the subject of private ownership, though this elementary principle is apparently overlooked in some of the decided cases. Such water is classed with light and the air in the atmosphere. It is publici juris or belongs to the public. A usufructuary right or right to use it exists, and the corpus of any portion taken from the stream and reduced to possession is private property so long only as the possession continues.

These principles were borrowed by the common law from the civil law and in turn were borrowed by the law of appropriation

from the common law. To recapitulate: The common-law doctrine excludes the non-riparian landowner from the use of water and confines the riparian owner in its use to riparian lands. It classifies the uses to which water may be applied and gives preference to the so-called natural uses.

Contiguity to the stream is the foundation of the doctrine of riparian rights, but it is disregarded by the doctrine of appropriation. Since the common-law rights attach to the riparian land as a part of it, no formalities are needed to exercise those rights; on the other hand, certain proceedings are necessary to acquire rights by appropriation. Use is the foundation of the law of appropriation, and the rights acquired thereunder may be lost by nonuse, whereas nonuse does not affect riparian rights. Equality of rights and reasonable use distinguish the common-law doctrine, while the appropriation rule sanctions exclusive use measured by priority, and, by fixing the amount of every appropriation, aims at certainty and the avoidance of needless litigation. Each of these doctrines has been modified greatly by recent legislation and judicial decisions.

Many cases involving the law of irrigation and water rights in Western jurisdictions have been reviewed by the Supreme Court of the United States. The conclusions announced are not always readily reconcilable one with another, but indicate rather a gradual development of the law. In *Sturr v. Beck*, 133 U. S. 541, 551, 10 Sup. Ct. 350, 33 L. Ed. 761, the court declared that the rights of a riparian owner attach when the government transfers title, and that they cannot be subsequently invaded.

In *United States v. Rio Grande Irrigation Co.*, 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136, it was held competent for a state to change the common-law rule with reference to the use of waters, provided such change does not operate to impair or defeat the riparian rights of the government to the flow and use of waters in natural streams upon the public domain, or countenance interference with commerce on navigable waters.

Finally in *Winters v. United States*, 207 U. S. 564, 577, 28 Sup. Ct. 207, 212 (52 L. Ed. 340), the court declared that—

The "power of the government to reserve the waters [in streams on a government reservation] and exempt them from appropriation under the state laws is not denied, and could not be."

Standing alone, these pronouncements would seem to confirm the California theory of federal proprietary title with the common-law riparian rights attached thereto and passing from the United States to the patentee, free from state interference or control. But it is to be observed that *Sturr v. Beck* arose in Dakota territory, where the common-law doctrine of riparian rights prevail-

ed, and the decision is to be understood with reference to that fact. In *United States v. Rio Grande Irrigation Co.* the court reviewed the Acts of Congress of July 26, 1866, § 9 (U. S. Comp. St. § 4647) of March 3, 1877 (U. S. Comp. St. § 4674) and of March 3, 1891, § 18 (U. S. Comp. St. § 4934), and concerning them said:

"Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow. * * * And in reference to all these cases of purely local interest the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common-law rule, which permitted the appropriation of those waters for legitimate industries."

Winters v. United States involved the right to the use of the waters of Milk river in this state, and the decision turned upon a construction of the treaty made by the United States with the Indians, under which a large portion of the Ft. Belknap reservation was opened to settlement.

In *Hardin v. Jordan*, 140 U. S. 384, 11 Sup. Ct. 808, 833, 35 L. Ed. 423, the court declared that a grant from the government, without reservation, is to be construed according to the laws of the state in which the lands lie.

In *Clarke v. Nash*, 198 U. S. 361, 370, 25 Sup. Ct. 676, 679 (49 L. Ed. 1085, 4 Ann. Cas. 1171), the court said:

"The rights of a riparian owner in and to the use of water flowing by his land are not the same in the arid and mountainous states of the West that they are in the states of the East. These rights have been altered by many of the Western states, by their Constitutions and laws, because of the totally different circumstances in which their inhabitants are placed from those that exist in the states of the East, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those states arising from mining and the cultivation of an otherwise valueless soil, by means of irrigation. This court must recognize the difference of climate and soil, which render necessary these different laws in the states so situated."

In *Kansas v. Colorado*, 206 U. S. 46, 27 Sup. Ct. 655, 51 L. Ed. 956, the court apparently departed from the theory that the rights of an appropriator of water from a stream upon the public domain rests in grant from the government evidenced by the several federal statutes, and treated the question from the standpoint of power inherent in local sovereignty, regardless of the so-called proprietary rights of the United States, and declared that every state in the Union—

"may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the west of the appropriation of waters for the purposes of irrigation shall control."

In *Producers' Oil Co. v. Hanzen*, 238 U. S. 325, 338, 35 Sup. Ct. 755, 759 (59 L. Ed. 1330), the same principle was reiterated. The court said:

"The effect of riparian rights, if established, would depend upon the local law."

And in *Norton v. Whiteside*, 239 U. S. 144, 153, 36 Sup. Ct. 97, 100 (60 L. Ed. 186), in reference to the claim of riparian rights on navigable waters, the court said:

"It was long since affirmatively settled that such claim solely involves a question of state law."

If, then, it may be accepted as finally settled that a patentee from the government has such rights only, in virtue of his conveyance, as are recognized by the law of the state where the lands are situated, it follows that the solution of the question now before us depends upon the answer to the inquiry: What is the rule in this state respecting the use of water for irrigation and other beneficial purposes?

It is interesting to note that since the organization of Montana territory—a period of more than 50 years—no owner, claimant, or occupant of riparian lands has ever asserted in the courts the common-law doctrine of riparian rights, as applied to the use of water, until the present action was instituted, so far as our investigation discloses. It is true that there are numerous reported cases, beginning with *Columbia Min. Co. v. Holter*, 1 Mont. 296, in which observations are made upon some phase or other of the riparian rights doctrine, but even a cursory examination of the facts will disclose that the question of riparian rights was not involved in any of them, and that the comment made upon the subject in every instance is purely obiter dictum. For any or all of those expressions it is not necessary to offer explanation or excuse. The language of Hon. Simeon E. Baldwin is particularly pertinent here:

"If the writer of a judicial opinion has permitted his pen to move too fast and gone beyond the exigencies of the case, it is the strength of our system of remedial justice that his words lose their authority, as soon as the bounds of necessity are passed." 18 *Yale Law Journal*, 1, 8.

Long on Irrigation classes Montana with the states which adhere to the California doctrine, and *Prentice v. McKay*, 38 Mont. 114, 98 Pac. 1081, is cited to justify the classification. After referring to the elementary principle that the owner of nonriparian land cannot initiate a right to appropriate water from a stream flowing through privately owned land by trespassing upon such land, we said that our statutes only apply to appropriations made from streams on public land and to such other appropriations "as

are made by individuals who have riparian rights either as owners of riparian lands or through grants from such owners." The use of the terms "riparian rights" evidently has been misleading, but they were employed only to indicate rights of access to the stream, and not the rights of continuous flow and use of the waters as recognized by the common law.

We feel entirely at liberty to treat the matter as one of first impression in this jurisdiction and to seek the public policy of the state and of the territorial government which preceded it by reference to the legislation which has been enacted upon the subject.

The First Territorial Legislative Assembly passed an act (approved January 12, 1865) "to protect and regulate the irrigation of land in Montana territory." That act provided that any owner or holder of a possessory right or title to land on the bank or margin or in the neighborhood of any stream should be entitled to the use of the water of such stream for the purpose of irrigation, and, if his land was too far removed from the stream to obtain access otherwise, he should have a right of way for the necessary ditch or ditches over the intervening property. *Bannack's Statutes*, p. 367. Certain sections of that act were declared to be invalid (*Thorp v. Woolman*, 1 Mont. 168), and the remaining portions were replaced by an act of the Sixth Legislative Assembly (1870) which in effect re-enacted the first provisions above. *Laws 1869-70*, p. 57. That act was carried forward into the *Codified Statutes of 1872* as chapter 34, with the addition of section 11, which provides:

"That in all controversies respecting the right to water in this territory, whether for mining, manufacturing, agriculture, or other useful purpose, the rights of the parties shall be determined by the dates of appropriation respectively, with the modifications heretofore existing under the local laws, rules, or customs and decisions of the supreme court of the territory."

In 1877 an act was passed by the Tenth Legislative Assembly which regulated the sale of surplus water. *Laws 1877*, p. 406. In 1879 the first section of chapter 34, *Laws of 1872*, was amended, and by the amendment the right of one to appropriate all the water of a stream was recognized, provided that quantity was necessary for his use, and provided further that, if at any time a surplus over and above his needs existed, such surplus should be turned back into the stream for the use of those having junior rights. *Laws 1879*, p. 52. The act passed in 1885 (*Laws 1885*, p. 130) provided only for a method of procedure to be observed in making an appropriation of water, and section 5 of that act declared:

"As between appropriators, the one first in time is first in right."

The Compiled Statutes of 1887 merely carried forward chapter 34, Laws of 1872, as amended by the act of 1879, and the Acts of 1877 and 1885 above. Comp. Stat. p. 992. This completes the history of our water right legislation up to the time Montana was admitted into the Union.

Section 15, art. 3, of our state Constitution provides:

"The use of all water now appropriated, or that may hereafter be appropriated for sale, rental, distribution or other beneficial use and the right of way over the lands of others, for all ditches, drains, flumes, canals and aqueducts, necessarily used in connection therewith, as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use."

In 1891 a special eminent domain statute was enacted which provided a ready means for securing a right of way for ditches, flumes, or canals for irrigation and other purposes. Laws 1891, p. 295. The provisions regulating the appropriation and use of water which came into existence with the adoption of the Codes of 1895 (sections 1880-1902, Civ. Code) are somewhat more comprehensive than the laws upon the same subjects theretofore in force, but they do not depart therefrom in any essential particular so far as the question now involved is concerned; on the contrary, section 1884 continued the recognition of the right of one to appropriate all the waters of a stream under like restrictions as imposed by the amendment made in 1879, referred to above. In 1899 two acts were passed. One changed the standard of measurement of water (Laws 1899, p. 126), and the other provided for the appointment of commissioners to measure and distribute waters the right to which had been, or which should thereafter be, adjudicated. Laws 1899, p. 136. In 1905 a statute was enacted (Laws 1905, c. 44) which provides:

"That the government of the United States may by and through the Secretary of the Interior, or any person by him duly authorized to act in that behalf, appropriate the water of streams or lakes within the state of Montana in the same manner and subject to the general conditions applicable to the appropriation of the waters of the state by private individuals."

With slight additions and amendments, not material here, the law has continued to the present time.

[7-10] These several provisions must be accepted as indicating the public policy of Montana respecting the subject now under review. They recognize: (1) The right to the use of water on nonriparian lands, even though such lands lie beyond the watershed of the stream from which the water is taken; (2) the right of one to take and use all of the waters of a stream, if appropriated by him and necessary to his use and actually used by him for a lawful purpose; (3) that the one

first in time is first in right without reference to the so-called natural and artificial uses; (4) that an appropriator derives his right from the state, and not from the national government, and that the use of waters flowing in natural streams in this state is subject to state regulation and control; (5) that an appropriation is not confined to waters flowing in streams upon public land, but may be made from a stream flowing through privately owned land by invoking the aid of eminent domain proceedings, if necessary, as authorized by the language of the Constitution quoted above (*Prentice v. McKay*, above); and (6) that, in order for the government of the United States to acquire the right to the use of waters flowing in the natural stream in this state, it must proceed as an individual to make an appropriation in compliance with the laws of this state.

In speaking of the territorial act of 1865 above, Judge Knowles said:

"As far as the legislative Assembly of Montana had the power, they repealed the common-law doctrine in regard to riparian proprietors." *Thorp v. Freed*, 1 Mont. 651, 657.

In *Smith v. Denniff*, 24 Mont. 20, 23, 60 Pac. 398, 399 (81 Am. St. Rep. 408), Mr. Justice Pigott, speaking for the court, said:

"The doctrine of 'prior appropriation' confers upon a riparian owner, or one having title to a water right by grant from him, the right to a use of the water of a stream which would be unreasonable at the common law, and to this extent the doctrine of prior appropriation may be said to have abrogated the common-law rule."

It may be conceded that in each instance the observations were not necessary to the decision rendered, but they do, respectively, represent the views of the distinguished jurists who in the early days were largely instrumental in formulating the public policy of Montana respecting this subject. See, also, the article of Judge Hunt, erstwhile Associate Justice of this court, United States District Judge for the district of Montana, and now United States Circuit Judge for the Ninth Circuit, in 17 Yale Law Journal, 585.

It is submitted that the policy established by the measures above is irreconcilable with the application of the doctrine of riparian rights even in the modified form in which that doctrine now prevails in the states adhering to the California rule; that our Constitution and statutes proceed upon the theory that artificial irrigation is absolutely necessary to the successful cultivation of large areas of land within the state; that the doctrine of appropriation was born of the necessities of this state and its people; and that it was intended to be permanent in its character, exclusive in its operation, and to fix the status of water rights in this commonwealth.

"The common law, as it existed in England at the time of the settlement of the American Colonies, has never been in force in all of its provisions in any colony or state of the United States. It has been adopted so far only as its general principles were suited to the habits and condition of the colonies, and in harmony with the genius, spirit, and objects of American institutions. Different political and geographical conditions may justify modifications, and whether common-law rules will be followed strictly in the United States will, necessarily, where no vested rights are actually concerned, depend on the extent to which they are reasonable and in accord with public policy and sentiment. And from this circumstance it is clear that what may be the common law in one state is not necessarily so considered in another." *Ann. Cas.* 1913E, p. 1232, note.

As emphasizing the correctness of this rule, the Supreme Court of the United States, in *Boquillas Cattle Co. v. Curtis*, 213 U. S. 845, 29 Sup. Ct. 495, 53 L. Ed. 822, said:

"Patentees of a ranch on the San Pedro have not the same rights as owners of estates on the Thames."

Our conclusion is that the common-law doctrine of riparian rights has never prevailed in Montana since the enactment of the Bannack Statutes in 1865; that it is unsuited to the conditions here; and that the complaint in this action does not state facts sufficient to entitle the plaintiff to relief.

The judgment and order are affirmed.
Affirmed.

BRANTLY, O. J., and REYNOLDS and COOPER, JJ., concur.

GALEN, J., being disqualified, takes no part in the foregoing decision.

PIONEER BANK & TRUST CO. v. ANDRUS. (No. 3421.)

(Supreme Court of Idaho. Oct. 25, 1921.)

1. Appeal and error §799—Motion to dismiss appeal for failure to serve garnishee denied, where not shown a necessary party.

The question of whether a garnishee in an action is an adverse party upon whom notice of appeal must be served is to be determined from the record. A motion to dismiss the appeal on the ground that notice thereof was not served upon the garnishee will be denied, where it does not appear that the garnishee makes any claim to the fund in its possession and the record justifies the presumption that no such claim was made.

2. Fraudulent conveyances §273—Where answer in intervention alleges fraudulent transfer of note, burden of showing fraud is upon party alleging it.

Where an answer to a complaint in intervention sets out that a transfer of a promissory

note to the intervener was made with intent to hinder, delay, and defraud creditors of the payee, the burden of showing fraud is upon him who alleges it.

Appeal from District Court, Lemhi County; F. J. Cowen, Judge.

Action by the Pioneer Bank & Trust Company against F. M. Andrus, in which A. F. Daniels intervened. Judgment for intervener, and from the judgment and an order denying new trial the plaintiff appeals. Judgment and order affirmed.

El. W. Whitcomb, of Blackfoot, and L. E. Glennon, of Salmon, for appellant.

A. C. Cherry, of Weiser, for respondent Daniels.

RICE, C. J. Appellant brought this action upon certain promissory notes executed by respondent Andrus. A writ of attachment was issued and served upon the Citizens' National Bank of Salmon City, by which it was sought to garnish certain money in its possession. The money had been paid into the bank by Frank G. Hussey, to be credited upon a note executed by him and payable to Andrus. Respondent Daniels intervened in the action, setting up that the Hussey note had been indorsed and assigned by Andrus to him. Judgment was entered for Daniels upon his complaint in intervention. The appeal is from the judgment and from an order denying appellant's motion for a new trial.

[1] A motion to dismiss the appeal has been made upon the ground that notice thereof was not served upon the Citizens' National Bank, which it is claimed is an adverse party in this appeal. Whether a garnishee is an adverse party upon appeal depends upon the issues and the character of the judgment rendered. The record in this case is deficient, in that it does not contain the answer of the garnishee to the writ. It does not appear from the record that the garnishee makes any claim to the fund in its possession. The record justifies the presumption that no such claim was made, since the same attorney represented it and the plaintiff in intervention at the trial. The motion to dismiss the appeal is denied.

[2] Appellant answered the complaint in intervention, and alleged that the pretended transfer of the note to Daniels was made with intent to hinder, delay, and defraud creditors of Andrus, and was therefore void as to such creditors.

It is contended that the evidence is insufficient to support the judgment. The evidence was sufficient to establish the transfer of the note to Daniels. The burden was upon appellant to prove that the transfer was fraudulent. There was not sufficient evidence

of fraud to warrant this court in interfering with the judgment.

The judgment and order are affirmed, with costs to respondents.

BUDGE, McARTHUR, DUNN, and LEE, JJ., concur.

SESSIONS v. WALKER et al. (No. 3367.)

(Supreme Court of Idaho. Oct. 19, 1921.)

Appeal and error §957(1)—Judgment §139—Opening of default is addressed to court's sound discretion, and its order is reversible only for abuse.

An application to open a default is addressed to the sound legal discretion of the court, and the order of the court will not be reversed on appeal unless it clearly appears that the court abused its discretion; and, in determining the question of discretion, the power of the court should be freely and liberally exercised, under the statute, to mold and direct its proceedings, so as to dispose of cases upon their substantial merits.

Appeal from District Court, Cassia County; Wm. A. Babcock, Judge.

Action by H. H. Sessions and another against James F. Walker and wife and others. From an order setting aside a default judgment, the plaintiffs appeal. Affirmed.

S. T. Lowe and T. Bailey Lee, both of Burley, for appellants.

J. T. Pence, of Boise, Peterson & Coffin, of Pocatello, and W. L. Dunn, of Oakley, for respondents.

RICE, C. J. This appeal is from an order setting aside a judgment by default on the ground that the default was due to the mistake, inadvertence, surprise, and excusable neglect of respondents. It appears from the record that on July 13, 1918, the court entered an order overruling a demurrer to the complaint of appellants and giving respondents 10 days from the date of the order in which to file and serve their answer to the complaint. On July 23d, counsel for respondents, in a telephone conversation, requested counsel for appellants to grant a day or two additional time in which to serve and file the answer, which request was granted, and again on the 25th or 26th of July, counsel for respondents had another telephone conversation with counsel for appellants, in which he obtained an agreement for additional time until July 29th in which to mail the answer to appellants' counsel. The answer

was not mailed or filed on the 29th of July, and on July 31st, pursuant to the request of appellants, their counsel had default judgment entered by the clerk and execution issued thereon.

Respondents' showing of surprise and excusable neglect amounts to this: According to the affidavit of their counsel, during the telephone conversation of July 23d, he asked Mr. Lowe, attorney for appellants, whether he would take default against respondents if a few days more should be taken to serve and file the answer; that Mr. Lowe replied that he would not, and that he had never taken default against any one yet, and respondents' counsel further excuses his delay by showing that he was unexpectedly called to Salt Lake on July 30th, and took the answer with him, intending to serve and file it upon his return, which he expected would be on September 1st. Mr. Lowe, counsel for appellants, admits that in the telephone conversation he said he had never taken default, but denies that he said he would not take default. However, in his final affidavit Mr. Lowe indicates a possible doubt in his mind as to whether or not he had stated that he would not take default.

It appears that before default was actually entered counsel had the answer prepared, and the court may have concluded that it would have been filed had not counsel believed from his conversations above referred to that default would not be taken against him. There was a question of fact involved which was sufficient to set in motion the discretion of the trial court, and its action will not be reversed unless its discretion was abused.

In the case of Pittock v. Buck, 15 Idaho, 47, 96 Pac. 212, it is said:

"An application to open a default is addressed to the sound legal discretion of the trial court, and the order of the court will not be reversed on appeal, unless it clearly appears that the court abused its discretion; and, in determining the question of discretion, the power of the court should be freely and liberally exercised, under the statute, to mold and direct its proceedings, so as to dispose of cases upon their substantial merits."

See, also, Pease v. Kootenai County, 7 Idaho, 731, 65 Pac. 432; Hall v. Whittier, 20 Idaho, 120, 116 Pac. 1031; Humphreys v. Idaho Gold Mines Development Co., 21 Idaho, 126, 120 Pac. 823, 40 L. R. A. (N. S.) 817.

The order will be affirmed. Costs awarded to respondents.

BUDGE, McARTHUR, DUNN, and LEE, JJ., concur.

NEWMAN v. OREGON SHORT LINE R. CO.

(Supreme Court of Idaho. Oct. 25, 1921.)

1. Appeal and error §928(3)—Presumed that evidence warranted instructions.

Where on account of the death of the court reporter no transcript of evidence can be furnished on appeal, but by stipulation of counsel a bill of exceptions is prepared in lieu thereof and settled by the trial judge, including the instructions requested by counsel and those given by the court, it will be presumed that there was competent evidence introduced without objection at the trial which justified the instructions given by the court.

2. Appeal and error §701(2)—Applicability of instructions cannot be considered in absence of evidence, unless clearly erroneous.

The question of the applicability of instructions refused cannot be considered by the appellate court unless the evidence is in the record on appeal, or unless clearly erroneous under any supposed state of facts.

Appeal from District Court, Bonneville County; Jas. G. Gwinn, Judge.

Action by Itha Newman, an infant, by Robert Newman, her guardian ad litem, against the Oregon Short Line Railroad Company, for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

George H. Smith, of Salt Lake City, Utah, and H. B. Thompson, of Pocatello, for appellant.

Jas. S. Byers, of Idaho Falls, and J. H. Peterson, of Pocatello, for respondent.

BUDGE, J. This action was brought by respondent against appellant to recover damages for personal injuries. Judgment was had in favor of respondent. This appeal is from the judgment.

[1] The record discloses that proper application was made to the court below for an order directing the court reporter to furnish appellant with a transcript of the evidence, but before the transcript was furnished the reporter died. By stipulation of counsel a draft of a bill of exceptions, embracing the instructions requested by appellant and respondent, including the court's rulings thereon and instructions given by the court, was prepared, and it was stipulated that the same should be settled as and for a bill of exceptions in lieu of the reporter's transcript.

The errors upon which appellant relies for a reversal of the judgment are that the court erred in giving instructions Nos. 3, 4 and 6, and in refusing appellant's requested instructions Nos. 2, 6, and 10, giving said instructions as modified as instructions 18, 15, and 13, respectively; and in refusing to give ap-

pellant's instruction No. 4. It is not our purpose to set out in *hac verba* any of the instructions given or refused, or given as modified and complained of, for the reasons as will presently appear.

[2] We have examined the pleadings and in our opinion the instructions that were given by the court are substantially based upon and are applicable to the pleadings. None of the instructions given contradict the affirmative allegations of fact set up in appellant's pleading. But, even though it be conceded that the instructions are not within the bounds of the issues raised by the pleadings, it was proper for the court to instruct the jury on the issues raised by the pleadings and the evidence. *Childs v. Childs*, 49 Wash. 27, 94 Pac. 660. We think the sound rule to be that the instructions have no connection with the pleadings except through the evidence. The jury find from the evidence and not from the pleadings. 2 Thompson on Trials, § 2310. It will be presumed that there was competent evidence introduced without objections that justified the court's instructions. When competent evidence is received without objections upon any particular ground not covered by the complaint, the court may assume that the complaint is as broad as the evidence, when charging the jury, and the complaint will be deemed amended to conform to the evidence and charge, since the amendment, if consistent with the cause of action stated in the complaint, could have been made as of course at the trial. *Schwaninger v. McNeeley & Co.*, 44 Wash. 447, 87 Pac. 514, at 517. In the absence of a contrary showing, it will be presumed that the amendment was so made.

It is held in the case of *Woolley v. State*, 8 Ind. 502, that:

"If the evidence be not in the record, instructions given will be regarded as pertinent to the case-made, unless clearly erroneous under any supposable state of facts; and instructions refused will, in that state of the record, be presumed to have been irrelevant."

See, also, *Morton v. Stevens*, 5 Ind. 520; *Independent & Oxford Plank Road Co. v. Doty*, 7 Ind. 581; *Abrams v. Smith*, 8 Blackf. (Ind.) 95; *Downey v. Day*, 4 Ind. 531; *Harvey v. Laffin*, 2 Ind. 477; *Town v. McConnell*, 8 Kan. 273; and *State v. Jones*, 28 Idaho, 428, 154 Pac. 378. So with refusal of instructions, if the record does not show that they were applicable to the case made by the evidence, the refusal to give the instructions is not error. The question of the applicability of instructions refused cannot be determined in this court unless the evidence is in the record, and we must presume that they were not applicable to the case. *Fuller v. Wilson*, 6 Blackf. (Ind.) 403; *Clark v. Wildridge*, 5 Ind. 176.

From what has been said it follows that the judgment must be affirmed; and it is so ordered. Costs are awarded to respondent.

RICE, C. J., and McCARTHY, DUNN, and LEE, JJ., concur.

MARSHALL et al. v. GILSTER et ux.
(No. 3375.)

(Supreme Court of Idaho. Oct. 28, 1921.)

1. Trial \S 165—Motion for nonsuit admits truth of plaintiff's evidence and every fact reasonably inferable therefrom.

A motion for nonsuit admits the truth of plaintiff's evidence and of every fact which it tends to prove or which could be gathered from any reasonable view of it, and he is entitled to the benefit of all inferences in his favor which the jury would have been justified in drawing from the evidence had the case been submitted to it.

2. Vendor and purchaser \S 129(1)—Agreement to convey by warranty deed requires title free from reasonable doubt.

An agreement by a vendor to convey real estate by good and sufficient warranty deed requires that title shall be good and free from reasonable doubt.

3. Vendor and purchaser \S 112(1), 334(5)—Purchaser may rescind contract and demand repayment where vendor offers doubtful title.

Where under a contract to convey real property by a good and sufficient warranty deed, vendor insists on vendee taking a doubtful title, vendee is at liberty to rescind the contract and demand repayment of money paid by him on the purchase price.

4. Vendor and purchaser \S 170, 341(3)—Purchaser need not tender performance where vendor unable to perform.

If the vendor is unable to perform at the time performance is required of him, a tender of performance by the purchaser is not required.

5. Vendor and purchaser \S 120—Purchaser's declaration that deal is off held sufficient notice of rescission.

A statement by the purchaser that the deal is off, that he will have nothing more to do with it, and that he will have to have his money back, is a sufficient notice of rescission.

6. Vendor and purchaser \S 78—Agreement extending time for performance makes time of essence.

An agreement extending time for performance in a contract for sale of real estate makes time of the essence.

Appeal from District Court, Lemhi County; F. J. Cowen, Judge.

Action by Charles J. Marshall and another against Henry Gilster and wife, for the re-

covery of purchase price following rescission of contract for sale of land. From a judgment of nonsuit, plaintiffs appeal. Reversed and remanded for new trial.

E. W. Whitcomb, of Blackfoot, and Wyman & Wyman, of Boise, for appellants.

J. M. Stevens and W. H. O'Brien, both of Pocatello, for respondents.

McCARTHY, J. On August 27, 1917, respondents and appellants entered into a written contract by which the former agreed to sell and the latter to buy a large stock ranch, 4,950 sheep, 140 head of cattle, 40 head of horses, and 400 tons of hay, together with farm equipment and other personal property, for a consideration of \$100,000. \$10,000 was paid upon the execution of the agreement. The contract provided:

"That the said parties of the second part hereby agree and obligate themselves, jointly and severally, to receive said property and pay the balance of said purchase price, on or before the 17th day of September, 1917, and upon their failure so to do, the said sum of \$10,000.00 paid at the time of the execution of this agreement, shall be forfeited to the said parties of the first part as liquidated damages.

"That upon the payment or tender of the said purchase price as herein agreed upon, to the said parties of the first part they shall execute and deliver to said second parties a good and sufficient warranty deed to all of said real property, together with an assignment of all forest reserve rights and lease rights owned by them, and a good and sufficient bill of sale to all said personal property, including therein in addition to the property hereinbefore described, their stock brand, and any other property owned by them and not particularly described herein."

On September 13, respondents' agent, L. E. Glennon, notified appellants that patents to 320 acres of the land were not recorded in the recorder's office of the county in which the land is situated. Glennon, on September 15, told appellant Farmer he thought the patents could be procured in three or four days, and asked for an extension of time. It was agreed that the time should be extended to September 22. The patents were not procured by that time, and a few days later appellants told respondents that the deal was off, that they would have nothing more to do with it, and would have to have their money back. On September 17, respondents, through Glennon, tendered to E. W. Whitcomb, appellants' representative, warranty deeds to the premises. Whitcomb declined to accept them on the ground respondents had not shown a marketable title. On October 6 exemplified copies of the patents were secured from Washington and recorded. Thereafter the respondents did not make another tender of the deeds to appellants or their representative. Appellants brought

this action to recover the initial payment of \$10,000 with interest from September 17, 1917. On the trial appellants asked respondent Henry Gilster whether subsequent to September 17 he sold the property to any one else. Respondents' objection was sustained, whereupon appellants offered to prove that on or about October 3, 1917, respondents sold most of the property involved to some one other than the appellants, which offer of proof was by the court denied. A motion for nonsuit was made by the respondents on the following grounds:

(1) The purchasers had not tendered the balance of the purchase price.

(2) No notice of rescission was given.

(3) A good and sufficient warranty deed, conveying absolute title had been tendered by Gilster on September 17th; and

(4) Plaintiffs knew prior to September 17th that patents to the 320-acre tract had been issued and were of record at Washington; that within a reasonable time after September 17, to wit, on October 6th, the patents were recorded in Lemhi county, and that Gilster had used every effort and all possible diligence to have the patents placed on record.

The motion was sustained, and judgment entered accordingly. On their appeal from the judgment appellants specify as errors, that the court erred: First, in rejecting said offer of proof; and, second, in sustaining the motion for nonsuit and granting judgment against plaintiffs.

[1] We will consider the second specification of error first.

"A motion for nonsuit admits the truth of plaintiffs' evidence and of every fact which it tends to prove or which could be gathered from any reasonable view of it, and he is entitled to the benefit of all inferences in his favor which the jury would have been justified in drawing from the evidence had the case been submitted to it." *Donovan v. Boise City*, 31 Idaho, 324, 171 Pac. 670; *Later v. Haywood*, 12 Idaho, 78, 85 Pac. 494; *Pilmer v. Boise Traction Co., Ltd.*, 14 Idaho, 327, 94 Pac. 432, 15 L. R. A. (N. S.) 254, 125 Am. St. Rep. 161; *Colvin & Rinard v. Lyons*, 15 Idaho, 180, 96 Pac. 572; *Culver v. Kehl*, 21 Idaho, 595, 123 Pac. 301; *Southern Idaho Adventists v. Hartford F. I. Co.*, 26 Idaho, 712, 145 Pac. 502; *Shank v. Great Shoshone & T. F. W. P. Co.*, 205 Fed. 833, 124 O. C. A. 35.

[2] We will discuss the grounds of the motion in what seems to us the logical order. The third ground is that a good and sufficient warranty deed conveying absolute title was tendered by respondents on September 17, the time fixed by the contract. An agreement by a vendor to convey by good and sufficient warranty deed, as in the present case, requires that title shall be good and free from reasonable doubt. *Boyd v. Boley*, 25 Idaho, 584, 139 Pac. 139; *Bell v. Stadler*, 31 Idaho, 568, 174 Pac. 129.

[3] The tender of a warranty deed in good and sufficient form would not be sufficient

compliance with respondents' contract unless they had a good title, free from reasonable doubt. The 320 acres of land, patents to which were missing, were a material part of the land to be conveyed.

"Where under a contract to convey real property by a good and sufficient warranty deed, vendor insists on vendee taking a doubtful title, vendee is at liberty to rescind the contract and demand repayment of money paid by him on the purchase price." *Boyd v. Boley*, supra.

The fourth ground of the motion is that appellants knew, prior to September 17, that patents to the 320 acres had been issued and were of record at Washington; that within a reasonable time after September 17th, to wit, on October 6th, the patents were recorded in Lemhi county; and that respondents used every effort and all possible diligence to have the patents placed on record. The evidence does not show that appellants knew, or had any reasonable cause to know, that the patents had been issued. Mr. Glennon, who was acting for respondents in procuring the patents, testified that he did not tell appellants or their representative that patents existed, because he did not know whether or not they did; that about September 17 or 18 he received a telegram from Washington, indicating that the patents had been forwarded, but that the telegram was subject to two different constructions. The telegram was not introduced in evidence. The matter was evidently doubtful, even in Glennon's mind.

[4] The third ground of the motion is that the appellants did not tender the balance of the purchase price. If the vendor is unable to perform at the time performance is required of him, a tender of performance by the purchaser would be vain and idle, and is not required. 89 Cyc. 1422, 2048; *Sutthoff v. Maruca*, 57 Wash. 102, 106 Pac. 632; *Aurand v. Perry, T. L. & Imp. Co.*, 178 Iowa, 262, 159 N. W. 779; *McManus v. Patch*, 20 Cal. App. 479, 129 Pac. 613; *Sherwin v. Baxter*, 86 Kan. 730, 121 Pac. 1128; *Kreutzer v. Lynch*, 122 Wis. 474, 100 N. W. 887; *Nelson v. Chingren*, 132 Iowa, 383, 106 N. W. 936; *Kicks v. State Bank*, 12 N. D. 576, 98 N. W. 408; *Burk v. Schreiber*, 183 Mass. 35, 66 N. E. 411; *Smith v. Lewis*, 24 Conn. 624, 63 Am. Dec. 180; *Burks v. Davies*, 85 Cal. 110, 24 Pac. 613, 20 Am. St. Rep. 213; *Runkle v. Johnson*, 30 Ill. 328, 83 Am. Dec. 191; *Smith v. Lamb*, 26 Ill. 396, 79 Am. Dec. 381. Here the evidence tended to show that respondents could not perform at the time performance was required of them, and a tender on the part of appellants was not required. In most of the cases on this question, the conditions to be performed by the vendor and vendee are concurrent. In some of the earlier decisions, a different rule is enforced where payment by the vendee is a

condition precedent. In the contract between appellant and respondents the expression that "upon payment or tender of the purchase price to respondents, they shall execute and deliver to appellants a good and sufficient warranty deed," might make it appear at first blush that payment is a condition precedent. The expression in the preceding paragraph that "appellants agree to receive said property and pay the balance of the purchase price on or before September 17, 1917," makes it appear that the conditions are concurrent. In case of doubt, and where it can be done without doing violence to the language of the contract, the courts held that the conditions of payment and conveyance are concurrent. 2 Williston on Contracts, § 835; San Diego Construction Co. v. Mannix, 175 Cal. 548, 166 Pac. 325. That is the construction which we place upon the contract in this case. But, even if it should be held that the payment of the balance was a condition precedent, the rule would not be otherwise. Under the great weight of authority, even where payment is a condition precedent, a tender by the vendee is dispensed with when, at the time for performance on his part, the vendor is unable or refuses to substantially perform. 2 Williston on Contracts, §§ 767, 768; Sands v. Clarke, 8 O. B. 751, 762; Newcomb v. Brackett, 16 Mass. 161.

The second ground of the motion is that no notice of rescission was given.

"As rescission is only an alternative remedy and is in derogation of the contract, it is said that the party who wished to avail himself thereof must manifest his election in some way. The way in which election must be manifested may vary in different cases. Formal notice is certainly not always requisite, and bringing an action promptly for restitution is generally held sufficient." Williston on Contracts, § 1460, and cases cited.

[5] But even if it should be held that express notice of rescission is necessary, appellant Marshall's statement to respondents, a few days after the 17th, that the deal was off, that they would have nothing more to do with it, and would have to have their money back, constitutes sufficient notice. It was suggested on argument that plaintiffs' action must fail because no formal demand

was made for repayment of the money. Our attention has been called to no authority holding that formal demand for the repayment of the money must be made, and we conclude that the law does not require it. If a demand were required, appellants' statement that they would have to have their money back is a demand in substance.

[6] The position was advanced by respondents' counsel on oral argument that time was not of the essence of the contract, and respondents were entitled to a reasonable time after September 17 to make and convey the title. Considering the fact that the contract covered personal property as well as real estate, that the value of the personal property was much greater than that of the real estate, and that the personal property was live stock, the value of which is subject to frequent fluctuations, we are of the opinion that time was of the essence, though not expressly declared to be in the contract. Williston on Sales, § 189; Mechem on Sales, § 1138. Moreover, the agreement extending the time for performance until September 22d had the effect of making time of the essence. Friess v. Rider, 24 N. Y. 367, 82 Am. Dec. 308; note in 50 Am. Dec. 600, and cases cited.

It follows that none of the grounds for nonsuit are well taken, and the motion should have been denied.

The court erred in sustaining the objection to the question whether respondents sold the property to some one else, and in rejecting the offer of proof made in connection therewith. There is no evidence that respondents or their agent Glennon made any express remonstrance or objection when notified of the rescission of the contract by appellants. They did not make another tender of the deeds to appellants after the patents were procured. In connection with these circumstances, their action in subsequently selling the property to another is admissible as bearing upon the question of whether they consented to a rescission, as contended by appellants.

The judgment is reversed, and the cause remanded for a new trial. Costs to appellants.

RICE, C. J., and BUDGE, DUNN, and LEE, JJ., concur.

STRINGER v. REDFIELD et al.

(Supreme Court of Idaho. Oct. 24, 1921.)

Appeal and error \S 553(1)—Where not properly presented by transcript, bill of exceptions or in response to *præcipe*, instructions cannot be reviewed.

Where the record on appeal contains no reporter's transcript, and no bill of exceptions containing the instructions to the jury given and refused, and the clerk's transcript contains what purports to be the instructions given and refused, which are not included therein in response to the *præcipe* filed by appellant with the clerk and are not included in the clerk's certificate of the transcript, such instructions cannot be reviewed on appeal from the judgment.

Appeal from District Court, Cassia County; Wm. A. Babcock, Judge.

Action by John W. Stringer against Fred W. Redfield and another. Judgment for the plaintiff and defendants appeal. Affirmed, with costs to respondent.

Charles A. Sunderlin, of Omaha, Neb., for appellants.

S. T. Lowe, of Burley, for respondent.

RICE, C. J. This is an appeal from a final judgment. The record contains no bill of exceptions or reporter's transcript of the evidence. Appellants' specifications of error relate solely to the giving of certain instructions by the court and to the refusal to give certain instructions requested by appellants.

In the case of *Minneapolis Threshing Machine Co. v. Peterson*, 31 Idaho, 745, 176 Pac. 99, it is said:

"Unless the alleged errors of the court in giving and refusing instructions to the jury are presented by the reporter's transcript, they can only be reviewed when saved by a bill of exceptions."

After the decision in that case, the court had under consideration what is now C. S. \S 6879, in the case of *Steinour v. Oakley State Bank* (on rehearing), 32 Idaho, 91, 177 Pac. 848.

After the decision in the *Steinour* Case, C. S. \S 7163, was amended to read as follows:

"On appeal from a final judgment the appellant must furnish the court with copy of the notice of appeal of the judgment roll and of any bill of exceptions or reporter's transcript prepared and settled as prescribed in section 6886, upon which the appellant relies, and of all papers, records and files designated in the *præcipe* filed by appellant with the clerk of the district court."

The amendment consisted of adding to the section as it formerly stood the words in

italics in the above quotation. It may be, and probably is, true that in cases in which the trial judge has filed with the clerk the instructions given and instructions requested by the parties, with his indorsements thereon, and they have been included in the record in response to a *præcipe* filed by appellant, they may be subject to review under the two sections above mentioned, without being preserved in a formal bill of exceptions.

But in this case the *præcipe* did not call for the instructions given or requested. The clerk in his certificate states that the record "is a true and correct transcript of the proceedings therein contained, and contains in full the papers included in the judgment roll in the said action, as well as a copy of the *præcipe*."

The instructions are not part of the judgment roll. It is clear that the purported instructions in the record are not properly included therein, and are not covered by the certificate of the clerk. Under any view we may take of the statute, they cannot be reviewed on this appeal.

The judgment is affirmed, with costs to respondent.

MCCARTHY, DUNN, and LEE, JJ., concur.

BUDGE, J., concurs in the conclusion reached.

ENDERS v. ENDERS.

(Supreme Court of Idaho. Oct. 24, 1921.)

1. Divorce \S 182—Supreme Court may entertain application for attorneys' fees where necessary to complete exercise of its jurisdiction.

Under article 5, \S 9, of the Constitution of this state, the Supreme Court has jurisdiction to entertain an original application for attorney fees on behalf of one of the parties to a divorce action, upon a proper showing that the granting of such relief is necessary to the exercise of its appellate jurisdiction.

2. Divorce \S 182—Wife is entitled to attorneys' fees for appealed case, where without means and husband was decreed all the property.

Where an action for divorce is brought by the husband, the wife is entitled to be provided with means at the expense of the husband for an efficient preparation of her case on appeal, where it appears that she is without means, and that all the property of the parties was awarded to the husband by the decree of the lower court.

3. Divorce \S 182—Wife entitled to be represented by counsel in appellate court at husband's expense.

In an action for divorce, considerations of justice and public policy require that the wife be afforded an opportunity to be properly represented by counsel before her property and other rights are adjudicated by the appellate court.

4. Divorce \S 182—The Supreme Court may grant alimony and suit money only where necessary to exercise of its jurisdiction.

Under C. S. \S 4642, 4653, original jurisdiction in the matter of granting alimony and suit money in divorce actions is vested in the district court, and such relief is granted by the appellate court only where it is necessary to a complete exercise of its appellate jurisdiction.

Appeal from District Court, Bannock County; O. R. Baum, Judge.

Action by Theo. Enders against Ruth Enders for divorce, and from a decree awarding property to plaintiff, the defendant appeals. Defendant's application for attorney fees on appeal granted in part. Application for temporary alimony denied.

Peterson & Coffin and H. E. Ray, all of Pocatello, for appellant.

D. W. Standrod, C. D. Smith, and C. M. Booth, all of Pocatello, for respondent.

BUDGE, J. This is an original application in this court for an order directing respondent to pay a certain sum of money to appellant for attorney fees in the prosecution of her appeal and for temporary alimony.

An application for the payment of costs, expenses, and attorney fees was made to the trial judge, whereupon an order was made directing that respondent pay the clerk of the court an amount necessary to cover the transcript on appeal, the filing fee in the Supreme Court, and the sum of \$30 to cover the cost of printing briefs, but denying the application for attorney fees.

[1] A motion has been made by respondent to dismiss appellant's application in this court, upon the ground that no appeal was taken from the order made by the district judge disallowing the attorney fees, and that therefore this court is without jurisdiction to entertain appellant's application. With this contention we are not in accord.

Article 5, \S 9, of the Constitution, provides that—

"The Supreme Court shall * * * have * * * jurisdiction to issue * * * all writs necessary or proper to the complete exercise of its appellate jurisdiction."

See Roby v. Roby, 9 Idaho, 371, 74 Pac. 957, 3 Ann. Cas. 50; Stoneburner v. Stoneburner, 11 Idaho, 603, 83 Pac. 938; Day v. Day, 12 Idaho, 556, 86 Pac. 531, 10 Ann. Cas. 260;

Spofford v. Spofford, 18 Idaho, 115, 108 Pac. 1054; Callahan v. Dunn, 30 Idaho, 225, 164 Pac. 356; Callahan v. Callahan, 33 Idaho, —, 192 Pac. 660; 14 Cyc. 745.

As will be observed from the foregoing authorities, this court has jurisdiction to entertain appellant's application upon a proper showing that the granting of such relief is necessary to a complete exercise of its appellate jurisdiction. Callahan v. Dunn, 30 Idaho, 225, at 231, 164 Pac. 356.

From the record on appeal in this case it appears that respondent's complaint was dismissed and a decree of divorce granted to appellant upon her cross-complaint, and that all of the property owned or possessed by appellant and respondent was awarded to the latter. Whether this property is the separate property of respondent or community property is a question to be determined when the cause is submitted upon the merits.

Appellant's application is supported by the affidavit of one of her attorneys, who upon information and belief, alleges that appellant is now, and since the rendition of the decree of divorce has been, compelled to seek aid from friends and relatives for her support; that she is in indigent circumstances and unable to pay counsel to prosecute her appeal; and that she has agreed to pay a reasonable attorney fee; and prays that this court make an order allowing her the sum of \$1,000 for prosecuting her appeal.

Respondent, in resisting appellant's application, filed an affidavit setting out his resources and liabilities, and alleging that he is unable to procure and advance any further sums for attorney fees or alimony.

[2, 3] Where it appears that all of the property of the husband and wife has been awarded to the husband, and the wife is without means to employ counsel to properly protect her interests on appeal, we do not think a showing of poverty by the husband should defeat her application, particularly where the action for divorce was brought by the husband, since he should not be permitted to maintain an action against his wife for divorce if he cannot furnish sufficient means to the wife to enable her to make her defense. A wife is entitled to be provided with means at the expense of the husband for an efficient preparation of her case on appeal, where it appears that she is without means and all of the property of the parties was awarded to the husband. Considerations of justice and public policy demand an opportunity for the wife to be represented before her property and other rights are passed upon by the appellate court.

[4] While respondent in his affidavit does not challenge the reasonableness of the amount of attorney fees prayed for by appellant, yet we think that \$250 is a reasonable amount to be allowed appellant for that

purpose at this time, reserving the right, however, to determine upon the final submission of the cause whether any additional amount should be allowed for services rendered or to be rendered upon the prosecution of her appeal.

In passing, we feel constrained to say that we do not wish to be understood as encouraging original applications to this court for attorney fees, alimony, or suit money. Application should be made to the trial court. As was said by this court in the case of Callahan v. Dunn, 30 Idaho, at page 231, 164 Pac. 357:

"An examination of sections 2662 and 2678, Rev. Codes, clearly shows that original jurisdiction in the matter of granting alimony and suit money in connection with divorce actions is vested in the district courts and the judges thereof at chambers. It is clear that this court does not have original jurisdiction in such matters. Such orders are made by this court only where it is necessary to a complete exercise of its appellate jurisdiction."

This court will review upon appeal an order of the district court allowing or disallowing alimony, suit money, or attorney fees.

In view of the foregoing, it is ordered that respondent be, and he is hereby, directed to pay to the clerk of this court, for the benefit of appellant, the sum of \$250 for the purpose stated, within 80 days after the filing of this opinion. The application for temporary alimony will be denied.

RICE, C. J., and McCARTHY, DUNN, and LEE, JJ., concur.

SEAMONS v. DAVIS et ux. (No. 3374.)

(Supreme Court of Idaho. Oct. 25, 1921.)

Appeal and error ¶979(2)—Trial judge's order granting new trial not reversed, unless abuse of discretion shown.

Where there is a substantial conflict in the evidence, and the trial court, who heard and saw the witnesses testify and observed their demeanor on the witness stand, grants a motion for a new trial, if it does not affirmatively

appear that such court abused its discretion, such action will not be reversed on appeal.

Appeal from District Court, Bannock County; Robert M. Terrell, Judge.

Action by David W. Seamons against William C. Davis and wife for damages. Verdict for the plaintiff, and from an order granting a new trial, the plaintiff appeals. Affirmed.

H. B. Thompson and Swanson & Tydeman, all of Pocatello, for appellant.

Budge & Merrill, of Pocatello, for respondents.

DUNN, J. Appellant brought this action to recover \$1,000 damages for alleged shortage of water occasioned by the failure of defendants to convey title to water sufficient to irrigate 20 acres of land according to the terms of a certain deed made by respondents to appellant. The case was submitted to a jury, and a verdict rendered, giving appellant \$300. Respondents moved for a new trial on the ground of the insufficiency of the evidence to justify a verdict and errors in law occurring at the trial and excepted to by the defendants. The motion was granted, and this appeal was taken from the order granting it.

Appellant assigns and relies upon this error: "The court erred in granting defendants' motion for a new trial." We have carefully examined the record in this case, and find a substantial conflict in the evidence. The trial court heard and saw the witnesses testify, and observed their demeanor on the witness stand, and it does not affirmatively appear from the record that the court erred in granting a new trial. Under the repeated decisions of this court the action of the trial court in such case will not be disturbed on appeal. *Cox v. Cox*, 22 Idaho, 692, 127 Pac. 679; *Baillie v. City of Wallace*, 22 Idaho, 702, 127 Pac. 908, and cases cited in both of these decisions. Judgment affirmed. Costs to respondent.

RICE, C. J., and McCARTHY and LEE, JJ., concur.

BUDGE, J., did not sit at the hearing, and took no active part in this decision.

¶ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

BEEBE v. PIONEER BANK & TRUST CO.
(No. 3370.)

(Supreme Court of Idaho. Oct. 24, 1921.)

1. Evidence ~~§~~441(1)—Contract written and signed constitutes final agreement, and cannot be varied by parol.

When a contract is reduced to writing and signed, it constitutes the final agreement of the parties as to its subject-matter, and prior or contemporaneous oral agreements or statements, varying its terms, are not admissible.

2. Evidence ~~§~~441(5)—Fixtures ~~§~~18(1)—Where mortgage includes fixtures, evidence of contrary contemporaneous oral agreement is inadmissible.

When a mortgage expressly covers a lot and all improvements situate thereon, it includes fixtures which have become part of the realty, and a contemporaneous oral agreement that the mortgage does not cover fixtures is not admissible as between the parties and their privies.

3. Fixtures ~~§~~1—"Fixture" to realty defined.

Personal property, in order to lose its character as a chattel and become a "fixture," must be annexed to the realty, either actually or constructively, must be appropriated to the use of that part of the realty with which it is connected, and must be intended as a permanent accession to the freehold.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fixture.]

4. Fixtures ~~§~~4—When the question whether a fixture has become part of realty arises, the annexer's secret intention is not material.

When the question as to whether or not a fixture has become part of the realty arises between the person who annexed it and another, the secret intention of the former, not disclosed to the latter, is not material, but the inquiry is as to what intention must be imputed to the former in the light of all the circumstances, tested by common understanding.

Appeal from District Court, Lemhi County;
F. J. Cowen, Judge.

Action by O. C. Beebe against the Pioneer Bank & Trust Company for conversion. Judgment for plaintiff for \$1 damages, and plaintiff appeals. Reversed, and new trial ordered.

R. P. Quarles, of Salmon, and A. C. Cherry, of Weiser, for appellant.

E. W. Whitcomb, of Blackfoot, for respondent.

MCCARTHY, J. Appellant sued the respondent bank for the value of a bank vault door with its facings and certain furniture and fixtures removed by respondent from a bank building formerly occupied by it, which had been acquired by appellant, through

sheriff's sale, after foreclosure of a mortgage. The building was originally constructed by Langsdorf & Co., bankers, for their own banking purposes. When it was near completion, at a time when the fixtures in question had been partly installed, the First National Bank took over the Langsdorf banking business and the real estate. It completed the installation of the fixtures, which consisted of railings, counters, shelves, and partitions with marble bases, glass and grill work, which were ordered by the architect of the building, designed by him for this particular building, and matched the other interior woodwork of the structure. They were set flush against the walls and fastened to them; the baseboard being cut and fitted around the partitions, which were attached to the floor with angle iron braces. It took two carpenters one day and three hours to remove them, and their removal left marks upon the walls and gaps in the baseboard. The vault door was built into the wall of the vault, imbedded in cement. It took an expert stone mason and concrete worker 15 hours to get it out of the wall by cutting away the concrete built around it.

For the purpose of securing a loan, the First National Bank mortgaged this real property to O. S. Burton, trustee for James D. Murdock; the transaction being accomplished through Carl D. Slaughter, to whom the property was deeded by the bank, and who executed a mortgage to Burton and then deeded the property back to the bank. The mortgage was foreclosed, and appellant bought the property at the sheriff's sale, receiving a certificate of sale and later a sheriff's deed. The mortgage described the lot upon which the bank building was situated and contained the words "with the improvements thereon situated." The sheriff's certificate of sale and sheriff's deed gave this same description. Subsequent to the sheriff's sale and the delivery of the certificate respondent bought the property in question from one L., who had bought it from the receiver of the bank, and without appellant's consent respondent removed it.

At the trial, the court, over the objections of the appellant, allowed respondent to introduce testimony that H. G. King, an officer of the bank, who negotiated the loan for the bank, had a verbal understanding with Burton that the mortgage was to cover the real estate, not including the furniture and fixtures; also testimony that the property in question was carried on the books of the bank as "furniture and fixtures."

The verdict and judgment were for the appellant in the sum of \$1. All the evidence as to value makes it clear that this was a verdict adverse to appellant so far as the conversion is concerned, and that the \$1 is nominal damages for injury to the building caus-

ed by detaching and removing the property in question.

Appellant's principal assignments of error are the admission of the above evidence over his objections, the giving of certain instructions, and the refusal to give certain instructions requested by him.

[1, 2] The mortgage was a written contract between respondent's predecessor in interest and the mortgagee. It described the property as the lot "with the improvements thereon situated." This would include any fixtures which had become part of the realty; it would not include fixtures which had not become part of the realty. Whether the fixtures in question had or had not become part of the realty would depend upon the application of established rules of law to the particular circumstances of the case. A parol agreement between King, who negotiated the transaction for the mortgagor, and Burton, who took the mortgage as trustee, to the effect that the mortgage did not cover fixtures, would vary the terms of the written agreement as embodied in the mortgage. When a contract is reduced to writing and signed, it constitutes the final agreement of the parties as to its subject-matter, and prior or contemporaneous parol agreements or statements varying its terms are not admissible. *Jacobs v. Shenon*, 3 Idaho, 274, 281, 29 Pac. 44; *Stein v. Fogarty*, 4 Idaho, 702, 43 Pac. 681; *First National Bank v. Bews*, 5 Idaho, 678, 51 Pac. 777; *Newmyer v. Roush*, 21 Idaho, 106, 123, 120 Pac. 464, Ann. Cas. 1913D, 433; 10 R. C. L. subject Evidence, §§ 208-214, and notes. The parol agreement between King and Burton, testified to by the former, varied the terms of the mortgage, and testimony as to it was not admissible.

Respondent's counsel cites us to cases in which it is held that, by agreement, property may retain the character of a chattel, although annexed to the land in such a way as, in the absence of such an agreement, would constitute it a part of the realty. This doctrine is well expressed in a leading New York case as follows:

"But, as by agreement, for the purpose of protecting the rights of vendors of personalty, or of creditors, chattels may retain their character as chattels, notwithstanding their annexation to the land in such a way as in the absence of an agreement would constitute them fixtures (*Ford v. Cobb*, 20 N. Y. 344; *Sisson v. Hibbard*, 75 Id. 542), so, also, it would seem to follow that, by convention, the owner of land may reimpress the character of personalty on chattels, which, by annexation to the land, have become fixtures according to the ordinary rule of law, provided only that they have not been so incorporated as to lose their identity and the reconversion does not interfere with the rights of creditors or third persons." *Tyson v. Post*, 106 N. Y. 217, 15 N. E. 316, 2 Am. St. Rep. 409.

In none of these cases is a written agreement permitted to be varied by an oral agree-

ment. In the case just above cited the court says that an oral agreement relied on by the prevailing party was not invalid on the ground that it varied a certain written instrument, because he was not a party to it. The decision clearly implies that the case would be far different if the party relying on the oral agreement had been a party to the written one. Obviously an oral agreement in regard to fixtures is no exception to the general rule which forbids parol evidence to contradict a written agreement.

[3, 4] The tests that are to be applied in determining whether a fixture becomes part of the realty or retains the character of a chattel are clearly expressed by this court in *Boise-Payette Lumber Co. v. McCornick*, 32 Idaho, 462, 186 Pac. 252:

"Personal property, in order to lose its character as a chattel and become a fixture, must be annexed to the realty, either actually or constructively; must be appropriated to the use of that part of the realty with which it is connected, and must be intended as a permanent accession to the freehold. * * *"

"In the leading case of *Teaff v. Hewitt*, 1 Ohio St. 511, 59 Am. Dec. 634, it was sought to lay down tests of general application for determining when an article becomes a fixture. The criterion in this case is formulated as follows: '(1) Actual annexation to the realty, or something appurtenant thereto. (2) Appropriation to the use or purpose of that part of the realty with which it is connected. (3) Intention of the party making the annexation to make the article a permanent accession to the freehold—this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation has been made.' * * *"

"Many authorities make the intention with which an article was annexed the consideration of paramount importance. These cases suggest that the other tests are mainly important as evidence of such intention. *Ewell on Fixtures* (2d Ed.) bottom pages 30 and 31.

"In *Hopewell Mills Co. v. Taunton Sav. Bank*, 150 Mass. 519, 15 Am. St. 235, 23 N. E. 327, 6 L. R. A. 249, it is said: 'These cases seem to recognize the true principle upon which the decisions should rest, only it should be noted that the intention to be sought is not the undisclosed purpose of the actor, but the intention implied and manifested by his act. It is an intention which settles, not merely his own rights, but the rights of others who have or may acquire interests in the property. They cannot know his secret purpose, and their rights depend not upon that, but upon the inferences to be drawn from what is external and visible. In cases of this kind every fact and circumstance should be considered which tends to show what intention, in reference to the relation of the machine to the real estate, is properly imputable to him who put it in position.' See, also, *Tate v. Blackburne*, 48 Miss. 1.

"Except in cases where, by contract or agreement, the intention of the party who made the annexation determines the character of the article or machine as to whether it is

a chattel or a fixture, the inquiry is not strictly as to the intention of the person himself who annexed the chattel to the freehold. Thus, in the case at bar the contest is between an attaching creditor and a mortgagee. Neither party was bound by the intention existing in the mind of the owner. The inquiry is as to what intention must be imputed to him in the light of all the circumstances, when tested by the common understanding of those familiar with the subject. As suggested by Lindley, L. J., in the case of *Viscount Hill v. Bullock*, 2 Chancery, 482, where it was claimed certain stuffed birds were fixtures: 'After all there is such a thing as common sense, and it must be brought to bear upon the question of whether these birds are or are not fixtures.'

Boise-Payette Lumber Co. v. McCornick, *supra*.

Under the rule above expressed, the fact that the bank carried the property in question on its books as fixtures was not admissible to show its true character. If it tended to show an intent on the part of the bank, it was a secret intent not disclosed to the mortgagee or the appellant, and was therefore not admissible. Applying the tests laid down in the above decision to the property in question, in the light of the evidence, the door to the bank vault was clearly part of the realty, and it would have been proper for the court to have so instructed the jury. As to the other property, a question of fact was presented which should have been presented to the jury under proper instructions along the lines suggested in *Boise-Payette Lumber Co. v. McCornick, supra*. Applying the rule of that decision to the instructions given by the court and assigned as error by appellant, instructions 11, 12, and 16 were erroneous. The refusal to give appellant's requested instructions 1, 2, 3, and 4 was also error.

For the reasons given the judgment is reversed and the case remanded for a new trial. Costs to appellant.

RICE, C. J., and BUDGE and DUNN, JJ., concur.

LEE, J., being disqualified, did not sit at the hearing and took no part in this opinion.

DYBERT v. HARRISON. (No. 3403.)

(Supreme Court of Idaho. Oct. 24, 1921.)

Abatement and revival §=58½—Proceeding to remove officer does not survive officer's death.

In an action to remove a public officer under C. S. § 8684, if judgment is for defendant and plaintiff appeals, a motion to dismiss the appeal will be granted by this court on a showing that respondent is dead.

Appeal from District Court, Bannock County; Robt. M. Terrell, Judge.

Action by R. J. Dybert against George Harrison. Judgment for the defendant, and plaintiff appeals. On motion to dismiss. Appeal dismissed.

R. J. Dybert, of Soda Springs, for appellant.

Isaac E. McDougall, of Pocatello, for respondent.

DUNN, J. Appellant filed an information in the district court of Bannock county, charging respondent, who was a justice of the peace of Soda Springs precinct, with failure to perform certain official duties. On the trial of the case the court made findings of fact contrary to the allegations of the information and entered a judgment of dismissal, from which appeal was taken.

Counsel for respondent has moved to dismiss the appeal, for the reason that the term of office of respondent has expired and that respondent is now dead.

By the death of respondent the action against him abates, since the cause of action is one that does not survive. C. S. 6652.

The appeal is dismissed, with costs to respondent.

RICE, C. J., and BUDGE, McCARTHY, and LEE, JJ., concur.

THOMAS' HEIRS v. VILLAGE OF MALAD CITY et al. (No. 3231.)

(Supreme Court of Idaho. Oct. 27, 1921.)

Injunction §=35(2)—Bona fide possessor of real estate under claim of right may enjoin trespasser threatening irreparable injury.

Bona fide possession of real estate under a claim of right entitles the one in possession to an injunction against a trespasser who threatens irreparable injury to the realty.

Appeal from District Court, Oneida County; Wm. A. Babcock, Judge.

Action by Sarah Thomas against the Village of Malad City, Idaho, and others, to enjoin a trespass on realty, in which plaintiff died, and her heirs were substituted. Judgment for the plaintiffs, and the defendants appeal. Affirmed.

T. E. Ray, of Malad, and D. C. McDougall and T. D. Jones, both of Pocatello, for appellants.

Davis & Evans, of Preston, for respondents.

McCARTHY, J. The original respondent, Sarah Thomas, brought this action to enjoin appellants from interfering with her possession, under claim of ownership, of a strip of land 4.2 feet wide, by tearing down her fence, uprooting shade trees, and con-

structing a cement sidewalk. Appellants contended that this strip of ground was a part of the public street of appellant village, and, in a cross-complaint, asked that she be restrained from interfering with the construction of a sidewalk over it. From a judgment in her favor, and an order denying a motion for a new trial, this appeal is taken. After judgment, and pending the appeal, she died, and her heirs have been substituted. The only assignments of error which we think it necessary to specifically discuss are, first, that the evidence is insufficient to support the judgment, and, secondly, that the judgment is contrary to law.

The original respondent had been in possession of this strip of land, inclosed by a fence, for 29 years, under a claim of right, and she and her deceased husband had planted shade trees on it, which, at the time of the trial, were at least 10 years old. In the deed upon which she relied, the land is described with reference to an old plat of the appellant village, antedating the government survey. The corners of lots and blocks, as purported to be shown on this plat, cannot be definitely located on the ground. The strip in question may or may not be part of the land as described in the deed. Appellants relied on this plat to establish the fact that this strip is in a street. The streets cannot be definitely located on the ground by reference to the plat. It is not sufficient to constitute a dedication, and the streets of the village are such by user. This strip has never been used as a street. It is admitted that the survey which was made for the purpose of laying out the sidewalks was based on existing conditions, and not on the old plat. The chief of police, under order of the board of trustees, attempted to fix the corners of the lots and blocks as shown on the plat, but we think that such assumption of authority transcends even the elastic limits of the police power. As the case stands, the original respondent showed peaceful possession of the strip of land in question for 29 years under a bona fide claim of ownership, and appellants showed no right whatever to its possession. Bona fide possession of real estate under a claim of right entitles the one in possession to an injunction against a trespasser who threatens irreparable injury to the realty. *Kellogg v. King*, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74; *Diamond Match Co. v. Village of Ontonagon*, 72 Mich. 249, 40 N. W. 448.

We have examined the other specifications of error, and conclude that none of them are well taken.

The judgment is affirmed. Costs to respondent.

RICE, C. J., and BUDGE, DUNN, and LEE, JJ., concur.

MEIR-NANDORF v. MILNER et al.
(No. 3361.)

(Supreme Court of Idaho. Oct. 25, 1921.)

1. Appeal and error \S 1033(5)—Deeds \S 95, 119—Evidence \S 450(3), 461(2)—Where language is plain and unambiguous, extrinsic evidence is inadmissible to show intent; deed held not ambiguous; appellant cannot complain of too favorable instruction.

If the language of a deed is plain and unambiguous, it must be given such effect as the parties thereto clearly intended it to have, and in such case extrinsic evidence is not admissible to determine the intention of the parties.

2. Deeds \S 115 — Where terms of description are unambiguous, court will construe them; general description as an island held not modified by erroneous description as to section, etc.

When there is a clear and unambiguous description in a deed, the court will construe the terms used.

Appeal from District Court, Bonneville County; James G. Gwinn, Judge.

Action by Catherine Meir-Nandorf against James I. Milner and others for damages. From a judgment for plaintiff, the defendants appeal. Affirmed.

D. E. Rathbun, of Idaho Falls, for appellants.

W. P. Hanson, of Idaho Falls, for respondent.

DUNN, J. This action was brought by the respondent against appellants to recover \$786.18 as damages for the loss of 26.65 acres of land which respondent claims to have been included in a warranty deed made by appellants to her, title to which land failed because of its being a part of a school section belonging to the state of Idaho.

[1] The warranty deed in question conveyed—

"all the certain lot, piece, or parcel of land situate, lying and being in the counties of Fremont and Bingham and state of Idaho, and bounded and described as follows, to wit: That certain tract of land commonly known as 'Bear Island' and situated principally in section thirty-five (35), township four (4) north, range thirty-seven (37) East, Boise meridian, accordingly as the same may appear described in patent yet to be issued. Said land having been filed upon by Thomas Weir, under desert entry No. 2116, together with all water rights, ditch rights, water wheel, and appurtenances thereunto belonging. Together with main land connecting bridge.

"This deed is intended to convey all interest and title taken by first parties in deed recorded on page 501, in Book 'P' of Deeds, records of Fremont County, Idaho, covering all property therein described."

At the time of the making of the desert land entry mentioned in this deed Bear Island was unsurveyed. The entire island was included in the entry and on the filing of the plat of the official survey application was made by Weir to adjust his entry to the land as shown by the official plat, which designated the land in the island as lot 7, section 2, township 8 north, lots 6, 7, and 8, section 35, and lot 4, section 36, township 4 north, all in range 37 East, Boise meridian. The application to adjust the entry to the lands above described was rejected as to lot 4, section 36, because of the fact that upon approval of the survey title to said lot 4 passed to the state of Idaho under the provisions of the act of Congress of July 3, 1890. The adjustment was allowed as to the remaining land in said island and patent for the last-named lands was issued to Thomas Weir September 6, 1912.

The respondent alleges the conveyance of the entire island to her by the foregoing deed, and that on or about the 1st day of March, 1912, she was notified that said lot 4, embraced within said island, and which she claimed was a part of the land conveyed by appellants to respondent, was school land, the title to which was in the state of Idaho, and that the application of Weir for patent therefor had been rejected; that she immediately notified appellants of this fact, and demanded that they procure for her title to said lot 4; that on or about the 15th day of July the state of Idaho asserted its claim to said lot 4, and advertised the same for sale at public auction; that the said state did, on or about the 13th day of August, sell said land at public auction; that said appellants at that time did refuse, and ever since have refused, to perfect respondent's title to said tract, and that in order to protect her interest therein and prevent great damage being done to the balance of the land described in said warranty deed, respondent was compelled to and did purchase said land from the state of Idaho at public auction, and paid therefor to said state the sum of \$786.18.

Appellants deny the conveyance of the entire island, and allege that the deed was intended to convey, and did convey, only such portions of the island as might be patented to Thomas Weir. In other words, it is their claim that the conveyance was made so that if Weir received patent to the entire island the deed would convey the entire island, but if, as turned out to be the case, only a portion of the island was patented to Weir, such portion only would be conveyed to respondent by the deed, and that the warranty of title would extend no further than to include such lands as might be patented to Weir. The whole controversy between the parties is whether or not the deed uncon-

ditionally conveyed the portion of the land lying within section 36.

The case was submitted to a jury, and a verdict returned as prayed for in the complaint. Appellants complain of certain instructions given by the court, and certain other requested and refused. They also assign as error the overruling of appellants' demurrer to the complaint; the denying of appellants' motion for a nonsuit; the submission by the court to the jury of the determination of what land was conveyed by the deed, and of the rendering of judgment by the court on the verdict and answers to certain interrogatories that were submitted to the jury, for the reason that the judgment is not consistent with the answers to the special questions submitted and is contrary to the law of the case.

The court instructed the jury that the deed in controversy was so ambiguous that it could not be determined therefrom whether the land in section 36 was included in said deed or not, and that for this reason it was necessary to submit to the jury the facts and circumstances surrounding the transaction to assist them in determining whether or not it was intended by said deed to convey said land in section 36, which instruction appellants claim was error. We think this was error on the part of the trial court, but appellants cannot be heard to complain of it, for the reason that it was more favorable to them than it ought to have been. As we view it, there was no ambiguity whatever in this deed, and the trial court should have instructed the jury that it was clearly intended thereby to convey all of the land in Bear Island, which would include the land in section 36, 18 C. J. p. 297, § 277.

The first rule of construction to be applied to a written instrument in order to determine what is intended by it is that resort shall be had to the language of the instrument itself, and "if the expressed meaning is plain on the face of the instrument it will control." 18 C. J. p. 257, § 204b, page 277, § 242e. "The intention must be ascertained from the language of the deed itself where that is not ambiguous." 8 R. C. L. p. 1039. Clearly the deed in controversy was intended to convey the entire tract referred to as Bear Island, for that is what it says. No other reasonable interpretation can be put upon the language. Its description as "situated principally in section thirty-five (35), township four (4) north, range thirty-seven (37) East, Boise meridian," plainly indicates that a portion of the island to be conveyed lies outside of said section. The expression "accordingly as the same may appear described in patent yet to be issued" cannot by any reasonable interpretation be made to mean that the amount of land conveyed by the deed was to vary with the amount that might be conveyed by the patent to be issued

to Weir. The statement, "This deed is intended to convey all interest and title taken by first parties in deed recorded on page 501 in Book P of Deeds, records of Fremont county, Idaho, covering all property therein described," does not limit the land conveyed by this deed to the land conveyed by the deed recorded on page 501 in Book P of Deeds, if we should assume that the last-named deed conveyed less than the entire tract known as Bear Island. The plain meaning of this latter expression is that it was intended to convey by this deed all that was conveyed by the former deed, but there is nowhere found in this expression anything to indicate that the property conveyed by this deed should be limited to that conveyed by the former deed, if the former deed did not convey all of Bear Island.

[2] The former deed, recorded at page 501 of Book P of Deeds, records of Fremont county, Idaho, to which reference is made in the deed in controversy, conveys to appellants—

"all that certain lot, piece or parcel of land situated, lying and being in the counties of Fremont and Bingham, Idaho, and bounded and described as follows, to wit: All of the unsurveyed tract of land known as Bear Island situate in section thirty-five (35), township four (4) north, of range 37 east, Boise meridian and in section two (2), township three (3) north, of range thirty-seven (37) East Boise meridian and containing two hundred (200) acres more or less, together with all ditch and water rights thereto belonging or in any wise appertaining, however, the same may be evidenced."

This is the deed, executed January 31, 1907, by which appellants acquired title to Bear Island from Thomas Weir, the entryman. It refers to the island as situate in section 2, township 3, and section 35, township 4, when it in fact covered a part of section 36, township 4. The island is divided among these sections as follows: In section 2, 2.97 acres; in section 35, 136.10 acres; in section 36, 26.65 acres. December 18, 1909, after holding title almost three years, appellants conveyed to respondent title to all of "that certain tract commonly known as 'Bear Island,' and situated principally in section 35." If they understood that they

had acquired only that part of the island lying in sections 2 and 35, and intended to convey no more than that, it is difficult, if not impossible, to explain the adoption of this expression, which, more clearly than the former, embraces the entire island.

This description, relied upon by appellants to limit the warranty to lands in section 2, township 3 north, and section 35, township 4 north, is not susceptible of such construction, for it clearly states that it conveys "all of the unsurveyed tract known as Bear Island." The erroneous statement following that this island is "situate in section thirty-five (35), township four (4) north, * * * and in section two (2), township three (3) north," does not restrict the area conveyed to what is in these last-named sections. The contention of appellants that this description in substance says "that part of Bear Island situated in section 35 and section 2" cannot be sustained unless we reject the plain meaning of the language used.

"Where a close or parcel of land is granted by a specific name, and it can be shown what are the boundaries of such close or parcel, the governing part of the description is the specific name, and the whole parcel will pass, even though to the general description there is superadded a particular description by metes and bounds, or by a plan which does not show the whole contents of the land as included in the designation by which it is generally known." *Attrill v. Platt*, 10 Canada Sup. Ct. pp. 425, 472; *Lodge's Lessee v. Lee*, 6 Cranch, 237, 3 L. Ed. 210; *Martin v. Urquhart*, 72 Ark. 496, 82 S. W. 835; *Melvin v. Proprietors of Locks and Canals on Merrimack River*, 5 Metc. 15, 38 Am. Dec. 384.

Reduced to its legitimate conclusion, the contention of appellants means that if Weir finally obtained patent for only lot 7, section 2, township 3, containing 2.97 acres of land, this would satisfy the warranty given by appellants, or, if Weir's entry finally failed and no patent issued to him, appellants had given no warranty whatever.

No error prejudicial to appellants appears in the record. The judgment is therefore affirmed, with costs to respondent.

RICE, C. J., and BUDGE, MCCARTHY, and LEE, JJ., concur.

JOHNSON v. ENSIGN, District Court Judge.
(No. 3755.)

(Supreme Court of Idaho. Oct. 24, 1921.)

Mandamus ¶57(1)—Will lie to compel settlement of reporter's transcript where wrongfully refused by trial judge.

Under C. S. § 6886, when a reporter's transcript of the testimony is duly and seasonably lodged with the clerk of the trial court, and duly delivered to the trial judge for settlement, and is in such condition that he can properly settle it so that it will conform to the truth, mandamus will lie to compel a settlement thereupon upon the refusal of the trial judge so to do.

Original application for writ of mandamus by Nellie Payne Johnson against Henry F. Ensign, as Judge of the District Court of the Fourth Judicial District of the State of Idaho. Writ issued.

Richards & Haga and Hawley & Hawley, all of Boise, for plaintiff.

R. H. Johnson and C. H. Nixon, both of Boise, for defendant.

RICE, C. J. This is an original application for a writ of mandamus, directed to the defendant, as judge of the district court of the Fourth judicial district of Idaho, directing him to settle the reporter's transcript in the case of Kate Cecelia Bedal v. Nellie Payne Johnson and the Florence Live Stock Company.

The transcript was lodged with the clerk of the trial court on August 29, 1920. It was duly served on counsel for respondent, and on September 30, 1920, plaintiff requested the clerk to deliver the transcript, together with the alleged errors noted by respondent in that case, to defendant for settlement. On October 1, 1920, the clerk delivered the transcript, with the objections of respondent, to defendant. There is no contention that there was any negligence or default on the part of plaintiff prior to the delivery of the transcript to the defendant. On August 9, 1921, defendant refused to settle the transcript giving as his reason therefor that—

"Due and proper diligence has not been shown by the defendant Nellie Payne Johnson in procuring settlement of said reporter's tran-

script between September 30, 1920, and June 3, 1921."

In this case we have no question presented as to negligence or default prior to the delivery of the transcript to the trial judge, nor any claim that the transcript is in such condition that the judge cannot properly settle it so that it will conform to the truth. When such questions arise, it may well be that the action of the trial court in settling or declining to settle the transcript is discretionary, and will not be controlled by mandamus.

Considerable space is occupied in the record in showing what transpired between counsel for appellant and respondent in the case of Bedal v. Johnson after delivery of the transcript to defendant, in an effort on the one hand to show that appellant in that case used due diligence, and on the other that she was guilty of negligence. In our opinion such showing is unnecessary.

When a reporter's transcript is seasonably delivered to the trial judge for settlement, it is the duty of the judge promptly to settle it.

In C. S. § 6886, it is provided, among other things, as follows:

"At the expiration of the time limited for designating errors, the transcript, with any notice designating errors shall be transmitted to the judge who tried the cause, by the clerk, on application of either party, and such judge shall forthwith settle the same, notifying the parties by such notice as he deems adequate of the time and place of settlement in the event of any error designated by notice and not agreed to. * * *

Under this statute, after a transcript is duly delivered to the trial judge for settlement, he becomes the actor. The law imposes upon him the duty of giving such notice as may be required and of settling the transcript when it is in such condition that he can properly settle it. In our opinion the duty is unqualified, and mandamus is the proper remedy to be invoked in case of refusal.

Let the writ issue. No costs awarded.

BUDGE, MCCARTHY, DUNN, and LEE, JJ., concur.

IN RE WATERS OF ROGUE RIVER AND ITS TRIBUTARIES.

PACIFIC PLACER CO. v. SPARLIN et al.

(Supreme Court of Oregon. Nov. 15, 1921.)

1. Waters and water courses \S 132—Prior appropriation for hydraulic mining may not be encroached upon during summer season for irrigation purposes.

The right of a prior appropriator of waters from a stream for mining use, which is a public necessity, cannot be encroached upon through the summer season by subsequent appropriation of waters for irrigation purposes, in view of Or. L. \S § 5789, 5716, where such waters are reasonably necessary for hydraulic mining.

2. Waters and water courses \S 152(12)—Objection to informality in exception to determination of water board cannot be first made upon appeal.

Where the parties were heard on exceptions to determination of water board, an objection to an informality in the entitling of an exception comes too late when first made on appeal, where appellants were not misled or injured.

Department 2.

Appeal from Circuit Court, Josephine County; F. M. Calkins, Judge.

Adjudication of rights of the Pacific Placer Company, successor in interest to the estate of J. T. Layton, deceased, to waters from the Rogue River. Petitioned by successor for rehearing. Ira F. Sparlin and other users of the waters intervened. The state water board declined to modify its determination, and from a decree of the circuit court fixing their rights the interveners appeal. Decree affirmed.

This is an appeal by Ira F. Sparlin and other water users of the waters of Williams creek, a tributary of Rogue river, from a decree adjudicating the waters of Rogue river and its tributaries as against the successors in interest of the estate of J. T. Layton, deceased.

About 1860 the predecessors in interest of J. T. Layton appropriated the waters of Williams creek for mining purposes and constructed a ditch, now known as the lower Layton ditch, from Williams creek, which was used for mining not far distant from the creek. About 1866 this ditch was constructed to Farris gulch, and there used, to its full carrying capacity, for hydraulic mining purposes. The ditch is 18 miles in length, $4\frac{1}{2}$ feet in width at the top, and 8 feet in width at the bottom. In 1876 Layton appropriated additional water from the stream and began the construction of another ditch, which was completed about 1878, at an expense of about \$10,000. This ditch is 21 miles in length, and

is known as the upper Layton ditch, being used for mining purposes on Farris gulch. Mr. Layton began his mining operations by using the waters as early as possible in the winter season, and continued each season as long as it was possible to get sufficient water. Sometimes the waters lasted until in August, and in other years until in September or the first of October, depending upon the snowfall in the mountains. The lower ditch goes dry in the early part of July, but the upper ditch furnishes water sometimes as late as the latter part of October or the first of November. The waters have been used continuously as late in the season as there was sufficient water for hydraulic mining.

The source of these ditches is high up in the mountains, where the snow falls to a great depth and freezing weather often predominates until in February or March, making mining earlier in the season impossible. It appears they usually clean out the ditches in the latter part of the winter and commence mining in March. There is no question in the case as to the prior right of the successors in interest of J. T. Layton to the use of the waters of Williams creek.

The state water board adjudicated as follows:

"Estate of J. T. Layton, deceased. Priority—1860, 12.00 sec. ft., hydraulic mining, Nov. 1 to July 1, lower Layton ditch.

"Estate of J. T. Layton, deceased. Priority—1876, 8.100 sec. ft., hydraulic mining, Nov. 1 to Aug. 1, upper Layton ditch.

"Estate of J. T. Layton, deceased. Priority—1876, 2.00 sec. ft., Aug. 1 to Nov. 1, upper Layton ditch.

"Water to be taken from east fork of Weaver fork and Glade fork, tributaries of east fork of Williams creek.

"Place of Use—Patented mineral lands at Farris gulch, Jackson county, Or."

The Layton estate, being dissatisfied with the board's determination, petitioned for a rehearing, and also filed exceptions, and asked that the other water users on the stream be brought into the proceeding for the purpose of a re-examination of the matter. In this proceeding numerous landowners and other users in the Williams Creek valley intervened and contested the right of the Layton estate to the amount of water awarded and as to the season of the mining use.

It developed from the testimony that when Layton commenced using the water at Farris gulch he commenced mining in November and continued through the winter and as late in the summer as water was available. The loss by seepage and evaporation in the summer in conducting the water through the lengthy ditches was about 50 per cent. Layton continued mining in winter and summer for about ten years, until he paid all his indebtedness. Then, as the mining during the win-

ter season was unprofitable, it was discontinued. Upon the rehearing, the state water board declined to modify its determination.

The circuit court decreed the successor in interest to the Layton estate a prior right through the lower ditch to 12 second feet of water, from November 1st to July 1st and through the upper ditch 8 second feet of water, from November 1st to September 1st, and 2 second feet from September 1st to November 1st.

It is indicated in the record that the state engineer's office measured the water carried in the Layton ditches, but the measurements are not contained in the record.

H. D. Norton, of Grants Pass, for appellants.

Gus Newbury, of Medford, and Fred A. Williams, of Salem (Colvig & Williams, of Grants Pass, on the brief), for respondents.

BEAN, J. (after stating the facts as above). It is contended on behalf of appellants, upon this appeal, that the Layton estate is diverting through its ditches an amount of water in excess of that required to carry on its mining operations. It is shown by the testimony that the water in the lower Layton ditch is used for bywash, or for carrying away the debris from the mine, and not for sluicing. The water carried through the upper ditch is impounded in a reservoir during the night and used for hydraulic mining during the next day. In order to operate the mine it is essential to use all of the water that can be obtained through these ditches, and more could be used if it were available. Testimony upon this point is practically uncontroverted. The testimony supports the findings of the court.

It is assigned by appellants that—

"The court erred in decreeing to the estate of J. T. Layton, deceased, the right to the use of any of the waters of Williams creek or its tributaries for mining purposes during the irrigation season, or for any period of time other than from October 1st of any year to May 15th of the succeeding year."

[1] It is urged on behalf of appellants that the use of the waters for mining operations should not be curtailed during the winter season when there is a surplus of water, and used therefor during the irrigation season, or, in effect, the water should not be used for mining purposes later in the year than May 15th.

The use of water of the lakes and the running streams of the state of Oregon for the purpose of developing the mineral resources of the state is declared to be a public and beneficial use and a public necessity, and the right to divert such unappropriated waters is granted by our statute. Section 5789, Or. L.

The privilege claimed by the appellants would intrench upon the vested right of the owners of the Layton ditches. However laudable may be the purposes of the appellants, and however great may be their necessity to obtain the waters of Williams creek for irrigation purposes, it is one of the fundamental principles of our water code that "subject to existing rights, all waters within the state may be appropriated for beneficial use," as provided by the statute and not otherwise. The statute further declares:

"But nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, corporation, or association to any water." Section 5716, Or. L.

The right of a prior appropriator of water is paramount. The use of the water for hydraulic mining by Layton and his successors in interest is shown to be reasonably necessary for the project fairly within contemplation at the time of the appropriation. *Andrews v. Donnelly*, 59 Or. 138, 116 Pac. 569; *Caviness v. La Grande Irrigation Co.*, 60 Or. 410, 430, 119 Pac. 731.

[2] The appellants criticize the exceptions filed on behalf of the Layton estate and considered by the circuit court. The exceptions are entitled, "In the Circuit Court of Oregon for Jackson County." It appears they were filed with the state water board, answered by the appellants, and sent to the circuit court with the record. We find no objection to this manner of proceeding made at the time of the hearing in the trial court. The parties were heard upon the exceptions. The objection to the informality is now too late. It does not appear that the appellants were misled or injured.

Complaint is made by appellants because the circuit court awarded the Layton estate "water of the east fork of Williams creek, through the upper and lower Layton ditches," instead of confining the use of water from the tributaries or forks of the east fork of Williams creek, as described in the record of the determination of the water board. The record here does not inform us that any material change in the place of intake was intended or made by the circuit court. The map of the Layton ditches mentioned in the testimony is not before us. We have only a printed topographical map of the section of the country in which the ditches are located. We are unable to distinguish any material difference in the two descriptions. It appears the water is to be taken to the mines by means of the Layton ditches as constructed.

After a careful reading of the testimony and examination of the record, we affirm the decree of the lower court.

BURNETT, C. J., and BROWN, J., concur.
JOHNS, J., resigned after argument.

POOLE v. VINING et al.*

(Supreme Court of Oregon. Nov. 15, 1921.)

1. Set-off and counterclaim \S 28(1)—Advances by contractor to prevent lien held proper set-off in suit by subcontractor.

In action against a contractor for work and labor, if the defendants of necessity had to extinguish a lien filed by a party hired by plaintiff in order to comply with their contract with the owner, such would be a legitimate offset to plaintiff's demand.

2. Evidence \S 158(5)—Lien not provable by a letter.

A letter to a contractor and subcontractor, notifying them that a lien had been filed for work on logs and timber, was incompetent to prove the lien.

Department 1.

Appeal from Circuit Court, Benton County; G. F. Skipworth, Judge.

Action by Alfred Poole against Carl Vining and another, partners as Vining & Keys. Judgment for the plaintiff only for a sum admitted due by the defendants, and the plaintiff appeals. Reversed and remanded.

This is an action to recover for labor which plaintiff alleges he performed for defendants. There are two causes of action set forth. The first is upon an account stated, for the sum of \$153.50. As to this cause the answer admits that the account was stated as alleged, but denies the averment of nonpayment.

The second cause of action is for labor and services performed by plaintiff for defendants between March 4 and May 20, 1918, aggregating 534½ hours, at the agreed price of 60 cents an hour and amounting to a total of \$320.60. The complaint allows a credit of \$9, leaving an alleged balance of \$311.60 due on this cause of action. In answer to this second cause, the defendants wholly deny making such a contract or any hiring of plaintiff by them, except that they admit plaintiff worked for them 14 hours in March, 1918, at the agreed price of 60 cents an hour, making a total of \$8.40, which they allege had been paid. For a further answer the defendants allege:

"That about March 1, 1918, plaintiff and defendants entered into a valid contract under the terms of which plaintiff was to fell and cut into logs timber from the F. S. Malcolm and H. Halter property for defendants at an agreed price of 70 cents per thousand feet; that under said contract plaintiff was to pay all his own expenses in said logging operations, including the cost of labor and tools; that defendants were to furnish plaintiff with tools at cost, and deduct the cost price thereof from money to become due plaintiff under the contract.

"That plaintiff proceeded with logging operations under said contract, and felled and cut

into logs 476,280 feet of timber, amounting under the contract to \$333.40.

"That at plaintiff's request, defendants furnished to plaintiff tools, the cost price of which amounted to \$30.30; that defendants are entitled to further credit on the above account for the following disbursements made at the request of plaintiff, and with the agreement that they would be charged against plaintiff:

Board paid for plaintiff in March, 1918.....	\$ 9 80
Board paid for Edward A. Austin, an employe of plaintiff.....	7 00
Paid to Edward A. Austin, April 20, 1918.....	20 00
Paid to Edward A. Austin, May 23, 1918.....	5 00
Paid to Edward A. Austin, June 13, 1918.....	100 00
Paid to Edward A. Austin, June 18, 1918.....	25 00

Total \$166 80

—"making a credit of \$197.10 to which defendants are entitled on said contract, and leaving a balance of \$298.20, which defendants admit is due and owing to plaintiff, subject to the defense hereinafter alleged."

A further answer or counterclaim is as follows:

"That about March 1, 1918, plaintiff and defendants entered into a valid contract, under the terms of which plaintiff was to fell and cut into logs, timber from the F. S. Malcolm and H. Halter property for defendants at an agreed price of 70 cents per thousand feet; that under said contract plaintiff was to pay all his own expenses in said logging operations, including the cost of labor and tools; that plaintiff employed one Edward A. Austin as an employe in logging under said contract; that plaintiff failed and neglected to pay said Austin for his labor on said logs, and that on June 24, 1918, said Austin filed notice of lien against the said logs and against certain railroad ties manufactured from logs bucked by plaintiff and his employe, Austin, under said contract; that said lien was in the sum of \$184.95; that defendants were indebted to said Austin in the sum of \$24.75, which was included in said lien, leaving \$160.20 of the lien indebtedness for work performed by Austin as an employe of plaintiff.

"That defendants had a contract with F. S. Malcolm for logging said timber, and had subcontracted part of the work to plaintiff, as hereinbefore alleged; that defendants were obligated to keep said timber and logs, and the product thereof, free from liens for labor performed thereon, and that it was necessary for defendants to pay said lien placed thereon by said Austin; that said lien in the sum of \$160.20 was a valid lien for labor performed by said Austin on said logs as an employe of plaintiff; that said lien was filed by Austin at the instance of plaintiff, and with full notice and knowledge thereof by plaintiff; that the indebtedness covered by said lien was a valid and legal obligation of plaintiff, and that defendants paid the same to save themselves from loss and damages; that as a result of the foregoing facts, defendants are entitled to the further credit of \$160.20 on their account with plaintiff, leaving a net balance of \$138.00 due plaintiff from defendants, which defendants are ready, able, and willing to pay."

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Motion to modify opinion overruled 202 Pac. 724.

The new matter in the answer was put at issue by a reply, and the cause came on for trial, which by stipulation of the parties was had before the court. Substantially finding for the defendants, the court rendered judgment against them for \$138, which they admitted to be due plaintiff. From this judgment the plaintiff appeals.

Arthur Clarke, of Corvallis (McFadden & Clarke, of Corvallis, on the brief), for appellant.

Jay L. Lewis, of Corvallis (Yates & Lewis, of Corvallis, on the brief), for respondents.

McBRIDE, J. (after stating the facts as above). [1, 2] If there were in the record any legal evidence that Austin had filed a lien for the labor done while he was working with plaintiff upon the logs, the judgment would be unassailable. But no lien was offered in evidence, nor is there any competent testimony that any lien valid or otherwise was ever filed. If plaintiff by neglecting to pay Austin had allowed a lien to be put upon the logs and timber, thus rendering it necessary for defendants to extinguish the lien in order to comply with their contract with Malcolm, the amount so paid would be a legitimate offset, so far as it goes, to plaintiff's demand. But the only evidence introduced on that subject was a letter from a firm of attorneys directed to defendants and Malcolm, notifying them that such a lien had been filed by Austin. The introduction of this letter was objected to, and the objection was overruled and exception saved. The letter was incompetent to prove a lien, and its admission was error.

The judgment is reversed, and the cause will be remanded for a new trial.

BURNETT, C. J., and HARRIS and BEAN, JJ., concur.

PETERSON v. BEALS et al.

(Supreme Court of Oregon. Nov. 15, 1921.)

1. Appeal and error \S 653(1) — Supreme Court has no power to amend record of court below.

The Supreme Court has no power to amend the record of the circuit court, and can only determine whether or not the circuit court erred in its decision.

2. Appeal and error \S 662(2), 670(1)—Official record of court below imports absolute verity as to time of entry of judgment, and cannot be contradicted by affidavits.

The official record of the court below imports absolute verity, and the recitals of a journal entry as to the day on which a judgment was entered cannot be contradicted by ex parte affidavits.

3. Courts \S 69—"Vacation" defined.

The periods between the end of one term of court and the beginning of the next, are called vacations, citing 8 Words & Phrases, 7265.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Vacation.]

4. Appeal and error \S 627(1) — Appellate court has no jurisdiction where transcript not filed within 30 days.

Under Or. L. \S 554, the Supreme Court acquires no jurisdiction of an appeal where appellant filed his transcript in the appellate court more than 60 days after rendition of the decree.

In Banc.

Appeal from Circuit Court, Tillamook County; George R. Bagley, Judge.

Suit by Andrew Peterson against F. R. Beals and others. Decree for defendants, and plaintiff appealed. Appeal dismissed without opinion, and plaintiff prays rehearing. Petition denied.

Mathison & Mannix, of Astoria, and E. J. Claussen, of Tillamook, for appellant.

Botts & Winslow, of Tillamook, for respondents.

BURNETT, C. J. In this case the defendants moved to dismiss the appeal of the plaintiff on the ground that, as appears from the records in this cause, the decree herein was entered by the circuit court on April 14, 1921, and the notice of appeal was not served until June 17, 1921, or more than 60 days after the entry of the decree. The motion was sustained and the appeal was dismissed without an opinion. In his petition for a rehearing, the plaintiff endeavored to show by accompanying affidavits that the decree was not rendered on April 14, 1921, but on the later date of April 20. In other words, he undertakes to make it appear by affidavits that the trial judge heard the cause in term time, took the matter under advisement, and afterwards, on April 14, 1921, made findings of fact and conclusions of law together with a decree which he forwarded to the clerk of the court, who received it on April 20 and afterwards entered it in the journal. The essence of the plaintiff's endeavor is to make the authentic history of the proceedings rest partly on the official journal of the court and partly on ex parte affidavits of individuals.

The official transcript filed by the plaintiff on his appeal reads thus:

"Be it remembered, that heretofore on the 14th day of April, 1921, the same being a day of a regular term of the circuit court for the county of Tillamook and state of Oregon, there was made and entered of record a decree in words and figures as follows, to wit."

Then follows the title of the court and cause, succeeded by these words:

"Based on the findings of fact and conclusions of law heretofore made and entered in this cause it is by the court ordered and decreed."

And this in turn is succeeded by the terms of the decree, about which there is no dispute, ending with the date April 14, 1921, and the signature of the presiding judge. At the foot, after the signature of the judge, appear these words:

"Indorsed" filed April 20, 1921. H. S. Brimhall, Clerk, by Bernice E. Ripley, Deputy."

We thus have the official declaration of the custodian of the records of the circuit court that the decree appealed from was made and entered of record on April 14, 1921, "the same being a day of a regular term of that court."

[1, 2] in effect, the effort of the plaintiff in this petition for rehearing is to have this court treat this record as amended and upon that new showing to reverse our former ruling and overrule the motion to dismiss the appeal. The only question before us is whether or not, on the data at that time before us, we ruled correctly in dismissing the appeal. We have no authority to amend the record of the circuit court. The only power this court has is to determine whether or not the circuit court erred in its decision, and even this we cannot do except upon an appeal regularly prosecuted in the manner prescribed in the statute upon appeals. Perforce, we must decide whether or not we have jurisdiction, and this we must do from the record presented by the appellant. As taught in *Wolf v. Smith*, 6 Or. 73, he must bring into the appellate court a perfect record. Unless he does so, the latter tribunal does not gain jurisdiction. The official record of the court below imports absolute verity, and as said in *Hislup v. Moldenhauer*, 24 Or. 106, 32 Pac. 1026:

"The recitals of a journal entry as to the day on which a judgment was rendered cannot be contradicted in the Supreme Court by a certified memorandum kept by the clerk of the trial court."

In that case the plaintiff insisted that the judgment in question actually was taken in the circuit court on May 20, 1892, but, owing to the neglect of counsel to furnish a proper entry for the clerk, it was written in the journal under date of May 24, 1892. Supporting his claim, the plaintiff produced the affidavit of the clerk corroborating his statement. The decision there held this to be incompetent, and ruled, in effect, that the journal entry is the conclusive and authoritative statement of the doings of the trial court.

[3] In argument, the plaintiff assumes that the decree in question was entered in vaca-

tion. The statement is that the cause was heard on the merits on October 25, 1920, and was taken under advisement. But we have no record to show that to be the case. Neither is there any record for the assumption that the cause was decided in vacation. The terms of the circuit court in Tillamook county at the time this litigation was carried on were held on the first Monday in February, May, and October. We have no statute defining the term "vacation" as applied to terms of court, like other states which have legislated on that subject. Hence we are remitted to the common-law definition of the term, viz.:

"The periods between the end of one term of court and the beginning of the next are called 'vacations.'" *Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109.

See other authorities cited in 8 Words and Phrases, 7265.

For aught that appears of record, the decree may have been rendered during the February term of the circuit court. Indeed, the transcript recites that April 14, 1921, was a day of a regular term of the circuit court. We cannot presume that the decree was entered in vacation. Section 196, Or. L., declares:

"If entered in vacation, the entry shall be entitled and dated substantially as follows."

Then follows this form:

"State of Oregon, County of _____, Court for the County of _____. In vacation, after the _____ Term, A. D. _____, the _____, A. D. _____, as the fact may be, and such entry shall have the same effect as if entered in term time."

On the contrary, the presumption is that, if the entry had been made in vacation, it would have followed the form prescribed by the Code as here noted. The official utterance of the only one authorized to make the entry is that of the clerk, who declared it was entered in term time on April 14.

[4] Even if we could consider the question presented by the affidavits and so countenance an attack upon the record by that means, with the result that we should consider the record corrected, it would be too late at this time, or even at the time the motion to dismiss was originally decided. Section 554, Or. L., says:

"Upon the appeal being perfected the appellant shall, within thirty days thereafter, file with the clerk of the appellate court a transcript or such an abstract as the law or the rules of the appellate court may require of so much of the record as may be necessary to intelligibly present the question to be decided by the appellate tribunal, together with a copy of the judgment or decree appealed from, the notice of appeal and proof of service thereof, and of the undertaking on appeal; * * * and after compliance with the provisions hereof the

appellate court shall have jurisdiction of the cause, but not otherwise."

The mandatory language of the last clause, "but not otherwise," effectually closes the door against the relief desired by the plaintiff on his appeal. He himself tendered the transcript showing that his appeal was taken more than 60 days after the rendition of the decree. Confessedly, the appeal was perfected when he filed his notice of appeal and undertaking, and the time had elapsed for the justification of sureties. That transcript did not confer jurisdiction upon this court. He has not complied with the provisions of the section just quoted, in that he has not lodged in this court within 30 days after perfection of his appeal a transcript giving us sanction to consider his appeal. He cannot otherwise confer jurisdiction upon this court.

The conclusion is that the petition for rehearing must be denied.

BREESE v. BRAMWELL, Superintendent of Banks, et al.

(Supreme Court of Oregon. Nov. 15, 1921.)

1. Injunction \S 141—May issue before service of summons after commencement of suit by filing complaint.

Under Or. L. \S 417, as to time of allowing injunction, and sections 51 and 395, as to how suit is commenced and when summons may be served, injunction may issue after commencement of suit by filing complaint, before summons is served.

2. Appeal and error \S 71(3)—Temporary and interlocutory injunction order not appealable.

An injunction being temporary and interlocutory, the order granting it is not a final determination necessary under Or. L. \S 548, for appeal.

3. Banks and banking \S 63½—Injunction may be issued before final judgment against superintendent of banks in charge of insolvent bank.

Or. L. \S 6221, prohibiting injunction against an insolvent bank before final judgment, does not apply to injunctions against the superintendent of banks, who has taken charge of such a bank, and also against another bank in which the superintendent has deposited funds, forbidding the paying out of such funds.

In Banc.

Appeal from Circuit Court, Crook County;
T. E. J. Duffey, Judge.

Suit by R. W. Breese against Frank C. Bramwell, Superintendent of Banks, and another. From orders relative to a temporary injunction, the named defendant appeals. Heard on motion to dismiss appeal. Appeal dismissed.

This is a suit in which the complaint is in substance that the defendant Bramwell as superintendent of banks has taken charge of the Crook County Bank, the same being insolvent; that during the process of liquidation he has deposited the funds of the Crook County Bank with the Bank of Prineville and has drawn a check on the latter bank in payment of a claim of French & Co. against the insolvent bank, without an order of the circuit court; that the payment of the check will disturb the pro rata distribution of the funds of the insolvent bank, resulting in a preference of French & Co. over the other creditors of the insolvent bank; and finally that the plaintiff is a depositor in the Crook County Bank and entitled to share pro rata in the money paid out to its creditors. On the filing of the complaint the county judge of Crook county issued an order of injunction forbidding the defendants from issuing, cashing, accepting, or paying any check drawn or to be drawn against the funds of the insolvent bank, and especially any check drawn in favor of French & Co., until further order of the court. Afterwards the circuit court in which the action was pending modified the order so as to restrain the payment of a check in favor of French & Co. only, until further order of the court. Later still the defendant Bramwell appeared specially for the purpose of presenting his motion only, and for no other purpose, and moved the court to set aside the restraining order issued by the county judge, "for the reason that said order was made and entered herein on the same day that the complaint in said cause was filed, before any summons was served and before the cause was prosecuted to final judgment, and execution issued against the Crook County Bank," the insolvent bank. This motion was argued and taken under advisement until a later date, when the court renewed the preliminary injunction and "ordered, adjudged, and decreed that a temporary injunction issue herein against the defendants and each of them, the same to continue in full force and effect until the final determination of this case, at which time said injunction is to be dissolved or made perpetual." From these orders the defendant Bramwell has appealed, and the plaintiff moves that the appeal be dismissed for the reasons:

"(1) That no judgment, decree, or final order has ever been made or entered in the above entitled court and cause.

"(2) That the injunction and restraining orders issued, * * * from which the defendant Frank C. Bramwell has appealed, do not affect a substantial right, and do not in effect determine the suit so as to prevent a judgment or decree therein, and are not final orders made in a proceeding after judgment or decree."

Willard H. Wirtz, Dist. Atty., of Prineville, for appellant.

Jay H. Upton, of Prineville (M. R. Elliott, of Prineville, on the brief), for respondent.

BURNETT, C. J. [1] An injunction may be allowed by the court or judge thereof at any time after the commencement of the suit and before decree. Or. L. § 417. Under section 51, Or. L., made applicable to suits in equity by section 395, Or. L., a suit is commenced by filing a complaint with the clerk, and at any time after suit is commenced the plaintiff may cause a summons to be served on the defendant. The objection that the injunction was granted before summons was served is clearly without foundation. Under the sections quoted, an injunction may be issued even before the service of summons. [2, 3] Moreover, the injunction, being merely temporary and interlocutory, is not final within the meaning of section 548, Or. L., reading thus:

"A judgment or decree may be reviewed as prescribed in this chapter, and not otherwise. An order affecting a substantial right, and which in effect determines the action or suit so as to prevent a judgment or decree therein, or an interlocutory decree in a suit for the partition of real property, defining the rights of the parties to the suit and directing sale or partition, or a final order affecting a substantial right, and made in a proceeding after judgment or decree, or an order setting aside a judgment and granting a new trial, for the purpose of being reviewed, shall be deemed a judgment or decree."

Nothing is decided finally by the terms of the injunction orders to which allusion has been made. The final determination of the suit remains in the breast of the circuit court on proper proceedings. It is urged in the brief appearing in the record attached to the motion to dissolve the injunction that under section 6221, Or. L.:

"No attachment, injunction or execution shall be issued against such bank or its property before final judgment in any suit, action or proceeding in any court of competent jurisdiction."

This refers to the insolvent bank which has been forced into liquidation. But in this case the insolvent bank is not a party. The injunction has been issued against the superintendent of banks and the Bank of Prineville, in which he has deposited funds belonging to the insolvent bank. The preliminary injunctions mentioned, therefore, do not come within the provision of this excerpt upon which the defendants rely. Even if it did apply, we have a mere interlocutory order of a court of competent jurisdiction, which may or may not be erroneous, as the event shall prove. But, until a final determination has been reached in that court, the Supreme Court has no jurisdiction to review

the orders of the circuit court. It may be that in the ultimate conclusion of the whole matter the circuit court will decide the matters at issue correctly. Until it has an opportunity to do so and makes a final decision, this court cannot interfere. As to the finality requisite to an appealable order, see *O. R. & N. Co. v. Taffe*, 67 Or. 102, 134 Pac. 1024, 135 Pac. 332, 515.

The appeal must be dismissed.

WOOLSEY v. DRAPER et ux.

(Supreme Court of Oregon. Nov. 15, 1921.)

1. Pleading ⚡98—Admission of fact not pleaded by opponent improper.

Insertion in an answer in a suit for specific performance of an admission that the property involved was owned by defendant's wife was improper and a nullity, where not in response to any allegation in the complaint alleging ownership in her.

2. Specific performance ⚡14—Suit against wife not bound and husband jointly not maintainable, unless plaintiff elects to accept husband's deed.

In specific performance suits, where the wife having a dower right is sued jointly with her husband on a contract not binding upon her, the suit cannot be maintained against her or her husband, unless prior to the decree plaintiff elects to accept the deed of the husband alone.

3. Specific performance ⚡126(3)—Motion to amend held election to accept deed of husband alone.

In a suit for specific performance against a wife not bound by the contract and her husband jointly, a motion to amend the complaint by demanding a decree against the husband alone held an election on plaintiff's part to accept the deed of the husband alone within the rule requiring plaintiff to elect.

4. Specific performance ⚡106(1)—Defendant's wife without dower right held not a necessary party.

A wife residing out of the state, having no dower right in land under Or. L. § 10073, held not a necessary party to a suit against her husband for specific performance.

5. Frauds, statute of ⚡118(1)—Entire contract need not be contained in one paper.

In order to make a contract binding under the statute, it is not necessary that it should be all contained in one paper.

6. Frauds, statute of ⚡118(4)—Evidence insufficient to show written contract for sale of land.

In a suit for specific performance, telegram and letters offered in evidence held insufficient to show a written contract between the parties.

7. Specific performance §32(1)—Party not bound cannot compel performance by the other.

In specific performance suits, whenever a contract is intended to bind both parties, if for any reason one of them is not bound, he cannot compel performance by the other.

8. Specific performance §29(2)—Sufficient description of land essential.

A suit for specific performance cannot be maintained where the land to be affected by the contract is not described therein with sufficient certainty to be capable of identification.

In Banc.

Appeal from Circuit Court, Malheur County; Dalton Biggs, Judge.

Suit for specific performance by Richard Woolsey against M. I. Draper and wife. Decree for defendants, and plaintiff appeals. Affirmed.

Eugene Ashwill, of La Grande, for appellant.

J. W. McCulloch, of Ontario (W. W. Wood, of Ontario, on the brief), for respondents.

RAND, J. This is a suit for the specific performance of an alleged contract. The complaint alleges that the plaintiff and M. I. Draper, one of the defendants, entered into a contract whereby the plaintiff contracted to sell and convey to Draper 315.24 acres of land owned by the plaintiff in the state of Montana for the agreed price of \$20 per acre, and that Draper, upon his part, agreed to deed to the plaintiff certain real property belonging to him in Ontario, Or., for which he was to be allowed and credited the sum of \$3,500 upon the purchase price of the Montana land, and that Draper assumed and agreed to pay an indebtedness secured by a mortgage upon the Montana property amounting to \$1,800, and to pay the balance in money to the plaintiff.

[1] The complaint alleged that Draper was the owner of the Ontario property. This was denied in the answer. To establish title in Draper the plaintiff introduced certified copies of deeds of record, purporting to convey the Ontario property to the defendant M. I. Draper, and also introduced evidence upon the trial showing that Draper was in possession of the property. No evidence denying ownership in Draper was offered by the defendant, from this it follows that the legal title to the Ontario property was established to be in Draper as alleged in the complaint. Inserted in the answer, following the denial of ownership in Draper of the Ontario property is a clause containing the following words:

"Admit that the defendant Mrs. M. I. Draper is the owner of the property described."

This admission was not in response to any allegation contained in the complaint alleging ownership in her. The admission so inserted is a mere nullity, and does not constitute any allegation of ownership in the wife. It was contended that, inasmuch as no reference to this admission was made in the reply, the title in her stands admitted of record. The insertion into a pleading of a clause pretending to admit a fact not pleaded by the opposite party is not a proper way to plead, raises no issue, is not capable of being denied, and should not be tolerated.

[2] The rule is settled in this state that in suits for the specific performance of contracts for the sale of land, where the wife having a right of dower in the land is sued jointly with her husband upon a contract not binding upon her, and the object of the suit is to divest her of her inchoate right of dower, the suit cannot be maintained against her nor against her husband unless prior to the decree in the lower court the plaintiff elects to accept the deed of the husband alone, because as to her the contract lacks mutuality. The court will not coerce the wife to perform a contract made by her husband alone, which she is not legally bound to perform. *Kuratli v. Jackson*, 60 Or. 203, 118 Pac. 192, 1013, 38 L. R. A. (N. S.) 1195, Ann. Cas. 1914A, 203; *Leo v. Deitz*, 63 Or. 261, 127 Pac. 550. This rule, however, must be limited to cases where the wife has a present existing right of dower in the lands involved.

[3] A motion to amend the prayer of the complaint was filed by the plaintiff before the entry of the decree in the court below, so that the wife should be decreed to have no dower right in the husband's land, and demanding a decree for specific performance against Draper alone. It appears that this motion was never called to the direct attention of the court, and no order was ever made concerning it. The motion so filed will not be considered to have been waived, even if the matter was not called to the attention of the court, in the absence of a showing that the plaintiff abandoned the motion; the motion being a part of the files of the suit, and presumably within the knowledge of the court. This constituted an election upon the part of the plaintiff to accept the deed of the defendant M. I. Draper alone within the rule referred to, requiring the plaintiff to elect. However, the plaintiff was not required to elect, because at the trial the wife, when called as witness, testified that she was then, and for four years prior thereto had been, living at Custer, Mont. Section 10073, Or. L., provides, among other things, that—

"Any woman residing out of the state shall be entitled to dower of the lands of her deceased husband lying in this state of which her husband died seized."

[4] This section was under consideration by this court in *Cunningham v. Friendly*, 70 Or. 222, 139 Pac. 928, 140 Pac. 989, and it was there held that a woman residing out of the state shall be entitled to dower in lands only of which her husband died seised, citing in support thereof *Thornburn v. Doscher* (C. C.) 32 Fed. 811, that in partition suits a nonresident wife is not a necessary party to such a suit. Under the provisions of this statute as so construed by this court the wife, being a nonresident of the state, had no right of dower in the lands involved, and was not a necessary party to the suit, as she had no interest therein.

On May 29, 1918, the defendant at Custer, Mont., wrote a letter to the plaintiff at La Grande, Or., stating that he had some income property in Ontario, Or., which he would like to trade to the plaintiff for the lands owned by the plaintiff in Montana. Subsequently, he wired to the plaintiff as follows:

"I have four three room houses and five lots in one block in the best part of town. One four room house and two lots in another block. I will trade this property in on your ranch at three thousand five hundred. Come down and see it."

Plaintiff testified—and it is not disputed,—that on going to Ontario the defendant Draper pointed out the Ontario property to him, and that they at that time entered into a parol agreement. His testimony as to the agreement is as follows:

"I agreed to exchange half a section of land that I had in Custer, Mont., at \$20 per acre, and I was to receive five cottages in Ontario, Or., for \$3,500 of that, and Mr. Draper was to assume a mortgage of \$1,800 that was on the land there that I was turning to him, and was to pay the balance in cash. There was a water right that Mr. Draper was to turn over to me, covering four of these cottages, the ones that stood together. I was to have the rent of those five cottages from that date. Mr. Draper was to have the rent of the Custer place for the year 1918."

On August 19th the defendant Draper wrote to the plaintiff a letter, of which the following is a copy:

"Custer, Mont.

"Mr. R. Woolsey, La Grande, Ore.—Dear Sir: Your instructions to Mr. Sharp does not jibe with our agreement. You say to Mr. Sharp that I am to pay you \$6,400 less mortgage \$1,800. Less \$3,500 value of my Ontario property. Now your abstract only calls for 215.24 acres at \$20 per acre which I agreed to pay you per acre would be only \$6,305.00. I told you I would take your property at \$20 per acre not \$6,400.00. I will guarantee the house I showed you are the ones I own in Ontario, Oregon. You must be in the habit of trading with a lot of crooks to think this. I have a water right with the property that has the four cottages on and will sent it to you. The banking corporation of Helena who has a mortgage on that property says you have an insurance on

the house which is of no value to you as there has not been any one living in the house to my knowledge for two years. I wish you would transfer that policy to me.

"Please attend to this at once if I am to get this place I want to know at once, if not, lets forget it.

"Yours truly,

M. I. Draper."

Other letters were introduced, and from them it appears that the plaintiff directed his lessee upon the Montana land to pay the rent to Draper and Draper directed his Ontario agent to pay the rent on the Ontario premises to the plaintiff, and at Draper's request the insurance upon the buildings on the Montana land was made payable in case of loss to Draper. Abstracts were prepared and delivered, and no question was raised as to the sufficiency of the title to the property of either party. The plaintiff executed a deed for his Montana property, and delivered the same to a bank at Custer, to be delivered to the defendant Draper upon his compliance with the contract, but the deed was never delivered. On September 1, 1918, the defendant wrote to the plaintiff a letter, stating, in effect, that, owing to the condition of the money market, he was not able to raise the money necessary to carry out the contract, and stating that he would call the deal off.

[5] In order to make a contract binding under the statute of frauds, it is not necessary that it should be all contained in one paper. Letters passing between the parties may supply such evidence as the statute requires. *Fry on Specific Performance*, § 537. There is, however, no such evidence in this case.

[6] The telegram and letters offered in evidence wholly fail to show any written contract between the parties, but from them it is obvious that a parol contract was entered into for the transfer of land by each to the other. The offer made in the telegram is a mere proposal or offer to negotiate for the making of a contract, and is so indefinite and incomplete in its terms that its acceptance before withdrawal could not ripen into a contract. Nor is it claimed that it was accepted, but, on the contrary, the plaintiff testifies that after receiving the telegram he went to Ontario, saw the property, and entered into a parol contract with the defendant. The letter of August 19th recites what Draper admits he had obligated himself to do and what he claimed the plaintiff was obligated to do, but nowhere in any writing can be found any promise or agreement by the plaintiff to do any of those things. His promises are wholly in parol, and, being within the statute of frauds, cannot be specifically enforced. Therefore there is no mutuality of remedy between the parties, without which neither party can obtain specific performance against the other.

[7] In cases of this kind it is an elementary rule that whenever a contract is in-

tended to bind both of the parties, if for any reason one of them is not bound, he cannot compel performance by the other. Pom. on Specific Performance of Contracts (2d Ed.) § 164, and cases cited.

[8] Again, if everything appearing in the record had been included in a written contract signed by both parties, this suit would fail, because there is no sufficient description of the property to be affected by the contract to be found anywhere therein.

The rule was established in this state in the early case of *Whiteaker v. Vanschoelack*, 5 Or. 113, where it was held that—

Before the court will exercise its extraordinary jurisdiction of enforcing the specific performance, "not only must a contract for the sale of lands be in writing, under the statute, but the lands must be certainly described in the writing, so as to be capable of identification without reference to extrinsic proof."

And again the same rule was announced in the case of *Knight v. Alexander*, 42 Or. 521, 71 Pac. 657, as follows:

"Before a court can decree the specific performance of a contract to convey real estate, whether in writing or parol, such contract must be certain in its terms, both as to the description of the property and the estate to be conveyed; and, unless the land is so described therein that it can be identified, specific performance will be denied: *Browne, Stat. Frauds* (4th Ed.) 385; *Whiteaker v. Vanschoelack*, 5 Or. 113; *Brown v. Lord*, 7 Or. 302, 311; *Wagonblast v. Whitney*, 12 Or. 83, 6 Pac. 399; *Ferguson v. Blackwell*, 8 Okl. 489, 58 Pac. 647; *Preston v. Preston*, 95 U. S. 200 (24 L. Ed. 494). Courts do not permit parol evidence to be given to describe the property intended to be included in the contract, and then apply such description to the terms thereof."

The court then cited numerous cases illustrating the principle and said:

"Numerous other cases of similar import are referred to in 22 Am. & Eng. Enc. Law, 963, from all of which it appears that, to entitle the vendee to a decree for the specific performance of a contract relating to real estate, the land involved must be described therein with such accuracy and clearness that it can be identified and its boundaries determined beyond the possibility of any future controversy."

See, also, *Riggs v. Adkins*, 95 Or. 414, 419, 187 Pac. 303, and *Feenaughty v. Beall*, 91 Or. 654, 667, 178 Pac. 600.

There was no testimony tending to show part performance to take the case out of the statute of frauds. Neither party entered into possession of the real property he was trading for, or expended any money, or made any valuable improvements thereon. In fact, nothing was done by either party to change the position of the other.

The decree of the lower court will therefore be affirmed, neither party to recover costs in this court.

BARTELS v. McCULLOUGH et al.

(Supreme Court of Oregon. Nov. 15, 1921.)

1. Mines and minerals §114—Lien notice held sufficient.

Notice of lien held regular in form and sufficient to support a decree on adequate testimony.

2. Mechanics' liens §157(3)—Intentional or negligent overstatement of amount due avoids lien.

Where a mechanic's lien claimant has intentionally, or through culpable negligence, overstated the amount due him, such overstatement will render the whole lien void; but a mere mistake in one item will not necessarily do so, when it is evident that no fraud was intended, and where defendant has not been misled to his prejudice in making his defense.

3. Mines and minerals §114—Overstatement by mistake of amount due held not to avoid lien.

That lien claimant by mistake in his notice overstated the amount of his claim, causing a difference of \$43 in a claim on a long account, amounting to \$362 after allowing for the mistake, held not to avoid the whole lien, where defendant was not misled or injured by it.

4. Trial §105(5)—Plaintiff's evidence not required incompetent because of reference to memoranda.

In a mechanic's lien suit, that plaintiff in testifying as to the items of his account referred to a memorandum in which he had copied them from another book wherein they had been originally entered, held not to make his testimony incompetent; there being no objection or demand for the original memorandum.

5. Mines and minerals §113—Cyaniding and assaying ore held lienable.

Services in cyaniding and assaying ore at a mine, requiring some physical labor as well as skill, and being necessary to the successful prosecution of the work of searching for and working the ore, held lienable.

6. Mechanics' liens §279—Burden of proving nonpayment is upon lienor.

In mechanic's lien cases, the burden of proving that the claim has not been paid is upon the person asserting the lien, particularly where the contract out of which the lien arose was made with some one not the owner of the property upon which it is sought to fasten the lien.

7. Mechanics' liens §280(6)—Notice not evidence of nonpayment.

In mechanic's lien suits, the notice of lien is competent to prove that when filed the lienor had filed claim of lien regular in form and substance for amounts asserted to be due, but it is not competent to prove nonpayment of the claim for which lien is filed.

In Banc.

Appeal from Circuit Court, Linn County; George G. Bingham, Judge.

Suit by F. J. Bartels against T. A. McCullough, John M. Williams, and another, to foreclose mechanics' liens. Decree for plaintiff, and defendant Williams appeals. Modified.

This is a suit to foreclose certain mechanics' liens upon a group of mining claims in Lane county. The plaintiff claims a lien on his own behalf for \$405.70, one as assignee of E. O. Pooler for \$253.69, and another, for \$445.76 as assignee of Lester Powers. All of the notices assert the respective liens on account of work and labor performed in the mines and in search of precious metals in said mines, or in mining and milling ores. The work was performed in pursuance of a contract with McCullough and Atkinson, who were in charge of said mines and were the reputed owners thereof. In particular it may be observed that the lien notice of the plaintiff claimed that he did work as follows:

"That I did and performed general work in and upon the tunnel and in the mill and about the mill and did assaying on said Great Northern claim. That I was employed to do such work by T. A. McCullough aforesaid, representing himself as one of the owners and agent for the owners of said premises and property, representing himself as the general manager and superintendent. That I performed 8 days' work in the month of June, 1917, at the agreed wage and price of \$3 per day. That I worked 30 days in July, 19 days in August, 25 days in September, and 27 days in October, 1917, at the agreed price and wage of \$3.25 per day. That I worked 30 days in November, and 28 days in December, 1917, and 28 days in January, 1918, and 10 days in February, 1918, at the agreed wage and price of \$4 per day. Said work comprising 205 days, aggregating the sum of \$736.25.

"It was also agreed and understood that I should pay \$1 per day for board and lodging, to be charged against my wages, and that I should pay the further sum of 1 cent per day for state industrial accident fund, \$2.05. That I commenced work in the month of June, 1917, as aforesaid, and did and performed work as herein stated to and including the 10th day of February, 1918, under the instructions and by the authority of said T. A. McCullough, and that 60 days have not elapsed since I ceased to do and perform such labor and work. That no part of said sum of \$736.25 has ever been paid, excepting the following charged against my account, to wit:

Board	\$205 00
State industrial accident [fund].....	2 05
Cash paid in June, 1917.....	16 00
Cash paid in July, 1917.....	67 50
Cash paid in August, 1917.....	40 00
Total	\$330 55

"That there is now due, owing, and unpaid from said George Atkinson and T. A. McCullough to me the said sum of \$405.70, and there are no just credits or offsets against the same."

The other notices are similar, except that the labor of assaying is not mentioned and different credits are given according to the nature of the circumstances. The notices of lien were filed April 9, 1918. The assignments of Pooler and Powers to the plaintiff were dated August 10, and August 12, 1918, respectively.

Williams as trustee was the legal owner of the mines, and McCullough and Atkinson were in charge and working them under an option to purchase, when the work was performed and the liens filed. McCullough and Atkinson made default and Williams answered, setting up his ownership and denying generally the allegations of the complaint. Upon the trial there was a decree for the plaintiff, and the defendant Williams appeals.

Williams & Bean, of Eugene, for appellant.

J. S. Medley, of Eugene, for respondent.

McBRIDE, J. (after stating the facts as above). [1] The notices of lien are regular in form and upon adequate testimony are sufficient to support the decree. On the trial, plaintiff testified positively to his account, except that he stated that his wages for November and December, 1917, were \$3.25 per day instead of \$4, practically admitting an error in the lien notice of \$43. This discrepancy was never called to his attention, and it is now claimed that his notice is not a true statement and is void, and that for this reason he should not recover anything.

[2] There is abundant authority in this state and elsewhere for the proposition that, where the claimant has intentionally or through culpable negligence overstated the amount due him, such overstatement will render the whole lien void. *Nicolai v. Van Fridagh*, 23 Or. 149, 31 Pac. 288; *Lewis v. Beeman*, 46 Or. 311, 80 Pac. 417; *Equitable Savings & Loan Ass'n v. Hewitt*, 55 Or. 329, 106 Pac. 447. This rule is of particular application in cases where the work is done at the instance of a contractor or other person only constructively, or as a matter of statute the agent of the owner; the reason being that in such cases the owner has no opportunity to know the length of time the claimant worked, the wages agreed upon, and the payments made, and is not in a position to controvert exorbitant claims of which he has no notice, and that the intentional or negligent overstatement of a claim is at least a constructive fraud as to him.

But it does not follow that a mere mistake in an item of a claim necessarily renders the whole lien void, when it is evident that no fraud is intended and where it has not misled the defendant owner to his prejudice in

making his defense. See *Rowland v. Harmon*, 24 Or. 529, 34 Pac. 357; *Lumber Co. v. Washburn*, 29 Or. 150, 170, 44 Pac. 390; *Allen v. Elwert*, 29 Or. 428, 433, 44 Pac. 824; *Cooper Manufacturing Co. v. Delahunt*, 36 Or. 402, 407, 51 Pac. 649, 60 Pac. 1; *Mason v. Germaine*, 1 Mont. 283; *Black v. Appolonia*, 1 Mont. 342; *Palmer v. McGinness*, 127 Iowa, 118, 102 N. W. 802; *Fairbairn v. Moody*, 116 Mich. 61, 74 N. W. 386, 75 N. W. 469; *Hulburt v. Just*, 126 Mich. 337, 85 N. W. 872; *Kendall v. Fader*, 99 Ill. App. 104; *Marston v. Kenyon*, 44 Conn. 349. All the above cases were decided upon statutes similar to ours. In many of the states, Massachusetts and California, for instance, it has been provided by statute that an unintentional misstatement of the amount of a claim should not render the claim void, and these statutes make decisions from such states inapplicable here. Decisions from several states take the opposite view, notably the earlier cases in Massachusetts, but liens in that state were then enforced at law and not in equity, which accounts, perhaps, for the extremely technical holding of the courts of that state, finally corrected by legislation. The cases last above cited seem in accordance with the true spirit of equity, and as such appeal to our judgment.

[3] To apply them to the case at bar, it may be said that there is not the slightest indication that the claimant Bartels had any fraudulent intent to swell his claim beyond what was justly due him. The account was a long one, consisting of many items, and he was the only witness called on either side of the case. Had his intention been to claim fraudulently \$43 more than was due him, he had only to make his testimony square with his statement in the notice of lien, and it is due to his testimony that Williams discovered that the notice stated a greater sum than was actually due. The discrepancy was not called to his attention on the trial, and was probably then unnoticed by him or his attorney. The defendant was in no way misled or injured by it. By his general denial he had put in issue the fact that plaintiff did any work at any wage, that he had any lien, or that any amount was due him. These issues would have been tried in any event. There was no controversy as to particular items or as to particular payments. And it is more fair to presume a not unnatural mistake than to assume that plaintiff had a fraudulent intent in the notice.

In *Mason v. Germaine*, *supra*, the court, discussing this subject under a similar statute, remarked:

"The fact that the complaint and notice of lien claimed as due plaintiffs a larger amount than that found by the court will not destroy their lien for the amount actually due, unless there be a fraudulent intent in filing the same,

which must be proven and will not be presumed."

This statement appears to us to be fair and equitable, and we adopt it, with the reservation, however, that there may be cases where the negligence in preparing the notice is so gross and palpable, or has so misled the defendant, as itself to raise a presumption of intentional fraud, or has occasioned such action by a defendant in the premises as to preclude the plaintiff from any right to relief in equity. We do not find these conditions in this case, and we are not disposed to fine plaintiff \$362 for making a mistake of \$43 in the amount claimed in his notice.

[4] It is urged that the testimony of the witness Bartels is incompetent because in testifying he referred to a book or memorandum in which were set down the items of his account. No objection was made while he was testifying on the direct examination, but upon cross-examination he testified, in substance, that he kept an account of his time in a book, and that before he came out he checked up the account in his book with the time book of the defendants McCullough and Atkinson, and that when his book became old he afterwards copied the account into the book to which he had referred while testifying. The book was not offered in evidence, but seems to have been used by the witness at least some of the time to refresh his memory, without any objection being made thereto at any time, so far as the claim of the witness was concerned. Neither was there any demand for the original memorandum, of which the document presumably used by the witness to some extent at least to refresh his memory was a copy. Under all the circumstances we are of the opinion that there was competent evidence to support plaintiff's claim so far as it related to the lien for his own services.

He used a similar copy of a like memorandum in testifying as to the claims of Pooler and Powers, and a motion was made to strike out his testimony in regard to their liens, but, in view of what we hold and shall hereafter discuss in relation to those claims, it is unnecessary to consider that matter further.

[5] It is objected that the services rendered by the witness in cyaniding and assaying ore at the mine are not lienable, but we are of the contrary opinion. Both required some physical labor as well as skill, and both were necessary to the successful prosecution of the work of searching for and working the ore. This is a much stronger case in favor of the liens than *Flagstaff, etc., Co. v. Cullins*, 104 U. S. 176, 26 L. Ed. 704, or *Willamette Falls, etc., Co. v. Remick*, 1 Or. 169, in which liens were upheld. The case of *Durkheimer v. Copperopolis Copper Co.*, 55 Or. 37, 104 Pac. 895, is not in point.

In that case the claim of Gibbs was not for any physical labor but for services as superintendent and general manager. He did not even "pick up the samples of ore and assay them," as appellant's brief concedes that plaintiff did in this instance. He was not in any sense a "laborer," while here the obtaining, sampling, and assaying of ore were just as much part of the labor of carrying on mining operations as the use of the pick and drill. It is true plaintiff's services were skilled labor, but it requires some skill even to use a drill efficiently. All that can be said is that it required greater skill than that exercised by the workers in the tunnels.

We conclude that the plaintiff is entitled to a decree foreclosing his lien for the amount prayed for, less \$43.50, and for the attorney's fee of \$40 allowed him by the circuit court.

As to the liens of Pooler and Powers, we regret to say that there is no competent evidence that they have not been partially or wholly paid. Those claimants held the liens from April to August, in which latter month they assigned them to plaintiff. Plaintiff knows that nothing has been paid to himself, but he does not know and cannot prove what took place between Pooler and Powers and McCullough and Atkinson during the interim between April and August, and his testimony on that subject is conjecture and hearsay. Pooler and Powers were in a position to know absolutely whether or not any payments had been made, but neither of them was put upon the stand, nor was their absence accounted for.

[8] Contrary to the rule in other cases, the burden of proof of nonpayment is upon the person asserting the lien, and this is particularly the case where the contract out of which the lien arose was made with some one not the owner of the property upon which it is sought to fasten the lien. *Lewis v. Beeman*, 46 Or. 311, 80 Pac. 417. The sit-

uation in that case was similar to that in the case at bar. The court, speaking through Mr. Justice Moore, said:

"The plaintiffs M. L. Hall, Frank Cardwell, and John F. Troy did not appear as witnesses at the trial; the testimony showing that neither of them was then in Jackson county. The plaintiff Alfred Lewis, who was foreman of the mines, testified in their behalf as to the correctness of the liens filed by each, in respect to the several sums due; but he did not say, and probably could not testify, that no payments had been made to them, or either of them, by Flanders or Beers, after the liens were filed. As the lessors' property is to be subjected in this suit to the payment of debts contracted by the lessees, the burden was imposed on the lien claimants of showing that no payments had been made on account of their liens since they were filed; and, not having done so, the claims of Hall, Cardwell, and Troy must be disallowed."

[7] It is suggested that, because the original notices of lien were admitted in evidence without objection, the recitals in these constitute some affirmative testimony that no payments had been made beyond those therein admitted. The notices were properly admitted for the purpose of showing the regularity of the liens and the amounts claimed by the lienors; that is to say, they were competent to prove that at the date when they were filed the lienors had filed claims of lien regular in form and substance for amounts which they asserted to be due them. Beyond this, the notices had no evidentiary value whatever. In this view of the case we are compelled to disallow the claims of Pooler and Powers.

The decree of the circuit court will be so modified as to reduce the amount of plaintiff's recovery on his own lien to \$362.20, which sum he shall recover, together with \$40 attorney's fee and his costs in the circuit court, including his claim for filing and recording the lien. The liens claimed by Pooler and Powers are disallowed, and neither party will recover costs in this court.

CARTON v. EYRES & SEATTLE DRAYAGE CO. et al. (No. 16631.)

(Supreme Court of Washington. Nov. 16, 1921.)

1. Carriers §296—Not negligence to permit overcrowding.

It is not negligence for a carrier to permit a passenger to ride on a crowded car if he chooses to do so.

2. Carriers §296—Must operate crowded car with due care for passengers riding on steps.

A carrier's employees in charge of a car so crowded with passengers that they are obliged to ride on the platform or steps are bound to operate the car with due care in the light of those facts.

3. Carriers §320(16)—Whether passenger voluntarily boarded overcrowded car, and whether it was thereafter operated with due care, held for the jury.

In an action for injuries to a passenger on a street car which collided with a truck, evidence held to raise a jury question whether the passenger had voluntarily boarded a car he knew to be so crowded that he would have to ride on the step, and whether the car was thereafter operated with due care in the light of the known condition.

4. Carriers §320(30)—Whether passenger's position on steps of car was the proximate cause of injury held for jury.

In an action for injuries to a passenger on a street car which collided with a truck, evidence that the passenger was required to ride on the lowest front step, and that he fell when the gates were torn off by the collision, held to raise a question for the jury whether the position the passenger was compelled to occupy was the proximate cause of his injuries.

5. Damages §158(4)—Complaint held to authorize evidence of neurasthenia.

A complaint alleging that plaintiff had suffered great pain from the injury in his head, that his memory, eyesight, and hearing had been affected, that since the accident he had been incapable of mental activity and suffered from dependency and insomnia, is sufficient to authorize testimony that he was suffering from "neurasthenia," though it did not use that term.

6. Damages §130(3)—\$7,500 for traumatic neurasthenia reduced to \$5,000.

Where the evidence showed that plaintiff was suffering from traumatic neurasthenia which prevented his working steadily, but there was little, if any, direct evidence that the injuries were permanent, a judgment awarding \$7,500 was so excessive as to indicate passion and prejudice, and will be set aside unless the amount above \$5,000 is remitted.

Department 1.

Appeal from Superior Court, King County; Calvin S. Hall, Judge.

Action by John E. Carton against the Eyres & Seattle Drayage Company and another. Judgment for the plaintiff against both defendants, and they appeal separately. Affirmed on condition plaintiff will remit \$2,500 of the \$7,500 judgment; otherwise reversed and remanded.

James B. Howe, H. S. Elliott, R. G. Sharpe, James B. Murphy, and Henry J. Gorin, all of Seattle, for appellants.

TOLMAN, J. Respondent, as plaintiff, brought this action to recover for personal injuries received by him while a passenger on a street car operated by the Puget Sound Traction, Light & Power Company in the city of Seattle, alleged to have been caused by the concurring negligence of both defendants, as a result of which negligence a collision occurred between the street car and an auto truck operated by the defendant Eyres & Seattle Drayage Company, and respondent suffered the injuries complained of.

The cause was tried to a jury which rendered a verdict against both defendants in the sum of \$7,500, and from a judgment thereon the defendants prosecute separate appeals.

The negligence charged against the traction company in the complaint is: (1) In allowing respondent to board the street car when it was already filled beyond its capacity, so that it was impossible for him to get into the car or even upon the platform, and he was obliged to remain upon the steps, the gate behind him being immediately closed and the car started; (2) operating the street car at a high, dangerous, and reckless rate of speed; and (3) failure upon the part of the motorman to keep a proper lookout and to have proper control of his car so as to see the auto truck in time to avoid the collision, notwithstanding the negligence of the driver of the truck.

At the conclusion of the introduction of the evidence, counsel for the traction company moved that the question of the crowded condition of the street car be taken from the jury, for the reason that respondent's position upon the front steps of the car was not a contributing cause of the accident, but an incident merely. This motion was denied, and an exception taken to the ruling. The trial court in his instructions to the jury read that portion of the complaint alleging negligence in permitting the respondent to board the car under the conditions hereinbefore set forth, and charged the jury:

"If you find from a preponderance of the evidence that the defendant traction company was negligent in one or more particulars substantially as alleged in plaintiff's complaint, and that said negligence was a proximate cause of plaintiff's injuries, and plaintiff was damaged thereby, then your verdict should be for the

plaintiff and against the said defendant traction company. If you do not so find, then your verdict should be in favor of the defendant traction company."

The traction company now urges that it was reversible error to refuse to take from the jury the question of the crowded condition of the car, and to expressly, by the instruction just referred to, submit to the jury this issue, for the reasons that respondent was shown to be the last passenger to board the car, and assumed the added risk, if any; that under the conditions shown the carrier was not negligent in permitting him to board the car and ride where he did, and in any event the fact that respondent was riding on the steps was not the proximate cause of the accident.

By appellant's abstract respondent's testimony as to the conditions under which he entered the street car as shown by his examination in chief are as follows:

"I was hurt on March 26th. Skinner & Eddy's was down on Railroad avenue about five or six blocks south of King street. On the 26th of March, 1919, about 10 minutes after 4, I was loaded on a street car just after I had ended my shift. There were about 10,000 men quitting in that shift. They had a terminal there where the cars were turned around, and they started them off so that a car left every fraction of a minute. They had a starter loading the cars from the front end and the conductor loaded them from the rear end. There was quite a crowd around the rear end of the car, so I ran up to the front end to get on in a hurry where there were not so many men, and they let me on at the front end. I was the only man to get on there. When I got on I found it was so crowded that I could not get in any further, and they just barely got the gates closed. I didn't have time to notice this congestion until I got up there. The car started immediately after I got on. I tried to push further into the car, but it was impossible because of its crowded condition. There were as many men on the steps as could get on, how many I could not say. There were about 15 or 20 men on the front platform. I couldn't see in the car because I could just barely turn my head. That is how tight I was jammed in. I was on the last step. After the street car started it stopped at Railroad way, about two blocks from where we had started. There were no stops from there until the place of the accident, about two or three blocks beyond."

And on cross-examination:

"There were probably 10 or 12 street cars waiting there at the shipyard. They would go out just as soon as they were loaded. I didn't notice particularly how many cars were ahead of the car I got on or how many back of it—probably one or two. The reason I did not get on one of the others was because I saw there were a great many men waiting around, and I saw a chance to get on, and I ran and got on the front end of the car where nobody was getting on. I tried to get into the rear end first. There were probably 6 or 8 get-

ting on the front end and 20 or 30 on the rear, and so I ran up to the front end because I thought I had a better chance to get on. I was the last man to get on the front end. I think there were two steps, and the platform on the front end of the car, which was a 500 style. I had one foot on the first step and one on the second step."

[1, 2] Upon the subject of the overcrowding of public conveyances the authorities are legion, and it would be a hopeless task to attempt to harmonize them. We think, however, that the great majority of the well-considered cases recognize these rules: (a) That a carrier is not negligent in permitting a passenger to ride in a crowded car if he chooses to do so; and (b) a carrier's employees in charge of a car so crowded with passengers that they are obliged to stand, or occupy positions upon the platform or steps, are bound to operate the car with due care in the light of those facts. *Kebbee v. Connecticut Co.*, 85 Conn. 641, 84 Atl. 329, Ann. Cas. 1913C, 167. *Becker v. Interborough Rapid Transit Co.*, 128 App. Div. 455, 112 N. Y. Supp. 816; *Hansen v. North Jersey St. Ry. Co.*, 64 N. J. Law, 686, 46 Atl. 718; *Mobile Light & R. Co. v. Hughes*, 190 Ala. 216, 67 South. 278; *South Covington & O. St. Ry. Co. v. Harris*, 152 Ky. 750, 154 S. W. 35; and *Reem v. St. Paul City Ry. Co.*, 77 Minn. 508, 80 N. W. 638, 778.

[3, 4] Adopting these rules, it is apparent that the trial court did not err in the ruling complained of, because it was for the jury to determine whether or not respondent voluntarily chose to board a crowded car, and, if he did so choose, whether the car was thereafter operated with due care in the light of the known conditions. Nor can we say, as a matter of law, that respondent's position upon the steps pressed so closely against the gate that he fell when the gate was torn off by the collision was not a proximate cause of the accident. No passenger, other than respondent, was, so far as here appears, injured, and it was for the jury to say whether respondent's position, involuntarily taken, as they might find it to be, was a cause but for which the injuries would not have been received. Perhaps, if requested, the traction company might have been entitled to have the jury instructed upon the "but for which" doctrine as defined in *Ross v. Smith & Bloxom*, 107 Wash. 493, 182 Pac. 582, but the record here does not present that question.

We have carefully considered all of the traction company's other assignments of error, and aside from the one based upon the amount of the verdict, which will be considered in discussing the appeal of the drayage company, find none of them well taken. There was sufficient evidence to go to the jury upon each ground of negligence alleged, and the jury was properly instructed.

[5] Turning now to the appeal of the dray-

(201 P.)

age company: it is urged that the trial court erred in admitting testimony as to the neurasthenic condition of respondent, and permitting the jury to consider the same. The complaint, among other things, charges:

"That he has suffered great pain and will continue to suffer in the future; that the injury to his head has caused him great pain in the head; he has suffered from the loss of memory, and his eyesight and hearing has been affected; that ever since the said accident he has been incapable of mental activity and suffers from despondency and mental and physical depression and insomnia."

The only motion directed to this part of the complaint was one asking that the respondent be required to state which of his injuries were permanent, and we think, in the absence of anything else, the complaint was sufficient to permit the introduction of the evidence complained of, even though in describing respondent's condition the expert witnesses used a term not mentioned in the complaint.

We find no error in the sustaining of objections to certain questions propounded to an expert medical witness, or in refusing the requested instruction of which complaint is made; but the length of this opinion precludes the discussion thereof.

[6] The drayage company's final assignment of error was also raised by the traction company, and is to the effect that the verdict is excessive. The evidence tends to show that respondent was 20 years old at the time of the accident, had always enjoyed good health, was earning good wages as a driller, and that following the accident he was in bed for a week or two, confined to his home for a month or two thereafter, and went to work at light employment about three months after the accident; later obtained a position as a street car motorman, and still later as a checker on the docks, though he complains that because of his physical condition he could not work full time at any of these occupations, and frequently became so sick and exhausted as to be obliged to lay off for a time. Medical witnesses, including the doctor who attended him immediately after the accident, and those who examined him later, have not pointed out anything organically wrong with him, except one or two who say that his heart is slightly enlarged. "The heart was not very much enlarged—only very slightly. The enlargement did not alarm me, and might possibly have been the natural size for him. I meant that it was a little larger than the average heart of a person of that size."

There is little, if any, direct evidence that the injuries are necessarily permanent in character, and taking respondent's showing of the nature of his injuries, subsequent suffering and present physical condition as

though admitted, we cannot find therein anything to justify the amount of the verdict. Respondent's condition is much like that described in *Mickelson v. Fischer*, 81 Wash. 423, 142 Pac. 1160, and, as in that case, may be classified as traumatic neuresthenia. It was there said:

"The allowance of damages in cases of traumatic neuresthenia touches the border of speculation at best."

We are convinced that the amount of the verdict in this case is so disproportionate to the injuries sustained as to indicate that the jury was influenced by passion and prejudice. We think a recovery of \$5,000 is the extreme amount warranted by the most favorable view of the evidence.

If within 30 days after the going down of the remittitur respondent shall file a remission of all above \$5,000, the judgment will stand affirmed for that amount; otherwise the judgment will be reversed, and the cause remanded, with instructions to grant a new trial. In either event appellants will recover their costs in this court.

PARKER, C. J., and MITCHELL and BRIDGES, JJ., concur.

STATE ex rel. FLEISCHMAN v. SUPERIOR COURT OF SPOKANE COUNTY. (No. 16850.)

(Supreme Court of Washington. Nov. 14, 1921.)

1. Mandamus \S 51—Does not lie to compel court to grant default, where it ruled affidavit of service insufficient.

Where, in a divorce suit, the district court, on presentation of the affidavit of service by publication, ruled that it was insufficient under Laws 1920-21, p. 293, mandamus will not lie to compel the court to grant the default asked for and proceed with the trial, since it did not refuse to exercise its judgment, and any error in the exercise of its judgment cannot be reviewed on mandamus.

2. Mandamus \S 4(1)—Not intended to perform function of appeal.

It is not the purpose of a writ of mandamus to perform the function of an appeal or writ of review, and it only issues from the Supreme Court to a superior court to compel the latter court to exercise its judicial functions and powers, and not to direct and control their exercise.

Department 1.

Appeal from Superior Court, Spokane County; Bruce Blake, Judge.

Original application for mandamus by the State, on the relation of Dora Fleischman,

against the Superior Court of Spokane County, Wash., Hon. Bruce Blake, Judge. Alternative writ quashed, and peremptory writ refused.

Frank Yuse, Fred Duggan, and McCarthy, Edge & Lantz, all of Spokane, for petitioner.

Wm. C. Meyer, Pros. Atty., of Spokane, for respondent.

FULLERTON, J. The relator, Dora Fleischman, instituted an action in the superior court of Spokane county against her husband, Frank Fleischman, for a divorce. The husband being a nonresident, service of summons upon him was sought to be obtained by publication, and to that end the relator caused a summons in the usual form to be published for the required time in a newspaper authorized under the statute to publish legal notices. After the publication had been completed, proof of its publication was made by affidavit. The affidavit was regular in all respects, save that it did not state that the fee charge for the publication had been fully paid and that it showed on its face that the charge made for the publication was less than the minimum charge prescribed by chapter 99 of the Laws of 1920-1921. On this proof the trial court refused to grant a motion for default or to proceed further with the cause, holding that a compliance with the statute in the respects mentioned was a necessary requisite to its jurisdiction to further proceed. With the status of the cause in this condition, the relator applied to this court for an original writ of mandamus directed to the judge of the court, commanding him either to grant the default and proceed with the trial or show cause why he should not do so. An alternative writ was issued, to which the trial court has made return to the effect that he ruled to the effect complained of because of the mandate of the statute cited.

[1, 2] In this court, at the hearing on the return to the writ, the relator urged but one question, namely, the constitutionality of the statute on which the trial court rested its conclusion. But this question we do not feel called upon to determine in this form of proceeding. It would be to make the writ of mandamus perform the function of an appeal or a writ of review. This is not the purpose of such a writ when issued from this court. It issues from this court to a superior court to compel it to exercise its judicial functions and powers, not to direct or control their exercise. In re Clerk, 55 Wash. 465, 104 Pac. 622; State ex rel. Woods v. Mackintosh, 99 Wash. 553, 169 Pac. 990; State ex rel. Luketa v. Jurey, 108 Wash. 44, 182 Pac. 932; State ex rel. Langley v. Superior Court, 74 Wash. 556, 134 Pac. 173; State ex rel. Godfrey v. Superior Court, 111 Wash. 101, 189 Pac. 256.

In the instant case the court did not refuse to exercise its judgment. On the contrary, it held when the affidavit was presented to it that it was insufficient to warrant the relief sought by the relator. This was clearly within its prerogative. It may have committed error in so doing, but if it did so the error is not reviewable in any form of proceeding in advance of the final judgment in the cause; much less is it reviewable by an original writ of mandamus issued out of this court.

There being no justiciable question before us, the alternative writ heretofore issued will be quashed, and a peremptory writ refused.

PARKER, C. J., and MITCHELL, TOLMAN, and BRIDGES, JJ., concur.

In re HOOPER'S ESTATE. (No. 16314.)

(Supreme Court of Washington. Nov. 8, 1921.)

1. **Executors and administrators** §194(6)—Decree that widow take incumbered home and household furniture under will and money judgment to make payments due on home held proper.

Where a will gave to the widow testator's equity in dwelling house and home with household goods and furniture, and made her a tenant in common in fee simple in residue, held, in view of Laws 1917, pp. 670-672, §§ 103, 104, 106, that it was proper to decree the widow the home and household furniture and money judgment against the estate and to authorize the executors to sell property which was not community property to pay such money judgment, which was necessary in order that she might meet the payments on the home.

2. **Executors and administrators** §176—Widow constitutes "family" notwithstanding there are no minor children.

Laws 1917, p. 672, § 106, providing for further allowance for maintenance of a family, does not prevent allowing maintenance for the surviving wife, where there are no minor children, since the widow constitutes a "family" upon the death of her husband.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Family.]

3. **Executors and administrators** §174—Statutes for allowance to survivor should be liberally construed.

Statutes, providing for allowances to the survivor of a decedent, rest in a sound public policy, and should be liberally construed to effect the intended object.

En Banc.

Appeal from Superior Court, Spokane County; Huneke, Judge.

In the matter of the estate of Arthur E. Hooper, deceased. After probate of will, a

petition was filed by Adeline R. Hooper, widow, and resisted by the executors resulting in a decree awarding the widow the home, household furniture, given her by the will, and a money judgment against the estate, authorizing the executors to sell sufficient of the estate to pay the same, and the executors appeal. Affirmed.

Luby, Pearson & Dillard and Stephens & Jack, all of Spokane, for appellants.

E. C. Matthias, of Seattle, and Graves, Kizer & Graves, of Spokane, for respondent.

HOLCOMB, J. [1] The last will and testament of the decedent in the form of a non-intervention will was duly admitted to probate. By it, after providing for the payment of debts, expenses of last sickness and funeral expenses, he bequeathed to two of his relatives bequests amounting to \$1,000. He bequeathed to his surviving spouse, Adeline R. Hooper, his equity in his dwelling house and home, together with the household goods and furniture owned by him or in which he had an interest at the time of his death. He devised certain other real estate to his daughter for life, with the remainder to his two sons; the residue of the estate he devised and bequeathed to his wife and two sons, Henry Arthur, and Robert Norman Hooper, share and share alike, as tenants in common, in fee simple. The home devised to the wife had been purchased under a contract of purchase; the unpaid purchase price being payable in monthly installments. The widow, being left without means or substance, was unable to make the monthly installment payments upon the residence, and she filed a petition in the lower court, praying that the residence and household furniture and such other property as she might be entitled to be set apart to her, and that in addition thereto a money allowance should be made to her sufficient to maintain her, according to her circumstances, during the settlement of the estate. The executors joined issue upon this petition, and resisted the allowance. The trial court, after a hearing, made findings substantially as follows: That the petitioner is the surviving spouse, and that there are no minor children of petitioner and the deceased. That debts having priority, after due notice to creditors, have been paid, and the estate is solvent. That petitioner was residing with deceased, and was dependent upon him. That the property of the estate is separate property. That deceased left a will by which he gave to the widow his equity in the dwelling house and home, together with the household goods and furniture. That the will specifically disposed of certain property. That the will contained a residuary clause as follows:

"I give, devise and bequeath all of the rest, residue and remainder of my estate of every kind and character, whether real, personal or

mixed, wheresoever the same may be situated, and of whatever the same may consist, not otherwise disposed of by this my last will and testament, to my wife Adeline R. Hooper and to my sons Henry Arthur Hooper and Robert Norman Hooper share and share alike as tenants in common, in fee simple."

That the home devised to the widow or the equity therein was worth \$1,370.63, and the household furniture bequeathed to her was worth \$300. That the widow was without means. That no homestead had been selected prior to decedent's death. That the property not specifically devised and which passed under the residuary clause of the will was of the value of \$6,468.75, exclusive of interest. The court therefore concluded that petitioner was entitled to have the equity in the dwelling house set aside to her and the furniture and \$1,329.37 out of other property not specifically bequeathed or devised, and that the executors should sell and dispose of so much as might be necessary to enable them to pay the above sum to the petitioner. A decree was thereupon entered, awarding the widow the home given her by the will, the household furniture, and \$1,329.37, as a money judgment against the estate, and authorized the executors to sell sufficient of the estate to pay this money judgment. No statement of facts is brought up.

Appellants did not resist the award of the home and household furniture, but insist that the court erred in concluding that respondent was entitled to any property in addition to the dwelling house and furniture bestowed on her by the will. It is contended that the whole proceedings are governed by sections 103 and 104 of the Probate Code (chapter 156, Laws of 1917, p. 642 et seq.). Section 103 provides for the setting apart of a homestead not exceeding in value \$3,000 when one has not been claimed in the manner provided by law, by the decedent, to the surviving spouse, if any, and out of either separate or community property. Section 104 provides, in the event a homestead has been selected in the manner provided by law and the value thereof would not exceed \$2,000, exclusive of incumbrances, in addition thereto, the court, upon being satisfied that the funeral expenses, expenses of last sickness and of administration, have been paid or provided for, shall set off and award to the surviving spouse other property, either separate or community, so that the total value of the homestead and other property awarded exclusive of liens, shall not exceed \$3,000, and that when such property shall be so awarded it shall not be subject to further administration. The proviso to section 104 reads as follows:

"Provided, that the wards in this and the preceding section provided for, shall not be taken from separate property of the deceas-

ed, which is otherwise disposed of by will, where there is no minor child living as the issue of the surviving spouse and the deceased."

Appellants therefore argue that this proviso precludes the setting aside of any property out of the residuary estate involved herein, for the reason that the residuum is "otherwise disposed of," and that there is no minor child living as the issue of the surviving spouse and the deceased. They urge that the Legislature intended to distinguish between an allowance for a widow with children and a widow without children. If there were surviving children, this allowance could be taken from any property; if there were no surviving children, this allowance could not be taken from any but community property. Counsel for the parties respectively use much space in discussing the meaning and intent of the words "otherwise disposed of" in the proviso to section 104. We think the proviso and the exact meaning of those words are immaterial as to this matter.

Section 106 of the Probate Code is as follows:

"In addition to the awards herein provided for, the court may make such further reasonable allowances of cash out of the estate as may be necessary for the maintenance of the family according to their circumstances, during the progress of the settlement of the estate, and any such allowance shall be paid by the executor or administrator in preference to all other charges, except funeral charges, expenses of last sickness and expenses of administration."

Appellants contend that respondent based her petition specifically upon sections 103 and 104 of the Probate Code. We observe that she did so only with respect to the homestead property and the household goods, and her petition further prayed "for an allowance for her maintenance pending administration." That was sufficient to give the court jurisdiction and authority to make a further allowance under section 106. The proviso to section 104 only restricts the awards provided for in it and the next preceding section, 103, so that they should not be taken from the separate property of the deceased which is otherwise disposed of by will, where there is no minor child living, etc. Section 106 contains no such restriction, and its only limitations are that a reasonable allowance be made, and that an allowance is necessary to the maintenance of the family according to their circumstances, during the settlement of the estate, and that only funeral expenses, expenses of last sickness and of administration, shall be preferred charges to that allowance.

[2] It may be contended that section 106, providing for further allowance for the maintenance of the "family," does not warrant an allowance for the maintenance of the surviving wife where there are no minor children or other persons dependent upon the surviving wife. A widow constitutes a family upon the death of her husband, though her children were all of age. *Aultman, Miller & Co. v. Price*, 68 Kan. 640, 75 Pac. 1019. And a widow without children constitutes a family. *Moore v. Parker*, 13 S. C. 490.

[3] Statutes providing for allowances to the survivor of a decedent rest in a sound public policy, and should be liberally construed for the purpose of effecting the object intended. In *re Neilbron's Estate*, 14 Wash. 536, 45 Pac. 153, 35 L. R. A. 602; In *re Lavenberg's Estate*, 104 Wash. 515, 177 Pac. 328. They are strongly favored in law. In *re Whitney's Estate*, 171 Cal. 750, 154 Pac. 855.

We are strongly of the opinion that the Legislature did not intend to restrict the meaning of the word "family" in section 106 to a collection of persons under one domestic roof, especially since in sections 103 and 104 the provisions were for the benefit of the surviving spouse, regardless of whether there were any minor children or any other persons constituting the family, except as to the proviso to section 104. In section 106, if we construe the word "family" to be the surviving spouse, as we think it should be, in order to give a liberal interpretation, the court is clothed with ample power to make the award made herein.

All the findings necessary to support the award were made by the court. It may often be, as here, that no property save separate property can be found out of which to make such an allowance to the surviving spouse. That is of no consequence, however, for as a rule the estate of the decedent in this state consists mostly of community property of which the share of the surviving spouse may generally be sufficient for the maintenance of the surviving spouse during the pendency of the administration. If there be no community estate, however, the surviving spouse, especially when it is the wife, is often in the most necessitous circumstances, and this is the beneficent purpose of this statute to relieve.

We therefore conclude that the judgment of the lower court is correct, and it is affirmed.

PARKER, C. J., and MACKINTOSH, TOLMAN, MAIN, MITCHELL, HOVEY, and BRIDGES, JJ., concur.

NISSEN et al. v. CHAS. H. LILLY CO.
(No. 16791.)

(Supreme Court of Washington. Nov. 12, 1921.)

1. Appeal and error ¶564(5)—Statement of facts must be served and filed within the statutory period of 90 days.

Where a statement of facts is not served and filed within the 90-day period fixed by statute, no excuse will suffice to extend the time for such filing and service.

2. Appeal and error ¶557—Duty of preparing, serving, and filing statement of facts is on appellant.

The duty of preparing, serving, and filing a proposed statement of facts rests solely with the appellant, and it is wholly optional with respondent whether he shall propose amendments or appear at the time of the settlement and certification.

3. Appeal and error ¶644(2)—Party held not estopped to take advantage of failure to file a proposed statement of facts within statutory period.

Where the appellant failed to file with the clerk of the trial court a proposed statement of facts within the statutory period of 90 days, and the respondent had no knowledge of this fact at the time of accepting service, the appearance in court after the 90-day period for settling and certifying the statement of facts does not estop the respondent from taking advantage of the failure to file the statement.

Department 1.

Appeal from Superior Court, Snohomish County; Guy C. Alston, Judge.

Action by Paul Nissen and others against the Chas. H. Lilly Company. Judgment being rendered for plaintiffs, defendant appealed and prepared a statement of facts, which was settled and certified, but not marked as filed until after the statutory period. Plaintiffs move to strike statement from files. Referred back for further hearing.

Wright, Kelleher, Allen & Hilen and Peters & Powell, all of Seattle, for appellant.

J. L. Corrigan, of Seattle, and Thos. Smith, of Mt. Vernon, for respondents.

TOLMAN, J. On April 8, 1921, the Hon. Guy C. Alston, judge of the superior court for Snohomish county, then presiding in the superior court for Skagit county, for the purpose of trying this cause, entered a judgment herein, upon the verdict of a jury, in favor of respondents and against the appellant. Immediately upon the entry of the judgment one of appellant's counsel directed the official court reporter to prepare a proposed statement of facts, file it with the clerk of the superior court for Skagit county, where the cause was pending, and

thereafter to withdraw such statement from the office of the clerk and forward it, with the necessary copy, to appellant's counsel in Seattle, for service upon respondents' counsel, and that it might be taken to Everett at the convenience of the parties interested for settlement and certification by the judge who tried the cause. In due course the original statement of facts, with a copy, was forwarded as directed to Seattle; the original bearing a form for acceptance of service, which recited that it had been duly filed in the office of the clerk of the superior court for Skagit county. On May 18, 1921, service was made at the office of respondents' counsel, and in his absence his clerk, without investigation or knowledge of the facts, and in accordance with the usual and accepted custom, signed the acknowledgment of service which contained the recital that the original statement had been duly filed. Thereafter, on May 25, respondents' counsel proposed certain amendments, and on July 20, by agreement of counsel, they appeared before the trial judge at Everett and the statement of facts was then and there settled and certified by the judge; all parties assuming that the original had been duly and timely filed. On August 17, 1921, and not until then, the clerk's file marks were placed upon the statement.

Affidavits are presented in this court pro and con, attempting to prove and disprove that the proposed statement of facts was lodged in the office of the clerk at the time it was completed by the court reporter and before it was sent to Seattle for service; it being contended that, if in fact it was so lodged with the clerk, the omission of the official file marks would be immaterial, which may be admitted.

It is further contended: (a) That if this court should hold that the statement was not in fact filed in time, the affidavits referred to show such excusable neglect as would justify a denial of respondents' motion to strike the statement of facts, upon which the case now comes before us; (b) that respondents, having appeared at the time of the settlement and having made no objection thereto, thereby waived any objection to the failure to file in time, if there was such failure, and are now estopped to raise such objections; (c) that respondents, by reciting in the acceptance of service signed in their behalf that the same had been filed, are now estopped by such recital; and (d) that respondents, by proposing amendments and urging them at the time of the settlement of the statement, are thereby estopped to deny that the statement had theretofore been duly filed.

[1] As to the contention that if the statement was not filed in time the affidavits show a sufficient excuse, it is sufficient to say

that it is now settled in this court that where a statement of facts is not served and filed within the 90-day period fixed by statute, no excuse will suffice to extend the time for such filing and service beyond the 90-day period. In the case of *Universal Motor Co. v. McGeorge*, 104 Wash. 344, 176 Pac. 331, the record discloses what was considered good and sufficient excuse, but the majority of the court sitting en banc, after due consideration, were of the opinion that the service and filing of the proposed statement within the 90-day period was mandatory, and that the court had already laid down the rule in *American Fuel Co. v. Benton*, 98 Wash. 26, 167 Pac. 346, that neither by the original statute nor by the amendatory act of 1915 was any authority given to this court to extend the time for serving and filing a proposed statement of facts beyond the 90-day period. Nor has the court at any time since departed from this position, and the question is no longer an open one. Hence we may not now consider whether the affidavits show excusable neglect.

[2, 3] The other contentions of appellant all raise the question of estoppel, and in support thereof the following authorities are cited: *Boyer v. Boyer*, 4 Wash. 80, 29 Pac. 981; *McGlauffin v. Merriam*, 7 Wash. 111, 34 Pac. 561; *Turner v. Bailey*, 12 Wash. 634, 42 Pac. 115; and *Johnston v. Gerry*, 34 Wash. 524, 76 Pac. 258, 77 Pac. 503. We have carefully examined these cases, the first two of which are based upon facts which arose before the enactment of our present statute, but can find in none of them anything which meets the present question.

The duty of preparing, serving, and filing a proposed statement of facts rests solely with the appellant, and the respondent not only has no duty in that respect, but it is wholly optional with him whether he shall propose amendments or appear at the time of the settlement and certification. It can hardly be said that it is in any manner incumbent upon the respondent to warn his adversary of errors of omission or commission, or concern himself with the steps which are being taken, beyond what is necessary to protect his own rights. One of these rights is to propose amendments, and when the respondent does so he acts wholly for himself, and should not be held thereby to have waived the performance of any clear statutory duty resting wholly upon oppos-

ing counsel. The appearance in court at the time of the settlement and certification in this case was after the expiration of the 90-day period, and must have been not for the purpose of assisting appellant in perfecting the appeal, but to secure the incorporation of respondents' own amendments, and protect their rights in the event that the appeal should be finally perfected. Nor is it shown that at the time of the acceptance of service, the proposing of amendments, the appearance for settlement and certification, or at any other time until long after the expiration of the 90-day period, respondents had any reason to suppose that the proposed statement had not been filed before it was served upon them. The acceptance of service with its recitals was prepared by appellant, and the signature of acceptance of service was made as an accommodation to appellant, in accordance with the established custom, at appellant's request, solely to save it the necessity of making other proof of service. It is apparent that respondents did not, intentionally or otherwise, mislead their opponent or fail to perform any duty owing by them to it; and simply because they did not sooner discover and in some manner advise appellant of the facts relating to the alleged omission to file is no ground for invoking the doctrine of estoppel against them.

If our conclusion so far be correct, it follows that, if the proposed statement of facts was not actually lodged with the clerk within the 90-day period, then respondents' motion to strike must be granted; but the facts relating to such lodgment cannot be determined with any assurance or certainty from the affidavits now before us, which contain only the ex parte statements of witnesses not cross-examined, are incomplete and unsatisfactory in some respects, and to some extent present incompetent matter which we cannot consider. The issue of fact therefore will be referred to the superior court of Skagit county, with directions to cause a hearing to be had on due notice, and at such hearing to accord each party the right to produce all its material witnesses to be examined and cross-examined under the usual rules, and to make and report to this court findings upon that issue of fact, with the evidence.

PARKER, C. J., and FULLERTON, MITCHELL, and BRIDGES, JJ., concur.

MURRAY et ux. v. CITY OF SPOKANE.
(No. 16419.)

(Supreme Court of Washington. Oct. 25, 1921.)

1. Municipal corporations \S 821(7)—Evidence of sidewalk's construction and slippery condition making it unsafe held sufficient for jury.

In action for injury caused by a fall on a slippery sidewalk, evidence that the ice at the particular place was uneven and rounded up on the sidewalk, that inclined both ways so as to make it an obstruction and cause it to be unsafe for travel with the exercise of reasonable care, held sufficient for jury.

2. Municipal corporations \S 755(1)—City not insurer of safety of streets and walkways.

A city is not an insurer of the safety of its streets and walkways.

3. New trial \S 151—Denial of motion for new trial held not an abuse of discretion.

In action for injury caused by a fall on a slippery sidewalk, after judgment for plaintiff, denial of defendant's motion for new trial for newly discovered evidence held not an abuse of discretion in view of affidavits and counter affidavits.

Department 2.

Appeal from Superior Court, Spokane County; R. M. Webster, Judge.

Action by William T. Murray and wife against the City of Spokane. Judgment for plaintiffs and defendant appeals. Affirmed.

Alex. M. Winston and J. M. Geraghty, both of Spokane, for appellant.

Robertson, Miller & Robertson, of Spokane, for respondents.

MITCHELL, J. Respondents brought this action against the city of Spokane to recover damages for injuries caused Mrs. Murray by falling upon a sidewalk, and, obtaining a verdict and judgment therefor, the city has appealed.

Only two contentions are now made by the appellant: (1) That the evidence is insufficient to show liability on the part of the city; and (2) that the court abused its discretion in denying a motion for a new trial.

There is evidence to show that the accident occurred on January 29, 1917, on a 4-foot cement sidewalk in front of residence property. The sidewalk where the accident occurred was slanting both ways, along the street and from the property line to the street. The surface of the residence lot was some 4 or 4½ feet above, and drained towards the sidewalk. A walkway from the residence led down to solid cement steps through a retaining wall and thence down to the surface of the sidewalk. The drainage and seepage from the lot were drawn down the steps onto the sidewalk, where much of it froze in the

then prevailing cold weather. The weather reports show that on the day of the accident the maximum temperature was 30 and the minimum 21; on the day before the maximum was 34, the minimum was 28, and two days before the maximum was 40, the minimum 30. That is all that was shown by the weather reports concerning the temperature. The residence lot is on the south side of the sidewalk, and shelters it from the sun. A number of witnesses testified that ice had been accumulating on the sidewalk, variously estimated at from 2 to 4 inches thick next to and near the steps down to very thin ice 6 or 7 feet down the sidewalk and also on the outer edge of the sidewalk. One of the witnesses describing it said:

"The sidewalk was covered with a thin sheet of ice, and opposite the point where the stairway came down had been—the water was overflowing; it was raised. Where the water had been freezing continually it was raised so it was slightly curved. It was not a flat walk. The hill sloped to the street slope, making a slight slope to the sidewalk. This ice had accumulated in the form of a swelling, to describe it in that way, just a little raise."

There was ample evidence that ice in the same place in substantially the same form had remained there for considerable time; some of the witnesses said for as much as 30 days and others fixed a longer period. They testified the place was not free from such ice formation during any portion of that time. At the place nothing had been done for the purpose of safety, although other portions of the sidewalk whereon the ice was evenly distributed had been treated from time to time by scattering ashes or other material thereon. Mrs. Murray was not aware of the condition of the ice at that place, and just a few minutes before she fell there was a light snowfall, less than one-half inch, that covered the ice. She seemed to have been in no way careless. She wore walking shoes with large heels, and also wore storm rubbers.

[1] The conditions described by the evidence, the jury was at liberty to accept, were more than mere slipperiness caused by ice on the sidewalk. There is evidence that the ice at the particular place was uneven and rounded up on the sidewalk, that inclined both ways so as to make it an obstruction and cause it to be unsafe for travel with the exercise of reasonable care. The conditions were such as to fall within the rule laid down in *Calder v. Walla Walla*, 6 Wash. 377, 33 Pac. 1054, which has been reaffirmed in subsequent cases. *Smith v. Spokane*, 18 Wash. 403, 47 Pac. 888; *Piper v. Spokane*, 22 Wash. 147, 60 Pac. 138; and *Wren v. Seattle*, 100 Wash. 67, 170 Pac. 342, 3 A. L. R. 1123. Nor does the fact that the water which partly formed the ice came from the adjoining prem-

ises, and that there may have been alternate thawing and freezing, relieve the city in this case, since the testimony shows that for a month or more the ice never entirely melted. *Smith v. Spokane*, supra.

Authorities cited by the appellant have been examined, and in our opinion are not controlling here. They refer to recurring or recently formed obstacles which were the immediate cause of trouble. The one case apparently most relied upon, because similar to the case at bar in many of its physical aspects, is *Kortlang v. City of Mt. Vernon*, 129 App. Div. 535, 114 N. Y. Supp. 252, the opinion being quoted in full in appellant's brief. In it the court first lays down the general rule as follows:

"The ascertainment of the principles of law which must control the disposition of cases of this character, is not difficult. An affirmative duty rests upon a municipality to keep its sidewalks reasonably free from accumulations of ice and snow, and the failure to act, after actual notice, or after time sufficient to justify the inference of knowledge, presents a question of negligence for the jury's consideration. *Keane v. Village of Waterford*, 180 N. Y. 188, 29 N. E. 130; *Beck v. City of Buffalo*, 50 App. Div. 621, 63 N. Y. Supp. 499. If the city allows drains or leaky plumbing to discharge water across the sidewalks, which, freezing, forms ice in cold weather, it is evidence of negligence (*Pymm v. City of N. Y.*, 111 App. Div. 330, 97 N. Y. Supp. 1108); but no duty rests upon property owners or upon the municipality itself to remove snow or ice until it has ceased falling."

And while the decision was in favor of the city it was because of the particular facts concerning which, among other things, the opinion says:

"For aught that appears, it may have been that the ice which caused the plaintiff to fall was formed the very day or the day before the accident. Under such circumstances, sufficient time had not elapsed to charge the defendant with negligence."

And again, as to the facts it reads:

"It seems clear to me therefore that, had this accident happened by the plaintiff slipping upon the old accumulation of snow and ice which had remained there all winter, the defendant would have been liable; but, if she slipped upon the ice formed by the recent freezing of the water discharged from the vacant lot, the defendant would not be liable."

[2] No rule is more firmly established than that a city is not an insurer for the safety of its streets and walkways. But under the facts in this case the question of the city's negligence and liability was for the jury's

consideration, under proper instructions, of which latter no question is raised.

[3] The motion for a new trial presents the question of newly discovered evidence. The situation, in substance, is that upon the respondents presenting their claim to the city its proper officers upon investigating inquired of the owner of the residence property as to the condition of the sidewalk at and prior to the date of the accident, and were by him informed that he could not tell, as he had been absent during all of that month of January. At the trial and before the verdict was returned the property owner, who under an ordinance of the city is charged with the primary duty of removing snow and ice from the sidewalk, and who claimed to have thought the accident occurred about the last of February instead of the last of January, then told the city's attorney trying the case that he had mistaken, that he was absent during February, but at home during January, and that the sidewalk had been kept clear during all of the month of January. In the latter respect there was a corroborating affidavit by his son, and also supporting affidavits by the officers of the city as to the misinformation by the property owner and his correction of it. This was not called to the attention of the trial court until after the verdict. There was a counter affidavit by the respondent Mrs. Murray, undenied categorically, that during the month of January and prior to the 20th she noticed that the shades in the house at 201 W. Sixth street in Spokane (in front of which the accident happened) "appeared to be drawn down, indicating that the house was vacant and no one living there"; that on or about February 5 or 6, while she was in bed suffering from her injuries, the owner of the residence spoken of called to see her, handed her his card (which was attached to her affidavit), stating that he owned the residence property; that he was solicitous about her condition and recovery; that his family was in California for the month, and he was staying downtown; and that he would like to do anything he could for her. Also there were counter affidavits of persons other than those who had testified at the trial that the sidewalk had not been clear of ice and snow during the winter and prior to the accident, and that no sand or ashes had been sprinkled on the sidewalk to lessen its dangerous condition.

Under such circumstances we are of the opinion the trial court did not abuse its discretion in denying the motion for a new trial. Affirmed.

PARKER, C. J., and TOLMAN, and HOLCOMB, JJ., concur.

COAST FIR LUMBER CO. v. PUGET SOUND
MILLS & TIMBER CO. (No. 16520.)

(Supreme Court of Washington. Nov. 15,
1921.)

1. Sales ~~400~~32—Correspondence held to evi-
dence acceptance of order.

In an action for damages for failure to de-
liver two carloads of shingles, letters and tel-
egrams held to establish an acceptance of or-
ders.

2. Sales ~~400~~418(2)—Measure of damages for
failure to deliver.

Measure of damages for breach of contract
to deliver goods is the difference between the
contract price and the market price at the time
of the breach, and the time of the breach is the
date upon which buyer is justified in treating
expressions of seller as amounting to an un-
equivocal refusal to perform.

Fullerton, Holcomb, and Tolman, JJ., dissent-
ing.

En Banc.

Appeal from Superior Court, King County;
A. W. Frater, Judge.

Action by the Coast Fir Lumber Company
against the Puget Sound Mills & Timber
Company. Judgment for defendant, and
plaintiff appeals. Reversed, with directions.

Bausman, Oldham, Bullitt & Eggerman
and Walter L. Nossaman, all of Seattle, for
appellant.

Kerr, McCord & Ivey and Wm. Z. Kerr, all
of Seattle, for respondent.

MACKINTOSH, J. [1] This is a suit for
damages because of respondent's failure to
deliver two carloads of shingles, claimed to
have been ordered by the appellant. The
reasonable conclusion of fact to be drawn
from the documentary evidence is that, in
January, 1919, the appellant ordered from
the respondent, who was a manufacturer of
shingles, two shipments of two carloads each,
and that the latter order was filled but the
former was not.

[2] The only matter for determination is
the amount of the appellant's damages, which
are to be measured by the difference between
the contract price and the market price at
the time of the respondent's breach. Although
the shingles should have been delivered with-
in a reasonable time after their order, the
respondent at that time did not repudiate
the contract, and it was not until some time
in August following that the appellants were
justified in treating the expressions of the
respondent in regard to the order as amount-
ing to an unequivocal refusal to perform.
The contract price being \$2.10 per thousand,
and the evidence showing that at the time
of the repudiation the fair market price was
about \$4.60 per thousand, and the evidence

showing that each carload contains 200,000
shingles, the appellant is entitled to judg-
ment for \$1,000.

Judgment of the lower court reversed,
with directions to enter judgment in the
amount named.

PARKER, C. J., and BRIDGES, MAIN,
and MITCHELL, JJ., concur.

FULLERTON, J. (dissenting). The al-
leged contract upon which the appellant sues
is found in certain letters and telegrams
passing between the parties. On January
4, 1919, appellant, from Portland, Ore., tele-
graphed respondent at Port Angeles, Wash.,
as follows:

"Ship medium car extra stars Morris also
Boynton Oklahoma two ten mill use order bill
lading draft here with papers."

The respondent replied by wire on Janu-
ary 6, 1919:

"Message fourth will ship two cars Stars im-
mediately."

On January 6, 1919, the appellant wrote
to respondent as follows:

"We have your wire of today advising that
you will ship the two cars of shingles immedi-
ately to Morris and Boynton, Oklahoma. We
are mailing in separate inclosure, formal orders
covering."

On January 15, 1919, at 10:15 p. m., the
appellant sent this further telegram to the
respondent:

"Can you furnish car numbers Morris Boynton.
Ship two medium stars as Cheyenne two
thirteen."

On January 17, at 10:28 a. m., the respond-
ent sent the following answer:

"Message fifteenth our rates do not apply via
Cheyenne will ship Morris Boynton cars next
week."

On January 17, before respondent's wire
of January 15 was received, the appellant
wrote to the respondent as follows:

"Our customer could not wait for the two
cars to go to Morris & Boynton, Oklahoma, so
we are giving them cars we have in transit.
Please change the destination to read Fort
Worth, Texas, and be sure and route both cars
Plummer, Idaho, O. W. R. & N., O. S. L., U. P.
to Denver and O. & S. to Ft. Worth, if your
agent will accept the routing, under the short
haul bulletin, or, if this cannot be accomplished,
please ship via South Omaha.

"The other two cars we wired you yesterday
are for Texas destination, and trusting that
you are prepared to handle them we are send-
ing you formal orders.

"It is our understanding that the bulletin ef-
fective Sept. 15, last, rearranging the routings,
takes nearly all shingles into Texas, through
Cheyenne."

On the following week, as promised in its telegram of January 17, the respondent shipped two cars of extra Star A shingles, changing the destination to Fort Worth, Tex., as directed in the letter last quoted.

On February 1 the appellant telegraphed respondent as follows:

"Ship two medium cars stars us Ft. Worth two twenty net also rush two older orders."

On the same day the respondent replied by telegram as follows:

"Unable to handle order for star shingles. Shingle mill closed down temporarily."

On February 1, the appellant also wrote to the respondent as follows:

"We are to-day in receipt of copy of your invoice covering car RCNo 13126 with destination, Fort Worth, Texas.

"We are quite sure that you are holding two more of our orders which we trust you will get moving promptly as they are now over three weeks old."

On February 3, 1919, the respondent replied by letter as follows:

"In response to your favor of the 1st inst., will say that all of your orders for Star shingles have been completed with shipment of car R. O. 131263.

"In your letter you state that you think we are holding orders for two more cars, and will say that such is not the case, as the two orders referred to were returned to you upon receipt."

On February 5, 1919, the appellant wrote to the respondent, referring to prior telegrams and stating its position as follows:

"While we received no formal acceptance of the two cars sent you at \$2.13, you billed the two cars shipped at \$2.13 and we, of course, concluded that you had accepted the orders and were shipping these two cars ahead of the two which you had at \$2.10. Expecting to receive them, we obligated ourselves by going out and buying the Morris and Boynton cars at a loss in order to give our customer service."

On February 10, 1919, the respondent answered this letter as follows:

"We have your favor of the 5th inst., regarding orders for two cars of Star shingles, of which there seems to have been some misunderstanding between yourselves and our Port Angeles office.

"The writer is in charge of all sales for the Port Angeles mill, also for the Crown Lumber Company at Mukilteo, Wn., and all correspondence pertaining to inquiries or orders should be in the future addressed to this office. We are very sorry indeed there was any misunderstanding regarding these shingles, and we would gladly make shipment of the two cars in question but for the fact that our mill is closed down, not having been in operation for the past thirty days and we are unable to say at this writing when we will start up again. It is, therefore, impossible to make shipment of any shingles as we have none on hand."

The appellant, on February 13, 1919, answered this letter, asking that the respondent ship the two cars as soon as the mill resumed operations, and on March 20 also requested a shipment. These letters were not answered. There was no further correspondence between the parties until August 21, 1919, when the appellant made another demand for two cars. The respondent replied by setting out its letter of February 10, 1919, and by disclaiming that it had any accepted orders for shingles which it had not fulfilled.

It seems to me that it should require no extended argument to show that the appellant is not entitled to recover. The rule is general that where the contract claimed must be found in letters and telegrams passing between the parties, and these are capable of different interpretations and are in fact differently interpreted, there is no contract. In other words, if the language used in the writings forming the supposed contract may fairly mean either one of two things, each party is at liberty to attach to it his own meaning, and neither, if he acts in good faith, can be held responsible to the other where his understanding differs from that of the other. Here, in my opinion, the writings are sufficiently indefinite and confusing as to admit of different interpretations. Nor can I find anything in the record that indicates anything other than an honest difference of opinion. There should therefore be no recovery, and I am compelled to dissent from the conclusion of the majority holding to the contrary.

But, if I am wrong in the foregoing view of the evidence, I think the recovery awarded too large. As will be seen by the quotation I have made from the respondent's letter of February 10, 1919, the respondent then distinctly repudiated the appellant's claim that it had an accepted unfulfilled order for two carloads of shingles. If, as stated in the majority opinion, the measure of damages is the difference between the contract price and the market price at the time of the respondent's breach of the contract, the price should be determined as of that date, rather than of a date in August following. The evidence overwhelmingly shows that the market price of shingles on February 10, 1919, was but a few cents per thousand in advance of the contract price, entitling the appellant to recover but little more than nominal damages, not the very considerable sum the majority have seen fit to award. In this connection also, I call attention to the further fact that the appellant, by its own showing, has covered any possible loss that could accrue to it by the rise in the price of shingles subsequent to February 5, 1919. By its letter of that date it appears that it had prior thereto supplied its customers by buying the shingles in the open market,

HOLCOMB, J. I agree with the majority upon the right of appellant to recover, but I agree with Judge Fullerton as to the measure of damage on which grounds alone I dissent.

TOLMAN, J. I concur with Judge FULLERTON upon the last ground stated.

STATE ex rel. WILLAPA ELECTRIC CO. v. PUBLIC SERVICE COMMISSION OF WASHINGTON et al. (No. 16595.)

(Supreme Court of Washington. Nov. 14, 1921.)

Street railroads ⇨28(3)—Order requiring extension of tracks held unreasonable.

Order of the Public Service Commission requiring a street railroad company, which had either sustained a loss or made only a small profit for several years, to extend its track along a street not yet opened, to serve a single mill which could not guarantee any quantity of traffic, but the estimated traffic from which would entail additional loss on the company, was arbitrary and unreasonable and was properly set aside by the court.

Department 2.

Appeal from Superior Court, Thurston County; D. F. Wright, Judge.

Writ of review by the State, on the relation of the Willapa Electric Company, against the Public Service Commission of Washington and others, to review an order of the Commission requiring the company to extend its street car line. The superior court reversed the order, and the Public Service Commission appeals. Affirmed.

Lindsay L. Thompson and Raymond W. Clifford, both of Olympia, and Fred M. Bond, of South Bend, for appellant.

Vance & Christensen, of Olympia, for respondent.

MACKINTOSH, J. A writ of review was taken to the superior court from an order of the Public Service Commission (now the department of public works), requiring the Willapa Electric Company to extend its street car line in the city of South Bend. The superior court, on the hearing of the writ, reversed the order, and the Public Service Commission has appealed. The case presents only a question of fact as to whether

the action of the Public Service Commission was arbitrary and unreasonable.

The Willapa Electric Company owns the street car system of the city of South Bend, which is devoted almost entirely to the carriage of passengers. The rolling stock of the company consists of three street cars, two of which are operated. On its capital invested the company's earnings and losses were:

1914.....	Profit 6.20%
1915.....	Profit 0.04%
1916.....	Loss 0.13%
1917.....	Loss 1.43%
1918.....	Profit 4.11%
1919.....	Profit 0.70%
1920.....	Loss 0.31%

This action before the Public Service Commission was to compel the street car company to extend its line a distance of some 900 feet, to enable lumber to be hauled over the line to a connection with the Northern Pacific Railroad. This proposed extension was to serve a mill, proposed to be rebuilt on tide-water; the car line to be built on a street not yet constructed and for which the right of way had never been acquired by the city. This street was proposed to be built by the city around a big bluff, and the record shows that the city had no funds wherewith to make payment therefor. If extended, the car line would serve no other property than this one mill, which could guarantee no amount of business to the company, but held out the hope that it might furnish an average haul of 30 cars a month. The evidence shows that the cost of the extension to the street car company would be \$21,828.85. The greatest possible earning it could expect would be \$2,700 a year, and this operation would result in a loss to the company each year of \$995.04; in other words, a loss on the new capital invested of 4.56 per cent. There is in the record no proof of a necessity for the extension and no proof of any fact justifying the imposition on the utility of this unprofitable business. The only theory upon which the conclusion of the Commission can be sustained is that the condition of the street railway is such that another little loss could not do it any harm.

The superior court was correct in holding, under these facts, that the order of the Commission was arbitrary and unreasonable, and the judgment of the superior court setting it aside is affirmed.

PARKER, O. J., and MAIN, HOLCOMB, and HOVEY, JJ., concur.

BELCHER v. TACOMA EASTERN R. CO.
(No. 16526.)

(Supreme Court of Washington. Nov. 14, 1921.)

1. Courts \S 90(1)—Holdings on former appeals held conclusive that measure of damages was correct.

Where it was decided on previous appeals in the same litigation over excessive freight charges that the case involved violations of the long and short haul provisions of the statute, it is too late to reopen the question by contending that the measure of damages was wrong because allowing such recovery as is only allowed for violation of the long and short haul provisions.

2. Courts \S 90(1)—Prima facie case made by Commission's award not overcome when evidence same as on prior appeal from Commission's order.

Where, on an appeal from a judgment for plaintiff in an action on an award by the Public Service Commission on account of excessive freight charges, the evidence is the same as on a prior appeal in a proceeding to review the Commission's order, there is nothing in the record to overcome the prima facie case as found by the Commission.

Department 2.

Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by James A. Belcher against the Tacoma Eastern Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

F. M. Dudley, Geo. W. Korte, and A. J. Laughon, all of Seattle, for appellant.

Ellis, Fletcher & Evans and J. E. Belcher, all of Tacoma, for respondent.

PER CURIAM. This appeal presents the final chapter of litigation which has heretofore occupied the attention of this court, and reference is made to the three former opinions of this court for a statement of the facts about which this controversy has been waged: *Belcher v. Tacoma Eastern R. Co.*, 99 Wash. 34, 168 Pac. 782; *State ex rel. Tacoma Eastern R. Co. v. Public Service Commission*, 102 Wash. 559, 173 Pac. 626; *State ex rel. Tacoma Eastern R. Co. v. Public Service Commission*, 112 Wash. 629, 192 Pac. 1079.

[1] The instant case is the one brought as suggested in the last opinion above referred to, to recover upon the award made the respondent by the Public Service Commission. We take it that the law of this case has been established by these prior decisions, and it would be acarpous to again review the many intricate questions involved. The appellant, however, presses upon us that there are some questions which were left open by the prior decisions. One of these affects the measure

of the respondent's recovery. It argues that the respondent's case, being based upon discriminatory charges, fixes the recovery at such an amount as would compensate him for the injury to his business resulting from such discrimination, whereas the measure of recovery allowed by the court was the difference between the rate paid by the respondent and the tariff rate; this recovery being such a recovery as is allowed a shipper in actions for the violation of the long and short haul provisions of the statute. The answer to this is that this court has decided this very case to be one involving long and short haul violations, and it is too late now for that question to be reopened.

[2] It is further claimed that the prior decisions of this court did not pass upon the contentions that it was error to award a refund on shipments made prior to November 1, 1906, and shipments made between November 1, 1906, and April 22, 1907. The answer to this position of the appellant is that the record shows the evidence to have been the same in the last appeal prior to this one as the evidence now before the court on this appeal, and that there is therefore now nothing in the record to overcome the prima facie case as found by the Commission. The last appeal determined the proper measure of recovery, and by necessary implication found with the Commission in awarding refund for the shipments just above referred to.

We find, therefore, nothing new presented by this appeal, and, in conformity with the law governing the facts as heretofore laid down, we affirm the judgment of the superior court.

GRANT v. SYFORD et al. (No. 16458.)

(Supreme Court of Washington. Nov. 16, 1921.)

1. Brokers \S 43(1)—Agreement between parties to exchange as to payment of broker's commission held not within statute of frauds; "agreement employing agent or broker to sell or purchase real estate for compensation."

An agreement for the exchange of lands, wherein it was specified that each party should pay a certain amount to a broker as commission, was not "an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation" within the statute of frauds; the thing still to be done being such as must be done by the parties themselves.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Agreement.]

2. Brokers \S 63(1)—Broker held entitled to commission.

In an action by a broker who procured defendants to contract for an exchange of real

estate, wherein it was provided that each party should have 30 days from notice thereof to correct defects, held that a failure to complete the exchange was due to defendants' wrongful rejection of a tender on the 31st day after notice of defect, and that they were liable for the commission provided for.

3. Judgment ¶707—Decree in action between parties contracting to exchange lands not binding on broker.

A decree in an action between parties to an agreement to exchange lands, arising out of failure to complete the exchange, was not binding on a broker whose compensation was provided for in the contract to exchange.

Department 1.

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by G. D. Grant against John Ten Hope and wife and Guy Syford and the Syford Mortgage & Realty Company. Judgment for plaintiff, and the last two named defendants appeal. Affirmed.

J. Charles Dennis and W. McB. Perrin, both of Tacoma, for appellants.

H. R. Lea, of Tacoma, for respondent.

TOLMAN, J. Respondent, a real estate broker, procured the defendants Ten Hope and wife, as parties of the first part, and the defendant Guy Syford, as party of the second part, to enter into a written contract for the exchange of real estate, dated January 3, 1914, which, among other things, provides:

"Whereas, the parties of the first part, and the party of the second part are desirous of making an exchange of real estate, the parties of the first part in consideration of one dollar (\$1.00) paid by the party of the second part, receipt of which is hereby acknowledged, agrees to sell to the party of the second part, and the party of the second part agrees to buy of the parties of the first part, to wit:

Then follows a description of the Ten Hope property, which is admittedly complete and sufficient, except that the township is given as "township 9" instead of "township 9 north," and no mention is made of the county and state in which the land lies. After setting forth the incumbrances to be assumed, the contract proceeds:

"The parties of the first part agree with the party of the second part that these above-described lands have a perpetual water right to such lands, the same having been paid up in full and all water rents have been paid to date.

"In consideration of the sum of one dollar (\$1.00) paid by the parties of the first part to the party of the second part, receipt of which is hereby acknowledged, the party of the second part agrees to sell and the parties of the first part agree to buy the following property."

Then follows a description of the Syford property, which is admittedly correct.

"Both parties agree to furnish complete abstracts of title to their respective properties within fourteen days from date of this agreement. In case the title of either of these properties should be defective, then the owner of the respective property should have thirty days from date that such notice is given of such defect in which to correct the same. Such abstracts to be examined within six days of the delivery thereof. * * * The party of the second part shall have one week from the signing of this agreement in which to examine the land and must give notification of acceptance or rejection within this period to G. D. Grant, acting agent.

"It is further agreed that the parties of the first part shall pay G. D. Grant \$500.00 as their share of the commission for his services in carrying out this transaction, to be paid as follows: \$50.00 in cash; the balance in three equal payments in 30, 60 and 90 days. It is further agreed that the party of the second part shall pay G. D. Grant as his share of the commission \$300 for services of said Grant in this transaction.

"This agreement shall be null and void if not signed by both the first and second parties thereto. It shall also be void if the said second party should give notice of rejecting the above-described land."

The exchange was not consummated because Syford claimed that there was a cloud upon the title to the property of the Ten Hopes, gave notice thereof according to the terms of the contract, and, the cloud not being removed within 30 days from the giving of the notice (although its removal was tendered on the 31st day and there is no provision of the contract making time the essence thereof), Syford brought an action against the Ten Hopes, to which respondent was not a party, resulting in a decree canceling the contract. His commission not having been paid, respondent brought this action against both parties to the contract, resulting in a judgment against the Ten Hopes for \$500; from which no appeal has been taken, and a judgment against Syford and the Syford Mortgage & Realty Company (the undisclosed principal for whom Guy Syford was acting) for \$200, there having been a written agreement to reduce the sum named in the contract to this amount. Syford and the Syford Mortgage & Realty Company appeal, raising the following points:

(1). That the action is barred by the statute of frauds because the contract does not contain a sufficient description of the Ten Hope land; (2) that respondent failed to procure a purchaser ready, able, and willing to purchase, as required by the contract; and (3) that respondent failed to effect an exchange of the properties within 30 days, or at all, and hence is not entitled to recover.

[1] 1. The statute provides (Pierce's Code

1919, § 7745) that "an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or commission" shall be void unless in writing and signed by the party to be charged. Clearly this is not such a contract, as it purports to give no authority to the agent or broker, and as we read it the broker's services had already been performed in bringing the parties together and procuring the contract to be signed. The things still to be done were such as must be done by the parties themselves, and, while it may have been understood that the broker would render them such assistance as he might without further charge, still it clearly appears that the contract neither authorized nor required him to do anything more. Assuming without deciding that the description of the land was insufficient, still under the authority of *Muir v. Kane*, 55 Wash. 131, 104 Pac. 153, 26 L. R. A. (N. S.) 519, 19 Ann. Cas. 1180, and *Henneberg v. Cook*, 103 Wash. 685, 175 Pac. 313, in which the subject is fully discussed, we hold that the statute of frauds does not apply.

[2] 2. Discussing together the two remaining contentions, and assuming that if one of the parties had been unable to perform the other would not be liable to pay the commission, still the evidence is clear that the so-called cloud was of a nature which gave rise to an honest difference of opinion as to whether or not the title was thereby affected; that Ten Hope was at all times eager to close the trade; was delayed in part by appellant's attempt to sell him the furniture in the property to be conveyed, believing that the transaction depended upon his purchasing the furniture rather than in removing the cloud, and, when finally convinced that Syford would insist on the payment of \$350 as the amount required to remove the cloud, he proceeded promptly to raise that sum of money, and obtained it in time to, and did, tender it on the 31st day after the giving of the notice. All this, in view of what the contract contains and does not contain—i. e., "this agreement shall be null and void if not signed by both parties hereto. It shall also be void if the said second party shall give notice of rejecting the above described land"—without a word making time of the essence, or indicating a right to cancel or rescind upon the failure to furnish abstracts, examine them, examine the land, or cure the defects within the time limits of the contract, convince us that Ten Hope was able and willing to perform, and the failure to complete the exchange was due to the appellants' wrongful rejection of the tender.

[3] We are not concerned with the decree in the action between appellants and Ten Hope, as the respondent was not a party thereto nor bound thereby, and can see nothing in appellants' offer of that decree in evidence in this case, or the manner in which

it was received, which tends to make it binding upon respondent.

Finding no error, the judgment is affirmed.

PARKER, C. J., and FULLERTON, MITCHELL, and MACKINTOSH, JJ., concur.

LESTER v. MILLS. (No. 16743.)

(Supreme Court of Washington. Nov. 14, 1921.)

Arbitration and award § 82(5)—Refusal to admit oral testimony of an arbitrator tending to exclude item the subject of arbitration according to award held correct.

Where witness who had been an arbitrator of the dispute between the parties was asked a question concerning credit for expenditures given to one of the parties at the arbitration, the exclusion of the testimony was correct, since it was an attempt to exclude by oral testimony an item which was the subject of arbitration according to the terms of the award by an arbitration board provided for in a written lease.

Department 2.

Appeal from Superior Court, Lewis County; W. A. Reynolds, Judge.

Action by E. H. Lester against S. B. Mills. From judgment for defendant, plaintiff appeals. Affirmed.

Gus L. Thacker, of Chehalis, for appellant.

A. E. Rice, of Chehalis, and C. D. Cunningham, of Centralia, for respondent.

PARKER, C. J. The plaintiff Lester commenced this action in the superior court for Lewis county, seeking recovery of compensation which he claimed to have earned as against the defendant Mills for the furnishing of feed in the care of stock for a period of several months following December 5, 1919. Mills' answer contained denials as to the several items of claimed compensation, and also affirmative allegations setting up several items of set-off and counterclaim, concluding with a prayer for an affirmative judgment against Lester in the sum of \$1,200. A trial upon the merits resulted in a verdict of a jury awarding Mills recovery against Lester in the sum of \$300. A judgment was rendered accordingly, from which Lester has appealed to this court.

The only contention here made in behalf of Lester is that the trial court erred in its ruling which had the effect of deciding as a matter of law that Lester could not recover upon any of his claimed items of com-

pensation accruing prior to February 11, 1920, because the proof conclusively showed that upon that date such claimed items had been settled between the parties and fully satisfied, in pursuance of an award of arbitration voluntarily caused by the parties to be made on that day.

On December 5, 1919, Mills, for a period of some five years, had been living upon Lester's farm in Lewis county under a 10-year lease thereof. The lease covered the implements and stock upon the farm, as well as the land and buildings thereon, and provided for the payment of rent by a division of the profits of the farm in kind, or the proceeds of the marketing of the produce and increase of the stock, from time to time, and the final division of the undisposed-of produce and increase of the stock, save as the lease otherwise specifically provided, at the termination thereof. The lease contained, among other things, the following:

"At any time during the life of this lease, or at the expiration of same, should the parties hereto not agree in their division or settlement in any form or manner, they hereby agree to submit their differences to three disinterested persons for arbitration, and agree to abide by their decision."

Early in December, 1919, both parties seemed to have arrived at the tentative conclusion that, by reason of then existing conditions, they would voluntarily terminate the lease as soon as they could arrive at a settlement of their respective rights under the lease upon its voluntary termination; but we think the evidence conclusively shows that they did not effect such a termination of their relations under the lease until February 11, 1920, on which day they voluntarily caused to be made, in pursuance of the above-quoted language of the lease, an arbitration by three disinterested arbitrators, settling their respective rights under the lease at that time; that is, as to what amount either then owed the other in money, and what each was entitled to in the division of the produce and increase of the stock. Settlement was made between them in accordance with the award so made, and the leased property then surrendered by Mills to Lester.

[1] The award made by the arbitrators is dated February 11, 1920, the day upon which it was actually made, and is in terms in all respects as to all items in the present tense. Section 9 of the award reads as follows:

"(9) Concerning the grain we find as follows: (a) there is a shortage of oats which we place a value of \$393.20 on. (b) The wheat on the place is to be divided equally between them."

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Upon the trial of the case counsel for Lester interrogated one of the arbitrators, who was then upon the witness stand, as follows:

"Referring to paragraph 9 of Defendants' Exhibit C (the award), I will ask you if you took into consideration the grain that had been used by the parties E. H. Lester and S. B. Mills for the feeding of stock up to February 11, 1920, and if in that award and amount fixed, a credit was given to S. B. Mills for that feed so used up?"

Plainly this referred to feed produced upon the farm. Objection to this inquiry was made by counsel for Mills, which was by the court sustained, upon the theory that it was an attempt to exclude, by oral testimony of one of the arbitrators, an item which was a subject of arbitration according to the plain and unambiguous terms of the award read in the light of the submission to arbitration. It is conceded that no attempt was made to impeach the arbitration. We are quite convinced that the ruling of the trial court was correct. 2 R. C. L. 386; 5 C. J. 240.

Counsel for Lester, in asking the question ruled out by the trial court, evidently was proceeding, and is now proceeding, upon the theory that the lease had been actually terminated on December 5, 1919, and that the arbitration was being made as of that date. It is true, as is pointed out by counsel for Lester, that Lester at that time moved into the dwelling upon the leased premises and lived with Mills thereafter, joining with Mills in giving some attention to the care of the stock upon the place. But, without reviewing the evidence, we think it sufficient to say that in our opinion it conclusively shows that there was no termination, or intended termination, of the lease at that time, and that the relation of the parties continued under the lease undisturbed, so far as their rights thereunder were concerned, up until the arbitration was actually made, and settlement made between them accordingly; which, as we have seen, did not occur until February 11, 1920. We conclude that the trial court did not err in its ruling, though such ruling had the effect of deciding, as a matter of law, that the matter sought to be proven was foreclosed by the arbitration.

Mrs. Mills is a party to this action, and of course will, with her husband, reap the benefit of the judgment which is here affirmed. Her name is omitted from our discussion merely for convenience of expression.

The judgment is affirmed.

HOVEY, MAIN, HOLCOMB, and MACK-INTOSH, JJ., concur.

SURRY v. SEATTLE TAXICAB CO.
(No. 16678.)

(Supreme Court of Washington. Nov. 17, 1921.)

1. Municipal corporations §705(2)—Right of way ordinance held to apply to entire intersection of three streets.

A municipal ordinance determining the right of way of vehicles at the intersection of streets applies to the common intersection of three streets which met at the same point, and is not limited to the space bounded by the extended imaginary lines of the two narrower streets, so that an instruction as to the right of way at such intersection was not misleading because it omitted to state what intersection was meant.

2. Trial §260(1)—Requests covered by given instructions need not be given.

The refusal of requested instructions does not require reversal where the substance of those which properly stated the law was fully and adequately expressed in the instructions given.

3. Witnesses §287(4)—Denial of statement on cross-examination held not to open entire conversation.

The denial by a witness on cross-examination that he had made a statement to the other party's counsel which was not referred to in the question, and which denial was accepted by the opposite party, does not authorize the introduction of the entire conversation with such counsel on redirect examination of the witness.

Department 2.

Appeal from Superior Court, King County; Otis W. Brinker, Judge.

Action by Henry Surry against the Seattle Taxicab Company. Judgment for the plaintiff, and defendant appeals. Affirmed.

W. A. Gilmore and Van Dyke & Thomas, all of Seattle, for appellant.

Totten & Totten, of Seattle, for respondent.

MACKINTOSH, J. Fifth avenue, a street 66 feet wide, intersects Olive street, 66 feet wide, at about right angles; Fifth avenue running in general northwesterly and southeasterly directions. Westlake avenue, a street 90 feet wide, passes through this intersection in a general northerly direction.

The automobile collision, the subject of this action, occurred at the junction of those streets, and the appellant's negligence is satisfactorily established by the evidence. There are presented on this appeal for our consideration objections to instructions, exceptions to the refusal to give certain requested instructions, exceptions to the failure to admit certain testimony, and objection to the amount of damages.

The appellant's taxicab was going north-easterly on Westlake avenue, and the re-

spondent's car was going westerly on Olive street. The latter car approached Olive street's intersection with Westlake avenue prior to the time that the appellant's taxicab reached the intersection of Fifth avenue and Olive street, and had proceeded across the intersection until it was within the imaginary east line of Fifth avenue across Westlake avenue, and the evidence fairly establishes that the point of impact was well within the imaginary intersection of Fifth avenue and Olive street.

[1] In instructing the jury in regard to the ordinances of the city of Seattle relative to the rights of drivers of vehicles approaching intersections, it is the contention of the appellant that the court should have applied those ordinances to the imaginary intersection of Fifth avenue and Olive street. Where a situation is presented such as this, to so interpret these ordinances would lead to interminable confusion, and would result, in the practical operation of automobiles, in causing rather than preventing collisions. The ordinances, among other things, provide:

"Drivers when approaching street intersections shall look out for and give right of way to vehicles on their right simultaneously approaching a given point."

This was interpreted, in its instructions, by the court as follows:

"One of those rules is that, where two vehicles simultaneously approach the same intersection, the car coming from the right has a right of way over the other."

As we view it, this was a correct interpretation of the ordinance, and we see no merit in appellant's contention that this instruction was confusing, in that it omitted to state what intersection it was applicable to, as it applied to the common intersection of the three streets. But, in any event, the court later instructed the jury that the ordinance applied to that portion of the highway where Olive street and Fifth avenue intersect, which was an instruction more favorable to the appellant than it was entitled to.

[2] Passing to the requested instructions, an examination of them shows that the substance of those which properly stated the law was fully and adequately expressed in the instructions given.

[3] The error claimed as to the exclusion of testimony relates to the refusal of the court to allow the appellant to ask the driver of the taxicab, on his redirect examination, to relate an entire conversation held between him and counsel for the respondent. On cross-examination the witness had denied that he had stated to respondent's counsel, after the accident, that there was no passenger in his taxicab at the time of the collision. No part of the conversation was alluded to in the question on cross-examina-

tion. The question on redirect examination called for entirely too much, and objection was properly sustained to it. The appellant had accepted the flat denial of the witness, and there was nothing before the court which called for any explanation. There was no error in this ruling.

Objection is made to the instruction as to the rule for assessing the damages, in which the jury was told it might allow compensation for the "pain and suffering, if any, which he (plaintiff) is reasonably certain to endure in the future, if established on the trial, and in doing so you are to take into consideration the duration of such injuries, their severity, the impairment of the faculties, if any. * * *" It is objected that there was no evidence to sustain a recovery for future pain and suffering, or impairment of the faculties. The record discloses, however, some evidence which the jury might take into consideration upon those points. We find no merit in the claim that the amount recovered was excessive.

The judgment is affirmed.

PARKER, C. J., and MAIN, HOLCOMB, and HOVEY, JJ., concur.

CLARK et ux. v. CITY OF OLYMPIA.
(No. 16760.)

(Supreme Court of Washington. Nov. 14, 1921.)

1. Municipal corporations \S 404(3)—Claims for damages must be filed within 30 days and contain items for damages.

Under Rem. Code 1915, \S 7998, providing that claims for damages must be presented within 30 days from the time such damage occurred, and shall contain item of damages, a claim filed February 17, 1920, for damages to real property on account of a street improvement occurring the latter part of January, 1920, and setting out the description of the property, the making of the improvement, character of the soil, removal of the lateral support, the extent of the slide, all the damages claimed resulting to real property and specified in one item, was sufficient.

2. Municipal corporations \S 404(6)—Evidence held to show negligence on part of city.

In action for damages to real estate on account of defendant's negligence in improving a street and removing lateral support, evidence held sufficient to show defendant's negligence.

3. Municipal corporations \S 394(6)—City in grading liable for removing lateral support.

A city is liable for the removal of lateral supports to property in making an original grade of the street where it was negligent in leaving a clay bank exposed, being charged with knowledge that it would result in disintegration

and aliding thereof when subjected to the action of the elements.

Department 2.

Appeal from Superior Court, Thurston County; D. F. Wright, Judge.

Action by George Clark and wife against the City of Olympia. Verdict for plaintiff, motion for judgment notwithstanding verdict and in the alternative for a new trial overruled, and defendant appeals. Affirmed.

George R. Bigelow and William W. Manier, both of Olympia, for appellant.

Geo. F. Yantis, of Olympia, for respondents.

MAIN, J. The purpose of this action was to recover damages to real property claimed to be due to the negligence of the defendant in improving one of its streets. The cause was tried to the court and a jury, and resulted in a verdict in favor of the plaintiff in the sum of \$400. Motions for judgment notwithstanding the verdict and in the alternative for a new trial was made and overruled. The defendant appeals.

[1] The appellant city is a municipal corporation of the third class, one of the streets of which is Brause avenue. The respondents own property which abuts upon this street. During the latter part of the year 1919 the appellant improved the street by grading and graveling, but the grade thereof was not made lower than the previously established grade. After the improvement was completed, the surface of the property of the respondents was from 4 to 15 feet above the street level. In making the improvement the lateral support of the abutting property was removed except for a 1 to 3 slope; that is, for every 3 feet of elevation the slope extended into the street one foot. The soil of the bank left exposed was of a clay formation and such as was likely to disintegrate and slide when subjected to the operation of the elements. During the latter part of January, 1920, a slide occurred which extended back on the lot from 6 to 10 feet. There was evidence from which the jury could find that a 1 to 3 slope, taking into consideration the character of the soil, was not sufficient to sustain the bank. After the slide occurred, and on February 17, 1920, the respondents filed a claim with the appellant for damages. It is first contended that this claim did not comply with the statutory requirement in that it was not filed in time and did not contain the "items of damages" claimed by the respondents. The statute (Rem. Code 1915, \S 7998), among other things, requires that a claim shall be filed within 30 days after the time when the damages occurred, and shall contain the items of damages. The evidence, as appears from the facts already stated, shows that the slide occurred during the latter part of January, 1920, and that the claim

was filed on February 17, 1920. There is no merit in the contention that the claim was not filed within the time.

[2] As to the items of damage the claim sets out in detail the description of the property, the making of the improvement, the character of the soil, the removal of the lateral support, the extent of the slide, and claims damages in the sum of \$600. The damages claimed were those resulting to real property and were specified in one item. The claim was sufficient in this respect. *Allbin v. Seattle*, 98 Wash. 275, 167 Pac. 922. Upon the merits it is claimed that there was no showing that the appellant city had been guilty of negligence in making the improvement. The evidence shows that the bank was of a clay formation, and, as one witness stated, was "treacherous material in lots of ways."

[3] The character of the soil was such that the bank was likely to slide when subjected to the operation of the elements, and this fact was known to the officers and agents of the appellant, or they were charged with knowledge thereof. It should be stated that the evidence was conflicting upon this question, but it presented a matter for the determination of the jury. The case falls within the rule of the cases of *Lochore v. Seattle*, 98 Wash. 266, 167 Pac. 918, 7 A. L. R. 800, and *Allbin v. Seattle*, supra, where it was held that the city is liable for the removal of lateral supports to property in making an original grade of the street where such city was negligent in leaving a clay bank exposed, knowing or being charged with knowledge that it would result in disintegration of the bank and the sliding thereof when the same was subjected to the action of the elements. The appellant relies upon the case of *Schuss v. Chehalis*, 82 Wash. 595, 144 Pac. 916, but the two cases above cited as controlling are the latest expressions of this court upon the question, and the present case is controlled by the holdings in those cases.

The judgment will be affirmed.

PARKER, C. J., and HOLCOMB, MACK-INTOSH, and HOVEY, JJ., concur.

WILLIAMS v. T. W. LITTLE CO. (No. 16487.)

(Supreme Court of Washington. Nov. 15, 1921.)

Appeal and error — 1012(1)—Judgment affirmed when evidence does not preponderate against court's finding.

In an action for commissions on sales of trucks, where the evidence did not preponderate against the trial court's finding that the payment of the commission was not conditional on plaintiff keeping the trucks in operation

and seeing to the making of the deferred payments, a judgment for plaintiff will not be disturbed.

Department 1.

Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by Patrick Williams against the T. W. Little Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Burkey, O'Brien & Burkey, of Tacoma, for appellant.

A. O. Burmeister and J. H. Gordon, both of Tacoma, for respondent.

TOLMAN, J. Respondent, as plaintiff, brought this action to recover a commission of 5 per cent. alleged to have been earned upon the sale of certain trucks, amounting to \$495, less \$100 paid on account, praying for judgment in the sum of \$395. The case was tried to the court without a jury, resulting in a judgment as prayed for, from which the defendant has appealed.

The principal defense urged below and relied upon here is, in substance, that respondent, at and before the time when the sales were made, represented to appellant that he was organizing a truck company, or an association of truck owners of which he would be the manager; that he had secured work for the trucks, would keep them employed, collect their earnings, and after paying operating expenses would from such earnings make the monthly payments on the purchase price, according to the terms of the conditional sales contracts which were to be, and in fact were, taken by appellant from the purchasers of the trucks; that appellant relied upon these representations; would not otherwise have made either of the sales with so small a down payment, and agreed to pay the commission only after three or four of the monthly payments had been made according to contract, thus reasonably insuring the seller from loss by reason of the purchasers' default. Respondent does not contend that he kept the trucks employed for any considerable length of time, or that he ever collected the earnings, or saw to the application thereof to the deferred payments, and, while denying that he made any express or positive representations regarding the matters claimed, does contend that he told appellant that he was trying to effect such an organization; that he then had work in sight for the trucks; and that he would have been able to place them in steady employment if they had been delivered at the time agreed upon. He denies that there were any conditions in the agreement to pay him a commission, except that the commission should be due when each purchaser had completed his first monthly payment.

In the last analysis there is involved here only questions of fact, and after a study of the evidence as brought to this court we are unable to say from the typewritten record that the evidence preponderates against the trial court's findings, or that, at the close of the arguments by counsel, when the evidence was fresh in his mind, and the impression created by the appearance of the witnesses and their manner of testifying had not been eradicated by lapse of time, the trial judge was wrong when he said:

"The Court: The defense claims a condition that Mr. Williams should not receive this commission unless he kept the trucks in operation until they were paid out. I cannot find from the evidence anything except that Mr. Williams urged them to the effect that he believed he could keep the trucks in operation. That may have been in entire good faith, but no condition was put in that they would not pay the commission unless he did. I am satisfied that Mr. Williams is entitled to his commission and that the defense is not sustained by the proof at all."

We find no sufficient reason for interfering with the judgment of the trial court, and it must be affirmed.

Judgment affirmed.

PARKER, C. J., and MACKINTOSH and MITCHELL, JJ., concur.

MURPHY v. SCHWARK et ux. (No. 16637.)

(Supreme Court of Washington. Nov. 5, 1921.)

1. Landlord and tenant §161(2)—Landlord bound to reasonable care of property left thereon by tenant.

Lessor's vendee, accepting control of the premises on the subtenant moving out, leaving lessee's goods therein, after notice by lessor to lessee to surrender possession, became the gratuitous bailee of such contents, required to use reasonable care.

2. Bailment §31(1)—Burden on bailee of explaining loss.

Gratuitous bailee has burden of explaining loss of the goods.

Department 2.

Appeal from Superior Court, Lewis County; W. A. Reynolds, Judge.

Action by Grace Murphy against Dave Schwark and wife. Nonsuit was granted, and plaintiff appeals. Reversed.

C. A. Studebaker, of Chehalis, for appellant.

HOVEY, J. This is an appeal from a judgment granting a nonsuit in an action brought by the plaintiff to recover the value of certain personal property belonging to herself and the other members of her family.

The evidence introduced by the plaintiff was to the effect that a dwelling house had been occupied by the Murphy family for a considerable period, and that for some time prior to the act complained of possession of the premises was in one Davis under sublease. The premises were purchased by the defendants, and the former owner notified the Murphys to surrender possession. The removal of the property belonging to the Murphys was delayed a short time because of there being a case of smallpox on the premises, but the subtenant Davis moved out about September 13, locked up the house, and at the request of the defendants deposited the key with a neighbor. When the Murphys came to remove their goods about one week later, they found the house unlocked and considerable of their goods gone, and were informed by the defendant Dave Schwark that he had unlocked the house, and that he was not running a warehouse, and was not responsible for the loss of the goods. The testimony on behalf of the plaintiff was to the effect that all of the missing goods were in the house at the time Davis moved out and surrendered the key as instructed by the defendant.

[1] We believe the lower court was in error. In accepting control of the premises, respondents became gratuitous bailees of the contents of the house, and as such they were required to use reasonable care. 6 Corpus Juris, 1102-1104; Smith v. Nashua & L. R. R., 27 N. H. 83, 59 Am. Dec. 365.

[2] In the case of Pregent v. Mills, 51 Wash. 187, 98 Pac. 328, this court sustained recovery against a saloon keeper who had accepted a deposit of a sack of money belonging to a customer without any proof of theft on the part of the bailee, and held that the burden was on him to explain the loss of the goods. To the same effect is Colburn v. Art Ass'n, 80 Wash. 662, 141 Pac. 1153, L. R. A. 1915A, 594.

The judgment of the trial court is reversed, for further proceedings in accordance with this opinion.

Appellant will recover costs.

PARKER, C. J., and MAIN, HOLCOMB, and MACKINTOSH, JJ., concur.

BRYAN et al. v. BLODGETT et al.
(No. 16695.)

(Supreme Court of Washington. Nov. 17, 1921.)

1. Highways §184(2)—Evidence held to sustain findings of excessive speed and freedom from contributory negligence.

In an action for injuries to a pedestrian struck by an automobile, evidence held to sustain the trial court's finding that the automobile was driven at an excessive speed, and that plaintiff was not contributorily negligent in attempting to cross in front of the automobile, though he saw its lights approaching.

2. Appeal and error §1012(1)—Court's finding on close question entitled to weight.

Where the evidence in a case tried before the court without a jury presents a close question of fact, the court's judgment is entitled to weight, and will not be set aside unless the Supreme Court can say that it is not sustained by a preponderance of the evidence.

Department 2.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by Albert Bryan and others against S. W. Blodgett and others. Judgment for the plaintiffs, and defendants appeal. Affirmed.

Reynolds, Ballinger & Hutson, of Seattle, for appellants.

John W. Whitham, of Seattle, for respondents.

MACKINTOSH, J. The North Trunk Highway runs in a northerly direction from the city of Seattle, and is paved with brick to a width of 18 feet. On the westerly side, in front of the residence of the respondent, the right of way is filled in with dirt to a level with the paved portion of the highway for the full distance of 30 feet to the appellants' property line. At about 6 o'clock on the clear evening of January 19, 1921, the respondent was taken from his place of work in the city in an automobile of one of his neighbors. When this machine reached a point opposite the respondent's residence it was stopped on the east side of the pavement; a portion of the automobile being off the pavement. The respondent alighted from the west side and hastened across the paved portion of the roadway towards his home, and, at a point from 10 to 15 feet west of the edge of the pavement, was struck by an automobile coming from the south, which was owned and operated by the appellants. For the injuries sustained the respondent was awarded \$1,500 by the court, which

tried the case without a jury. From this judgment this appeal is brought.

[1] It is the claim of the appellants that the evidence does not establish their negligence, and that, in any event, the respondent's conduct was such as to amount to contributory negligence. The evidence indicates that the dimmers and the spot light were burning on the appellants' car, and that the respondent, when he alighted from his friend's automobile, saw the lights of the appellants' approaching car, and proceeded towards his home without anticipating that the appellants would run him down. The appellants saw the respondent in the roadway, and turned from the paved portion of the roadway in the expectation of being able to pass in front of the respondent. He says that he applied the brakes immediately and did everything possible to avert a collision. The testimony shows that the appellants' car left the pavement 55 feet from the place where the respondent was struck, and from the marks left in the earth it is indicated that for this entire distance the brakes were rigidly set. From the angle at which appellants' car left the highway it necessarily appears that the point at which the appellant discovered the respondent's presence was some distance south of that point.

[2] From all of this testimony it is impossible for this court to say that the trial court's finding of fact that "At said time said defendant was driving said automobile at an excessive rate of speed, and was driving the same without regard for the safety and life of the plaintiff or other persons," is not supported by the evidence, and it is equally impossible to disagree with the court's findings that the respondent was not guilty of contributory negligence. Although this case was tried without a jury, and is before us upon its facts, it presents a close question of fact, and, as we said in *Laughlin v. Seattle Taxicab, etc., Co.*, 84 Wash. 342, 146 Pac. 847:

"Upon a close question of fact, the judgment of the trial court is entitled to weight, and will not be set aside unless we can say that it is not sustained by a preponderance of the evidence." *Borde v. Kingsley*, 76 Wash. 613, 136 Pac. 1172; *Zisich v. Holman Security Co.*, 77 Wash. 392, 137 Pac. 1023, 139 Pac. 57; *Baker v. Yakima Valley Canal Co.*, 77 Wash. 70, 137 Pac. 342; *Johnsen v. Johnsen*, 78 Wash. 423, 139 Pac. 180, 1200; *Mueller v. Vancouver*, 81 Wash. 384, 142 Pac. 868.

Judgment affirmed.

PARKER, C. J., and **MAIN, HOLCOMB**, and **HOVEY, JJ.**, concur.

LINDBERG v. MURRAY. (No. 16124.)

(Supreme Court of Washington. Nov. 14. 1921.)

1. Contracts \Leftrightarrow 93(1)—Equity will rescind for bona fide mistake if complaining party not negligent.

Where there is a clear bona fide mistake regarding material facts, without culpable negligence on the part of the person complaining, the contract may be avoided, and equity will decree a rescission.

2. Contracts \Leftrightarrow 93(5)—Test in actions for rescission of contracts for mutual mistake stated.

In actions for rescission of contracts, the true test in cases involving mutual mistake of fact is whether the contract would have been entered into had there been no mistake.

3. Banks and banking \Leftrightarrow 312½, New, vol. 6A Key-No. Series—Contract for purchase of trust company stock rescinded for discovery of error in assets of company.

Where a contract to purchase stock in a trust company was entered into between plaintiff, an officer of S. Bank, and defendant, the principal stockholder of a trust company, by which plaintiff was to purchase 1,519 shares of the trust company's stock, and the S. Bank was to take over the assets of the trust company, and a few days later, on discovery of the trust company bookkeeper's defalcation, materially reducing the trust company's assets, and the bank refusing to take the trust company over, a new contract was entered into between the trust company and S. Bank for taking over and liquidating the trust company, the second contract is separate and distinct from the contract between plaintiff and defendant, and, there having been a mistake as to the trust company's assets, plaintiff may rescind the first contract.

Mackintosh, Holcomb, and Hovey, JJ., dissenting.

En Banc.

Appeal from Superior Court, King County; Boyd J. Tailman, Judge.

Action by Jafet Lindeberg against James A. Murray. Judgment for plaintiff, and defendant appeals. Affirmed.

Stephen V. Carey, of Seattle, for appellant.

Williamson, Freeman & Broenkon, of Tacoma, for respondent.

TOLMAN, J. Appellant, James A. Murray, has appealed from a decree entered by the trial court rescinding a contract whereby the respondent, Lindeberg, agreed to purchase, and appellant, Murray, agreed to sell, 1,519 shares of the capital stock of the Bankers' Trust Company of Tacoma for the sum of \$14,000. It is conceded that the case turns almost entirely upon questions of fact, and, while there is comparatively little dispute

regarding the facts, the parties are widely apart in the construction and emphasis which they lay upon the facts and in the conclusions which they draw therefrom.

The history of the transactions out of which this action arises is long and complicated, and a full and complete statement of all the facts shown by the record would occupy far too much space; therefore in our statement of the facts and discussion we have limited ourselves to such facts as seem to be necessary for an understanding of the points raised and relied upon by the appellant. Other facts are called to our attention, but, after a careful reading of the record, we do not regard them as controlling.

The Bankers' Trust Company being in financial difficulties, the stockholders in March, 1917, authorized the directors to convert the assets into cash and liquidate its affairs. At this time appellant was its principal stockholder, owning 1,519 shares out of a total of 3,000 shares of the capital stock of the trust company. Nothing was accomplished in the way of liquidation for some months, and in the fall of the year 1917, the bank examiner insisted upon the levying of a 100 per cent. assessment against the stockholders, or, as the only alternative, that the institution be closed. Being unwilling to submit to the assessment, the officers and stockholders determined to voluntarily liquidate under some plan which would be agreeable to the bank examiner. The Scandinavian-American Bank of Tacoma, seeking an opportunity to secure the business of the depositors of the Bankers' Trust Company, entered into negotiations with appellant, James A. Murray, through his nephew and agent, James E. Murray, and with the officers of the trust company, looking towards the liquidation of the trust company through the Scandinavian-American Bank. Respondent, Lindeberg, was an officer and stockholder of the Scandinavian-American Bank, and became interested through a desire to assist his bank, and also, perhaps, because of a possible opportunity to realize a profit upon the purchase of appellant's stock in the trust company. Mr. Lindeberg and appellant's agent, James E. Murray, were brought together about November 7, 1917, and after some negotiations they arrived at an understanding which James E. Murray submitted to his principal, the appellant, in a telegram reading as follows:

"Seattle, Wash. November 8th, 1917

"Mr. James A. Murray, Montezuma Hotel, Nogales, Ariz. Have closed deal with Scandinavian-American Bank turning over all assets for twenty-eight thousand dollars to be distributed pro rata amongst the stockholders Scandinavian paying all deposits and obligations and saving stockholders harmless you to take out properties at prices as follows Bank Building two hundred thousand, Regents twen-

ty-five thousand Manning note seventeen thousand J Street property three thousand five hundred total two hundred forty-five thousand five hundred. Stop. Your deposit and interest one hundred twenty thousand your share of dividend fourteen thousand therefore must provide additional to this approximately one hundred twelve thousand when property mentioned will be deeded to you clear of all incumbrances. Consider deal a good one and am anxious to close immediately fearing complications.

James E. Murray"

—it being understood that, if appellant should approve the plan outlined in the telegram, the necessary formal papers would be executed. Appellant replied to this telegram, giving the plan his approval, and provided the funds necessary to carry it into effect. Thereafter Mr. Larson, representing the Scandinavian-American Bank, declined to carry out the arrangement outlined in the telegram quoted. Mr. James E. Murray renewed negotiations with others, but on November 13, 1917, the parties again got together and made the agreement out of which this controversy immediately arises, which agreement is as follows:

"Agreement.

"This agreement made this 13th day of November, A. D. 1917 by and between James A. Murray, of Butte, Mont., as party of the first part, and Jafet Lindeberg, of San Francisco, Cal., as party of the second part, witnesseth: That the said party of the first part hereby sells to the party of the second part fifteen hundred nineteen (1519) shares of the capital stock of the Bankers' Trust Company of Tacoma, for the sum of fourteen thousand dollars (\$14,000.00), it being understood that the said party of the second part shall, upon the execution of this agreement, deposit in the American Savings Bank & Trust Company of Seattle the said sum of fourteen thousand dollars (\$14,000.00), the same to be delivered to the said James A. Murray upon the surrender by James A. Murray of the fifteen hundred nineteen (1519) shares of the capital stock of the Bankers' Trust Company of Tacoma, which stock is to be delivered on or before thirty (30) days from the execution of this instrument, it being understood and agreed, and the said party of the second part hereby binds himself to save the said James A. Murray harmless from any liability or assessment on said stock. James A. Murray, by James E. Murray, his Agent and Attorney in Fact. Jafet Lindeberg."

It is undisputed that at the time this contract was executed the books of the Bankers' Trust Company showed that its assets were ample to take care of all its liabilities. On the day following the execution of this agreement, Mr. Larson, as manager of the Scandinavian-American Bank, forwarded to the American Savings Bank & Trust Company at Seattle a cashier's check for \$14,000, payable to the order of appellant, with directions to deliver the check upon the

surrender of the 1,519 shares of stock of the Bankers' Trust Company properly indorsed. The receipt of this check was acknowledged under date of November 15, 1917. On the same day appellant was advised by the American Savings Bank & Trust Company by telegram that the check had been deposited and that the stock should be forwarded. On the evening of November 15, 1917, a shortage was found in the assets of the Bankers' Trust Company amounting to the sum of \$17,175.86, due to the defalcation of a bookkeeper, who, by a system of false entries, had succeeded in passing through the Bankers' Trust Company a number of checks drawn by himself which he had caused to be charged to the accounts of various depositors, so that the trust company in fact owed its depositors \$17,175.86 in excess of the amount shown by its books to be due depositors. Before this shortage was discovered James E. Murray, the agent of appellant, who had conducted the negotiations, had returned to his home in Butte, Mont., but before he left Tacoma the arrangements for turning the assets of the Bankers' Trust Company over to the Scandinavian-American Bank had been completed contemporaneously with the execution of the agreement for the sale of the stock hereinbefore set forth, by the adoption of the proper resolutions by the directors of the Bankers' Trust Company on November 13, 1917, which, among other things, provided that the Scandinavian-American Bank should save the trust company stockholders harmless from any stock liability. Respondent, Lindeberg, had also departed for his home in California, leaving the carrying out of the details to Mr. Larson, of the Scandinavian-American Bank. Pursuant to the contract between the two banks, the Scandinavian-American Bank was to take actual possession of the Bankers' Trust Company at the close of business on Saturday, November 17, 1917, so that the transfer, so far as the public was concerned, should be effected on Monday, November 19, at which time the depositors' accounts would be written into the books of the Scandinavian-American Bank. The discovery of the defalcation came as a complete surprise to everybody, and of course presented a situation which had not been theretofore contemplated by either party. The directors of the trust company, feeling that the Scandinavian-American Bank would, on discovery of the defalcation, refuse to go further, and that in such event the bank examiner would immediately take possession, which all were anxious to prevent, concluded that something must be done immediately that same night if the bank was to open in the morning. Mr. Larson was informed of the defalcation, and he and a Mr. Heitman, who had been acting as a broker in the matter (each party now asserting that he was the agent of the other) immediately called up Mr. James E.

(201 P.).

Murray in Butte by long-distance telephone, and acquainted him with the situation. The parties are not in accord as to the nature of the conversation had with Mr. Murray over the telephone. Mr. Larson testified that he told Mr. Murray that Mr. Lindeberg would not purchase the stock under the conditions as they then appeared, and that the Scandinavian-American Bank would not proceed with the liquidation. James E. Murray in his testimony denies that anything was said in this telephone conversation about calling the deal off. Mr. Heitman testifies that he told Mr. Murray over the telephone that Mr. Larson, representing the respondent, was hesitating, and that Murray replied: "If he don't want to go through with it, we can liquidate the bank ourselves." All agree that James E. Murray in the telephone conversation gave them no satisfaction, and committed himself to nothing except that he was sorry to learn of the additional trouble. Following this telephone conversation, the bank examiner was called in and met with the directors of the trust company early on the morning of November 16, at which meeting Mr. Larson was present, and gave notice that the Scandinavian-American Bank would not carry out the agreement of the 13th, and also the bank examiner advised all present that he would not permit that agreement, which relieved the stockholders of their double liability, to be carried out, and they would have to perfect some other plan immediately or he would close the institution. Realizing the situation, the board of directors authorized the execution of a new agreement with the Scandinavian-American Bank which met with the approval of the bank examiner, and is as follows:

"Tacoma, Wash., Nov. 16, 1917.

"A special meeting of the board of directors of the Bankers' Trust Company was held at the city of Tacoma on November 16, 1917, at the hour of 9 o'clock a. m., at which meeting all of the members of the said board were present and consented to the holding of said meeting and waived any and all notice thereof.

"It was reported that upon checking up the books and account of the said bank that a shortage of about \$17,125.00 caused by the defalcation of the bookkeeper, McDonald, had been found, and that said McDonald had confessed thereto.

"In view of such shortage, the board after discussion recognized that the Scandinavian-American Bank of Tacoma, Wash., could not be expected to carry out its agreement heretofore made to save the stockholders of this bank from an assessment upon their stock in case the assets were found insufficient to pay all of its liabilities, and, after going over the matter with the bank examiner, Mr. Hanson, and his deputy, Mr. Moore, and with the officers of the said Scandinavian-American Bank, the following resolution was offered by Mr. Wright, and seconded by Mr. Danaher, and unanimously adopted, to wit:

"Whereas a defalcation and embezzlement of about \$17,125.00 of this institution's money

has been made by McDonald, the bookkeeper; and

"Whereas, the Scandinavian-American Bank of Tacoma refuses to guarantee to hold the stockholders of this bank harmless from any liability as such, by reason of such defalcation; and

"Whereas, we believe it is for the best interests of all concerned that this bank be liquidated through the Scandinavian-American Bank of Tacoma, and that the stockholders of this bank agree to guarantee and hold harmless the said Scandinavian-American Bank from any loss in its liquidation thereof; and

"Whereas, the said Scandinavian-American Bank agrees to proceed to liquidate this bank in case we convert certain of our assets into cash in compliance with the terms and conditions of the proposed plan outlined in our minutes of November 13, 1917:

"Now, therefore, be it resolved that, in consideration of the said Scandinavian-American Bank of Tacoma taking over our deposits and paying our depositors and assuming and agreeing to pay all of our contracts and engagements, that the liability of each and every one of the stockholders of the said Bankers' Trust Company shall continue and be in full force and effect until sufficient assets have been converted into cash to meet the established liabilities; and

"Be it further resolved that the Bankers' Trust Company sell, assign, transfer, and convey to James A. Murray the following described property for the prices set opposite each item, in conformity with his offer heretofore made and outlined in our minutes of November 15, 1917, to wit:

Bankers' Trust Building, supplies and	
personalty	\$200,000 00
Regent Theater Building.....	25,000 00
L. R. Manning note and securities.....	17,000 00
The J street residence property.....	3,500 00
	<hr/>
	\$245,500 00

"The purchase price of said property to be as follows, to wit: Total selling price, \$245,500.00—the said James A. Murray to be allowed a credit for the full amount of his deposit in the Bankers' Trust Company and all accrued interest thereon, amounting in all to the sum of \$120,000.00, to apply as a part payment on the purchase price of said property, the balance of said purchase price to be paid in cash by said James A. Murray, or his assigns, upon the delivery of deeds and abstracts showing merchantable title, said deeds and abstracts to be delivered to and deposited with the American Savings Bank & Trust Company of Seattle, with directions to deliver the same to said James A. Murray or his assigns upon the payment of the balance of the purchase price herein specified, allowing a credit of \$120,000.00 as above mentioned and the balance of the said purchase price, to wit, \$125,500.00, to be paid in cash; and

"Be it further resolved that J. F. Murphy, as vice president, and M. M. Ogden, as secretary, of this corporation, be, and they are hereby authorized, empowered and directed to procure the necessary abstracts, make, execute and deliver to the said James A. Murray, or to his assigns, the necessary deeds of conveyance and assignment, granting, conveying and as-

signing to the said James A. Murray, or his assigns, the said described property free and clear of all incumbrances, except as above mentioned, and receive the purchase price therefor, the same to be paid in the manner above specified.

"The above action was taken under authority vested in the board of directors by the stockholders at their meeting held on March 17, 1917.

"Mr. J. C. Heitman, representing Mr. James A. Murray, was present at this meeting and stated that Mr. Murray's agreement to purchase the assets above mentioned would be carried out notwithstanding the new developments hereinabove mentioned.

"There being no further business, the meeting adjourned.

J. F. Murphy,
"Geo. P. Wright,
"M. A. Cole,
"W. C. Wheeler,
"C. F. Danaher,
"Guy E. Kelly,
"M. M. Ogden,
"Directors."

"Appointment of Committees, Nov. 16, 1917.

"The chairman appointed a committee consisting of Guy E. Kelly and M. M. Ogden to consult with Mr. Edwards, of the Northern Bank & Trust Company of Seattle, regarding the Phillips indebtedness, to consult with the prosecuting attorney, if thought advisable, and to report to the directors, suggesting the best course to be taken in the matter."

On the same day that this final agreement between the banks was entered into Mr. Larson wrote a letter to the American Savings Bank & Trust Company of Seattle referring to the escrow agreement for the purchase of appellant's stock by the respondent, which, in part, reads as follows:

"That since the execution and delivery of said agreement and the deposit with you in escrow of the \$14,000.00, pursuant to the terms of the agreement, it has developed that a shortage in the cash assets of the Bankers' Trust Company of \$17,125.00 exists and did exist at the time of the making of the agreement herein referred to by reason of the defalcation of one of the bookkeepers of the Bankers' Trust Company by the name of McDonald, which fact was unknown to all parties to the agreement at the time of the making of the same. There may be other defalcations as yet undiscovered.

"Since the discovery of this defalcation just last night the board of directors of the Bankers' Trust Company has been in session with the state bank examiner and his deputy, and resolutions have been passed modifying the terms of the agreement entered into whereby the Scandinavian-American Bank of this city was to take over the liabilities and assets of the Bankers' Trust Company for the purpose of liquidating the same, at which meeting Mr. Heitman, of this city, the local representative of Mr. James A. Murray, was present, representing Mr. Murray.

"In view of this changed condition, you and each of you are hereby notified not to deliver the cashier's check No. 24527 for \$14,000.00, deposited under the terms of the agreement

heretofore referred to, nor to indorse, negotiate, or otherwise dispose of the same to James A. Murray or to any other person whomsoever until further notice from the undersigned, which will not be given until matters have been satisfactorily adjusted in view of the developments herein referred to.

"Yours very truly,

O. S. Larson,
"Manager."

Nothing having been heard from Mr. James E. Murray following the long-distance telephone conversation had on the night of November 15, Mr. Larson on November 20, acting in behalf of the respondent, wrote Mr. Murray as follows:

"This is to advise you that last Thursday evening, the 15th day of November, it was discovered that the liabilities of the Bankers' Trust Company on individual account had been understated to the amount of \$17,166.68, and that there may be other discrepancies for which no adequate provision has been made, and that this condition was concealed from the said Jafet Lindeberg, and that he had no knowledge of the same at the time of entering into the agreement above referred to. Upon the discovery of this shortage, we served the American Savings Bank & Trust Company at Seattle with legal notice, a copy of which we inclose, instructing them not to deliver, indorse, negotiate, or in any way dispose of the cashier's check for \$14,000.00, which they are holding in pursuance of an agreement entered into between James A. Murray and Jafet Lindeberg on November 13th. Friday morning, November 16th, the directors of the Bankers' Trust Company, in pursuance of authority vested in them by a stockholders' meeting duly called and held, turned over to the Scandinavian-American Bank all of the assets of the Bankers' Trust Company for the purpose of paying the depositors of said bank by and with the approval of the banking department of the state of Washington, and in addition guaranteed and agreed to hold the Scandinavian-American Bank of Tacoma harmless from any loss in case all of the assets of the said Bankers' Trust Company should prove of less cash value than the established liabilities, contracts, debts, and deposits of the said Bankers' Trust Company.

"In view of the facts as enumerated above, said Jafet Lindeberg hereby refuses to accept from James A. Murray the said 1,519 shares of the capital stock of the Bankers' Trust Company, and denies that he is indebted to the said James A. Murray in any sum or sums whatsoever, and hereby demands the said James A. Murray to order the American Savings Bank & Trust Company at Seattle to return to the Scandinavian-American Bank of Tacoma the cashier's check for \$14,000.00, now held by said American Savings Bank & Trust Company in pursuance of the escrow agreement between James A. Murray and Jafet Lindeberg, dated November 13, 1917."

No response to this letter having been made by Mr. Murray, this action was brought, demanding a rescission and cancellation of the agreement to purchase appellant's stock, that the cashier's check be re-

turned to the Scandinavian-American Bank, and that the stock of the Bankers' Trust Company be returned to appellant. The trial court, after hearing the evidence, entered a judgment rescinding the contract and placing the parties in status quo as prayed for, from which judgment this appeal is prosecuted.

Appellant's principal contentions are that there was no mistake in a legal sense inducing the making of the contract sought to be rescinded; that the agreement for the sale of the stock and the agreement for the transfer of the bank's assets were interrelated and inseparable parts of one contract, which cannot be affirmed as to its benefits and rescinded as to its burdens.

[1, 2] We think it is elementary that, where there is a clear bona fide mistake regarding material facts, without culpable negligence on the part of the person complaining, the contract may be avoided, and equity will decree a rescission. We take it that the true test in cases involving mutual mistake of fact is whether the contract would have been entered into had there been no mistake. *Stahl v. Schwartz*, 67 Wash. 25, 120 Pac. 856; 10 R. C. L. 296-299.

[3] We are clear that there was such a mistake here. The agreement of November 13 for the purchase of the stock was undoubtedly entered into by both parties in the belief that the books of the trust company spoke the truth as to its assets and liabilities, and presumably the contract would never have been entered into had respondents known the true facts. The two agreements, the first between appellant and respondent, whereby the former sold to the latter his stock in the trust company, and the second whereby the Scandinavian-American Bank took over and liquidated the affairs of the trust company, were, we think, separate contracts, each distinct from the other. The first agreement for the sale of the stock was related to the second only in the sense that the appellant, as the dominating stockholder in the Bankers' Trust Company, had used that fact to hold up the plan for the liquidation of its assets and the payment of its obligations until he had disposed of his stock, and no doubt the purchase of the stock by respondent moved the appellant to consent to the agreement to liquidate. However, the effect of even this relationship was completely lost upon the discovery of the defalcation, and the refusal of the Scandinavian-American Bank to proceed with the liquidation contract as first made, the giving of the notice to all concerned, and the substitution of the new agreement of November 16 under which the liquidation was finally effected, which effectually rescinded the former agreement. Appellant's agent, James E. Murray, was promptly notified upon the discovery of the defalcation, and whether or

not we accept the testimony of Mr. Larson and Mr. Heidman to the effect that he was then informed that Lindeberg would not purchase the stock, or that he was hesitating, still, as a man familiar with business affairs, he must have known that knowledge of this defalcation and the changed conditions would produce its effect, and that the Scandinavian-American Bank might, and probably would, refuse to undertake the liquidation of the trust company under the terms of the agreement theretofore made between them, which placed the liability caused by the defalcation upon it. He had opportunity, brief, it is true, to wire directions to the directors of the trust company as to what should be done under the changed conditions, but whether he did so or not, and without regard to appellant's position as the holder of the majority of the stock of the trust company, its directors had full legal power and authority to manage and direct its affairs, and must be held to have properly entered into the modified agreement made after the defalcation was discovered, for the liquidation of the trust company. The second agreement made by the directors of the trust company on November 16 cannot be said to be a part of the agreement for the sale of the stock which was executed three days before, and we see no reason in view of the power of the directors to make the later agreement which was entered into after knowledge of the shortage, why the former agreement between the individuals, who are parties to the cause, should now be held to be a part of an agreement which was not even contemplated until two or three days after the agreement between the individuals was made.

Other points are raised and discussed by the appellant, which, in view of the length of this opinion we do not consider it necessary to discuss. We are clear that the parties entered into the agreement under consideration through mutual mistake of fact, from which equity will relieve, and that the contract between the individuals, parties to this suit, and the subsequent contract between the banks, by which the affairs of the Bankers' Trust Company were liquidated, were not so related that the performance of the latter contract will prevent the rescission of the former.

The judgment appealed from will be affirmed.

PARKER, C. J., and MAIN, MITCHELL, BRIDGES, and FULLERTON, JJ., concur.

MACKINTOSH, J. (dissenting). I cannot agree with the majority opinion in this case, one reason being that the contract of Lindeberg of November 13 to purchase Murray's stock in the Bankers' Trust Company and Murray's contract with the Scandina-

vian-American Bank to purchase certain assets of the Bankers' Trust Company were, as testified to by every witness in the case, inseparable parts of one general agreement, and that Murray cannot be held to his bargain to assume the burdens and at the same time be denied the benefits. Lindeberg himself testified that the agreement was made by him to assist the Scandinavian-American Bank, in which he was a large stockholder, and that his agreement to purchase Murray's stock and the purchase by the Scandinavian-American Bank of the Bankers' Trust Company, which involved the purchase in turn by Murray of certain of the Bankers' Trust Company's assets, were parts of one transaction. He testified:

"I would not have cared to purchase the stock without getting the assets. The purchase of the stock and the delivering of the assets went together naturally."

This court has already held, in conformity with the general rule, that a party cannot ratify one part of a contract which is beneficial to his interest, and disaffirm that part which does not result in his benefit; that the rescission must be total. *Seattle Nat. Bank v. Powles*, 33 Wash. 21, 73 Pac. 887. On November 16, after the discovery of the McDonald shortage, Lindeberg and the Scandinavian-American Bank did not elect to rescind, but in the absence of Murray, or any one acting in his behalf, they agreed to changes in the contract between the Bankers' Trust Company and the Scandinavian-American Bank which did not modify the agreement of Murray to take up the unliquid assets of the trust company, and by November 20 the Scandinavian-American Bank had proceeded with the acquisition of the Bankers' Trust Company's assets, which included \$125,000 in cash which Murray then had on deposit in that institution, and had obtained possession of the deposit at Seattle of Murray's additional sum of \$112,000 to complete the purchase of the assets of the Bankers' Trust Company, and all this money was received by Lindeberg's institution before Murray was notified of the changed arrangement of November 16. The sum total of the transaction is that Murray has paid out \$245,500 in cash, and in exchange therefor has received unliquid assets of the Bankers' Trust Company under a modified agreement of which Murray was not advised, and, according to the majority opinion, the other parties to the contract now have a right to refuse to carry out the agreement to buy Murray's stock for the sum of \$14,000, which was a part of the consideration to pass to Murray in exchange for his agreement to take up the trust company's assets.

Furthermore, the mistake, if any there be,

which the majority opinion holds is sufficient to justify a rescission, is not such a mistake as would cause that result to follow. There is no question of rescission on the ground of fraud as fraud is expressly disclaimed. The only mistake that is alleged is the lack of knowledge as to a fact which might have had some bearing on the making of the contract. Although Lindeberg might not have entered into the contract had he known of this shortage, Murray certainly would have made the contract had he known of the shortage. The common lack of knowledge is not a mutual mistake so far as the law is concerned. As was said in *Borden v. Richmond, etc., Ry. Co.*, 113 N. C. 570, 18 S. E. 392, 37 Am. St. Rep. 633:

"A unilateral error does not avoid a contract."

And, even though there may be exceptions to this rule, as was stated in *Bibber v. Carville*, 101 Me. 59, 63 Atl. 303, 115 Am. St. Rep. 303:

"While a court of equity may decree the rescission of a contract for a mistake which is unilateral, the power should not be exercised against a party whose conduct has in no way contributed to or induced the mistake, and who will obtain no unconscionable advantage thereby."

There being no fraud in the case, no mutual mistake, and no mistake which induced Murray, who has secured no unconscionable advantage by reason of the contract, to make the contract, a court of equity will not rescind.

For the reasons stated, I dissent.

HOLOOMB and HOVEY, JJ., concur.

STEVENS v. SWEITZER et al. (No. 16652.)

(Supreme Court of Washington. Nov. 1, 1921.)

1. Vendor and purchaser ¶34—Vendor is bound to show the land he owns and boundaries thereof under penalty of damages or action for rescission.

One undertaking to show his land to a prospective purchaser is bound to show the land he owns and the boundaries thereof, under penalty of responding in damages or to an action for rescission, and cannot evade responsibility by contending that he did not know its exact location and undertook to procure agents to point out his own land.

2. Husband and wife ¶221—Complaint for rescission, alleging plaintiff married but owning land in his own right, held not demurrable.

Under Rem. Code 1915, § 5925, every married person may acquire, hold, enjoy, and dis-

pose of property and sue and be sued as if unmarried, so that a complaint, in an action for rescission of a sale of land, alleging that plaintiff is married, but pleading as a conclusion of law that he owned the land in his own right, is not subject to demurrer because his wife was not made a party.

Department 2.

Appeal from Superior Court, Grays Harbor County; Geo. D. Abel, Judge.

Action by J. A. Stevens against Lydia Sweitzer and husband. Judgment for plaintiff, and the defendants appeal. Affirmed.

J. A. Hutcheson, of Montesano, for appellants.

E. S. Avey, of Elma, for respondent.

HOLCOMB, J. Under the issues of fact pleaded in this case the facts shown upon the trial amply justify the decree of rescission. There was an exchange of properties, and representations by appellants that their lands were well timbered, and they undertook to point out their lands and the timber to respondent, but pointed out a different tract, an adjoining 40 to the one owned by appellants, the one pointed out being well timbered, while the one owned by appellants had but little or no valuable timber upon it.

[1] Where a party undertakes to show his land to a prospective purchaser he is bound to show the land he owns and the boundaries thereof if required, under penalty of responding in damages or to an action for rescission. *Freeman v. Gloyd*, 43 Wash. 607, 86 Pac. 1051; *Shaw v. O'Neill*, 45 Wash. 98, 88 Pac. 111; *Bradford v. Adams*, 73 Wash. 17, 131 Pac. 449; *Warville on Vendors* (2d Ed.) 996.

Nor can the vendor evade responsibility by contending that he did not himself know the exact location of his own land, and that he undertook to procure agents to point out his own land. Furthermore, there is evidence in this case justifying the belief that appellants Sweitzer did know that the lands pointed out belonged to a relative, and did not belong to appellants.

[2] Appellants contend that their demurrer to respondent's complaint upon the ground that there was a defect of parties plaintiff, in that Eva J. Stevens, wife of the plaintiff, should be a party thereto, should have been sustained, and that the court erred in overruling the same.

Respondent, in his complaint, alleged that he is the husband of Eva J. Stevens, but that he owned in his own right the property which was to be exchanged. This manner of alleging ownership is pleading a conclusion of law, but it has always been held to be customary and sufficient as an allegation of

ownership without deraigning title, in the absence of a motion to make more definite and certain. *Hester v. Stine*, 46 Wash. 469, 90 Pac. 594; *Freeburger v. Caldwell*, 5 Wash. 769, 32 Pac. 732. And we have held that the proper remedy where the ownership is so pleaded is by a motion to make more definite and certain. *Harris v. Halverson*, 28 Wash. 779, 63 Pac. 549. The statute, section 5925, Rem. Code, gives the right to every married person to acquire, hold, enjoy, and dispose of every species of property, and to sue and be sued as if unmarried. There was no error in overruling the demurrer.

Appellants also claim that the court erred in denying their motion for security for costs. Even if erroneous, this denial works no harm to appellants, and is therefore not prejudicial.

Judgment affirmed.

PARKER, C. J., and MAIN, MAORIN-TOSH, and HOVEY, JJ., concur.

STATE ex rel. SILVER LAKE RY. & LUMBER CO. v. PUBLIC SERVICE COMMISSION OF WASHINGTON et al. (No. 16613.)*

(Supreme Court of Washington. Nov. 5, 1921.)

1. Carriers ⇐4—Whether corporation is common carrier one of fact to be determined by courts on evidence.

The disputed question of whether a corporation is a common carrier held one of fact, to be determined by the courts on the evidence.

2. Carriers ⇐4—Whether corporation is common carrier determined by what it does, not by its charter.

Whether a corporation is a common carrier is not concluded by the fact that its charter gives it the power of such a carrier, but is to be determined by what it does.

3. Carriers ⇐4—That a corporation had filed petition to condemn showing it was a common carrier not conclusive relative to duty to accept freight.

That a corporation in a petition to condemn land, which it got by purchase, without prosecuting the action to judgment, alleged facts showing it to be a common carrier, is not conclusive of it being such, relative to its duty to accept freight for carriage.

4. Carriers ⇐4—Under facts, railway and lumber company not a common carrier.

Facts relative to purpose of organization of a railway and lumber company, its road as constructed, its equipment, and the business carried on by it, held to show that it never advanced beyond the status of a private carrier, and so was not obliged to receive as a common carrier logs for transportation.

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied December 30, 1921.

Department 2.

Appeal from Superior Court, Thurston County; John M. Wilson, Judge.

At instance of the Tenino Lumber Company, the Public Service Commission of Washington made an order declaring the Silver Lake Railway & Lumber Company a common carrier, and requiring it to act as such. On writ of review, on relation of the Railway & Lumber company, the order was affirmed by the superior court, and relator appeals, the Director of Public Works, the Supervisor of Transportation, and the Supervisor of Public Utilities of Washington being made substitute defendants and respondents. Reversed, and order set aside.

Miller, Wilkinson & Miller, of Vancouver, for appellant.

Lindsay L. Thompson and Raymond W. Clifford, both of Olympia, for respondents.

HOVEY, J. This is an appeal from a judgment of the superior court of Thurston county affirming an order of the Public Service Commission declaring the relator, Silver Lake Railway & Lumber Company, a common carrier, and directing it to "operate its line of railway by transporting freight upon such schedules and upon such days as may be approved by the Commission."

There is little conflict in the testimony, and the facts are substantially as follows: The relator was incorporated under the laws of this state in the year 1903 as a railway company. Its charter contains the broad powers of a common carrier railway company. The corporation was formed and the railway built for the purpose of conveying a large amount of logs owned by the incorporators from the woods to the Cowlitz river, where the logs are dumped. This terminal point is about one mile from Castle Rock, and the railway as now constructed runs about six or seven miles further to Silver Lake, which is in the midst of the timbered area owned by the incorporators of the railroad. The road was built purely as a logging railroad. It has a maximum grade in excess of 4 per cent., and includes curves as great as 29 degrees. Its equipment consists solely of logging trucks and one 40-ton locomotive for the hauling of the same. It has no stations, has never published any tariffs, and has never sought business from others nor held itself out as desiring the same. The country is sparsely settled, and while there is a wagon road following the general line of the railway, it is at times difficult of passage, and the railway company has carried a small amount of merchandise for other persons, for which service it has at times made a charge, and at other times has rendered the service without charge. The charge made has never been under any fixed schedule, and has never been compensatory nor sufficient in amount to have justified the rendition of the service if that were the

sole purpose of the railway. The operation of the railway has been entirely dependent upon the requirements of the railway company, and when the market for its logs was inactive, it has not been operated. At one time the railway was not operated for a period of 18 months, and it had not been operated for some weeks at the time the hearing was had.

It was found by the Commission that the relator operated as a common carrier for a number of years after its incorporation, and held itself out to the public as a common carrier. In our opinion this finding is not justified by the testimony in this case, and the character of its operation does not seem to have differed during that period from that of later years.

In the year 1908 the relator brought an action seeking to condemn certain land which it required for its right of way, and in its petition alleged facts showing it to be a common carrier and as such entitled to the right of eminent domain. This action was never prosecuted to judgment but the relator paid to the owners of the land the full price which they demanded for the same, and secured their title in that manner.

The service heretofore rendered by the relator to other persons consisted chiefly of transportation of merchandise needed by a store operated near Silver Lake, the customers of which were principally the employees of the railroad. For a short time it transported shingles for one of its stockholders, and at other times has carried isolated shipments of machinery, and in one month transported a large amount of gravel for the county commissioners for the purpose of repairing a highway. It has never transported logs for other persons.

The respondent Tenino Lumber Company has acquired options on some 30,000,000 feet of timber, and desires to have the relator compelled to carry out its logs.

[1] At the outset the question is raised as to the power of the Commission to declare a corporation a common carrier if that fact is disputed, and we are asked to pass upon the effect of such an order.

In most of the cases heretofore decided by this court, the corporations involved have been confessedly public service corporations, and we have held that the orders of the Commission relative to them are presumed to be within the bounds of reasonableness; and unless the contrary clearly appears the same will stand. *Great Northern Ry. v. Railway Commission*, 60 Wash. 218, 110 Pac. 1075.

In our opinion the question of the character of the corporation is one of fact, and must be determined by the courts upon the evidence presented in the record. In the case of *Cushing v. White*, 101 Wash. 172, 172 Pac. 229, L. R. A. 1918F, 463, the question of the character of the corporation was determined

by the court upon the evidence, and the effect to be given to the finding of the Commission was not discussed. In *Associated Pipe Line Co. v. Railroad Commission of California*, 176 Cal. 518, 160 Pac. 62, the Supreme Court of California in answering the contention that the declaration of the Legislature of the character of a carrier would make it a common carrier irrespective of the facts, says:

"Indeed, such legislation, if attempted, would have been futile, since under the Fourteenth Amendment of the federal Constitution no state shall deprive any person of property without due process of law, and to take or devote private property to public use without compensation is such deprivation."

In *Producers' Transp. Co. v. Railroad Commission of California*, 251 U.S. 228, 40 Sup. Ct. 132, 64 L. Ed. 239, the Supreme Court of the United States said:

"It is, of course, true that if the pipe line was constructed solely to carry oil for particular producers under strictly private contracts, and never was devoted by its owner to public use, that is, to carrying for the public, the state could not, by mere legislative fiat or by any regulating order of a Commission, convert it into a public utility or make its owner a common carrier; for that would be taking private property for public use without just compensation, which no state can do consistently with the due process of law clause of the Fourteenth Amendment."

A long line of cases are cited in support of this statement.

[2] We come now to the question of the effect to be given to the declarations of the charter. Respondents cite section 211 of Wyman on Public Service Corporations, in which general language is used to the effect that a corporation is bound by the recitals in its charter. We have examined all the cases cited in the note to this section, and none of them meet the present situation. Where a corporation enters upon a line of conduct prescribed by its charter, it is held to full performance, but there are doubtless many corporations operating under charters containing an enumeration of powers which they have never sought to exercise. In our opinion, while these declarations are the justification for the acts that the corporation afterwards does, and are binding upon the corporation for any line of action which it undertakes in accordance therewith, they are not in themselves the sole criterion by which the position of the corporation may be judged. What really fixes the status of the corporation is what it does rather than what it says.

"The answer to that question does not depend upon whether its charter declares it to be a common carrier nor upon whether the state of incorporation considers it such; but upon what it does." *United States v. Brooklyn Eastern District Terminal*, 249 U. S. 296, 39 Sup. Ct. 285, 63 L. Ed. 618, and cases cited.

See, also, *Bridal Veil Lumbering Co. v. Johnson*, 30 Or. 205, 46 Pac. 790, 34 L. R. A. 368, 60 Am. St. Rep. 818; *Apex Transp. Co. v. Garbade*, 32 Or. 582, 52 Pac. 573, 54 Pac. 367, 882, 62 L. R. A. 518.

This court in *State ex rel. Harris v. Superior Court*, 42 Wash. 660, 85 Pac. 666, 5 L. R. A. (N. S.) 672, 7 Ann. Cas. 748, has recognized this principle:

"The courts are not confined to, and it is not to be tested exclusively by, the description of those objects and purposes as set forth in the articles of association, but evidence aliunde, showing the actual business proposed to be conducted, may be considered."

[3] The fact that the relator brought an action seeking to condemn land for a right of way and the statements made in its petition therefor are, like the statements in its articles of incorporation, evidence to be considered in considering its status, but are not, in our opinion, sufficient in themselves to establish a status which was in truth contrary to the facts.

[4] The facts as shown in the record in our opinion conclusively establish that this corporation never advanced beyond the status of a private carrier. In *Cushing v. White*, supra, Judge Webster has set out the text of a great many authorities upon this subject and it seems hardly necessary to restate them here, and we will confine ourselves to the discussion of some of the authorities which we consider pertinent to this particular case. The undisputed evidence is to the effect that the relator was organized for the purpose of getting out timber owned by the persons organizing it, and that is the only business which it has ever followed as a business. Its transportation of articles for others where it made no charge would, of course, not change the status, and the fact that it did make charges in other instances, which were in every instance less than the cost of the service rendered, might be considered as bringing these acts within the gratuitous class, and, as defined in 1 Moore on Carriers, p. 2, would constitute the railroad a private carrier so far as these acts are concerned.

The finding of the Commission is that the logs transported by the railroad for itself, if charged for at customary rates, will equal in value \$45,000 per annum, while the total sums realized from the charges made other persons did not average more than about \$175 per year, and, while the size of the business is not in itself sufficient to absolve the carrier of its position of common carrier, yet the fact that the business has been so conducted for so many years along this line is persuasive evidence that the relator neither intended to be nor held itself out to be a common carrier. The evidence is clear that the road is not now equipped for the carrying on of a general freight business. Its logging trucks, when loaded, aggregate about 80,000

pounds in weight, while the loaded standard railway car is about double this weight. Its track is laid with rails which in no instance are more than 40 pounds. Its grades and curves are excessive for those of ordinary railway business. When it operates its entire equipment is now utilized in its own business, and to require it to undertake the transportation which is tendered in this case would require clear evidence of its legal obligation so to do, and, in our opinion this is not supplied by the record in this case.

The judgment of the superior court of Thurston county is reversed, and the order of the Public Service Commission heretofore made set aside.

Relator will recover costs.

PARKER, C. J., and MAIN, HOLCOMB, and MACKINTOSH, JJ., concur.

ROGERS v. SAVAGE et ux. (No. 16158.)

(Supreme Court of Washington. Nov. 15, 1921.)

1. Appeal and error \S 346(1)—Void grant of new trial suspends time for appeal.

An order setting aside a judgment and granting a new trial, which was void because beyond the power of the court, suspended the right of or reason for an appeal from the judgment, and therefore suspended the time within which the appeal must be taken under Rem. Code 1915, \S 1718, so that the party against whom the judgment was rendered could appeal therefrom within the statutory time after reversal of the void order.

2. Pleading \S 193(6)—Complaint held demurrable for alleging slander and assault and battery in same count.

An amended complaint charging that defendant assaulted and struck plaintiff, and while so doing falsely and maliciously spoke of her certain defamatory words, was subject to demurrer for alleging in the same count a cause of action for assault and battery and one for slander.

En Banc.

Appeal from Superior Court, King County; John L. Corrigan, Judge.

Action by Ada M. Rogers against John E. Savage and another. Judgment for the plaintiff, and defendants appeal. Reversed, with directions to sustain the defendants' demurrer.

Piles & Halverstadt, of Seattle, for appellants.

Van C. Griffin, of Seattle, for respondent.

MACKINTOSH, J. This case was before this court on a prior appeal by the plaintiff from an order of the trial court vacating a

judgment entered by the clerk on the verdict of the jury, and granting a new trial. *Rogers v. Savage*, 112 Wash. 246, 192 Pac. 13. It was there held that the record failed to show any order or instruction by the court directing the clerk not to enter a judgment on the verdict; that the judgment was properly entered by the clerk on the verdict, in accordance with the mandates of the statute (Rem. Code 431), and the trial court, having regularly denied the motion for judgment non obstante veredicto and a motion for a new trial, could not thereafter reconsider the motion for a new trial, grant the same, and direct the judgment to be set aside. The order of this court was:

"Reversed and remanded to the trial court, with direction to set aside the order granting the respondent's motion to set aside the judgment, and also to set aside the order of December 18, 1919, vacating and setting aside the order of November 7, 1919, denying the motion for a new trial."

The trial court complied with the ruling of this court upon the going down of the remittitur, and set aside both orders on September 25, 1920, and thereafter, on October 4, 1920, the defendants gave notice of appeal to this court from the original judgment, which was entered by the clerk on November 7, 1919.

The plaintiffs, respondents here, moved to dismiss the appeal because not taken within the statutory time from the rendition of the judgment appealed from. The defendants, appellants here, first contend that the prior decision of this case has been overruled by this court in *Buckley v. Harkens*, 195 Pac. 250, but in that case the record clearly shows, and this court found, that the trial court instructed the clerk to withhold the entry of the judgment on the verdict until its further order; hence the two cases are clearly distinguishable.

[1] It is next contended that, the judgment of the trial court setting aside the judgment entered by the court having been annulled by this court on appeal, the statutory time for appeal from the first judgment begins to run only from the time the decision of this court becomes effective. The statute (Rem. Code, \S 1718) provides:

"In civil actions and proceedings an appeal from any final judgment must be taken within ninety days after the * * * entry of such final judgment."

And it would seem at first thought that this is conclusive, though to so construe the statute would work great hardship in such a case as this, because the appellants, who were the judgment debtors, would be, under the circumstances of this case, denied the right of appeal, which the statute clearly intends

that they shall have. The judgment against them from which they now appeal was rendered on November 7, 1919. It was set aside by the court on December 6, 1919; hence within 30 days, or before the time for appeal had expired, there became nothing from which they could appeal, and, the court having made an order granting their motion for a new trial, all reason for appeal upon their part ceased. The plaintiff, however, feeling aggrieved by the court's order of December 6, 1919, setting aside the judgment, exercised her right to take an appeal from that order, which appeal was successful, resulting in a holding that the order of December 6, 1919, was in excess of the trial court's jurisdiction, and therefore void, and a reinstatement of the judgment of November 7, 1919. This decision was filed on August 18, 1920, and the remittitur putting it into effect reached the trial court on September 25, 1920, when for the first time appellants were apprised of the fact that there was something from which they could appeal. The right of, or reason for, an appeal being suspended by the setting aside of the judgment, the time for appeal should likewise be held to be suspended during the same period. Authorities are not numerous upon this subject, and the industry of counsel has brought to our attention only the following:

"Where the right of appeal is suspended, an appeal is in time if taken within the statutory period after the right is restored. Therefore, where a judgment of the lower court substituted by it in place of one previously rendered has been annulled on appeal, there is the statutory period from the time of this decision of the appellate court in which to appeal from the first judgment." 2 R. C. L. 105, § 80.

This text seems to be based upon only the case of *Flint v. Cuny*, 7 La. 379, 26 Am. Dec. 505, which squarely so holds. In the absence of any contrary authority, and in the interests of justice, we feel justified in adopting the rule as quoted, and the motion to dismiss is therefore denied.

The errors assigned upon the merits bring up only the following:

Plaintiff by her first or original complaint, alleged as one cause of action:

"That on or about December 29, 1918, the defendants, without just cause or provocation, and acting together and jointly, assaulted and attacked plaintiff, pulled her hair, struck her many angry and violent blows upon the head and in her face, and upon her arms, and wrenched and twisted her arms in a most cruel manner, causing her most excruciating pain, humiliation, and mental anguish.

III. "That on or about the 29th day of December, 1918, at the Hotel New Cecil, in Seattle, King county, Wash., said defendants, and each of them in the presence of plaintiff and other people maliciously spoke of and concerning the plaintiff herein defamatory words and language, which injured and impaired the repu-

tation of plaintiff for virtue and chastity, and which exposed her, or tended to expose her, to contempt and ridicule, the said plaintiff then and there being a female person over the age of 12 years."

The defendants moved against this complaint, asking that it be made more definite and certain by separately and distinctly setting forth the different causes of action therein alleged, or, in the alternative, requiring the words alleged to have been maliciously spoken to be set out. This motion being granted, the plaintiff filed an amended complaint, in which she alleged the assault as one cause of action and the slander as a second cause of action, asking for judgment for \$2,000 on the first cause of action, and for \$8,000 on the second cause of action. To this complaint the defendants demurred, on the ground of misjoinder of causes of action which demurrer was sustained. The plaintiff then filed a second amended complaint, the charging part of which is as follows:

"That on or about December 29, 1918, at the New Cecil Hotel, in Seattle, Wash., defendants, without just cause or provocation, and acting together and jointly, assaulted and attacked plaintiff, pulled her hair, struck her many angry and violent blows upon her head and in her face, and upon her arms, and wrenched and twisted her arms in a most cruel manner, causing her most excruciating pain, humiliation, and mental anguish at said time and place; and while so assaulting said plaintiff, said defendants, and each of them, in the presence of plaintiff and other people, falsely and maliciously spoke of and concerning the plaintiff herein defamatory words and language, which injured and impaired the reputation of plaintiff for virtue and chastity, and which exposed her, or tended to expose her, to contempt and ridicule, said plaintiff then and there being a female person, over the age of 12 years. Defendants, and each of them, said to plaintiff: 'You are a bum;' 'you are a whore;' and used other language too vile and vulgar to be set forth herein. All of which language accused plaintiff of being a prostitute, and said language was used in the presence of many people, the exact number of whom are to plaintiff unknown."

Defendants moved for an order striking this complaint, first upon the ground that it contained more than one cause of action not separately stated, and, second, that it was a reiteration of the original complaint, which, on their motion, the court had ordered stricken. This motion was denied as was also defendants' demurrer upon the ground that several causes of action were improperly joined therein. The cause went to trial upon this second amended complaint, and after the jury was impaneled the defendant moved the court to require the plaintiff to separately state and number her causes of action, and to elect upon which cause of action the case would go to trial, which motions were denied. Defendants excepted to the ruling. Trial was

had, resulting in a verdict for plaintiff for \$5,000, which, upon motion for a new trial, the court required to be reduced to \$3,000, from which judgment this appeal is prosecuted.

[2] Appellants' contention is that the complaint states a cause of action for assault and a cause of action for slander, not separately stated and numbered, as the statute requires, and that respondent was permitted to try her case as though prosecuting a cause of action for assault and another for slander. Appellants rely chiefly upon the case of *Konick v. Champneys*, 108 Wash. 35, 183 Pac. 75, 6 A. L. R. 459, in which it is said:

"The complaint, therefore, states two causes of action, and the question arises, Are they improperly united? The appellant argues that they are not, and calls to his assistance that section of the Code which permits two or more causes of action to be united in one complaint when they arise out of the same transaction. Rem. Code, § 296. But we cannot think the statute aids the appellant."

After quoting from *Pomeroy's Remedies and Remedial Rights* and from *Anderson v. Hill*, 53 Barb. (N. Y.) 238, the court proceeds:

"Within the principles here announced, the complaint plainly improperly unites two causes of action; and since the Code, as we have shown, makes the improper uniting of two or more causes of action a distinct ground of demurrer, the demurrer was properly sustained."

This case is undoubtedly good authority for the ruling of the trial court upon the first or original complaint, because the pleader there did not in any way connect the assault and beating with the use of the defamatory language referred to. It is also good authority for the sustaining of the demurrer to the first amended complaint, because there it was plainly attempted to plead a cause of action for assault and another cause of action for slander, which may not be joined in the same action. See cases cited in *Konick v. Champneys*, *supra*. And the second amended complaint, the charging part of which we have hereinbefore quoted, in our judgment does plead two causes of action—one for assault and one for slander—and in the very language of the statute on slander, and in such a way as to show that it was not pleaded for the purpose of showing the aggravated nature of the assault, which might properly be done. *De Leon v. Doyhof Fish Products Co.*, 104 Wash. 337, 176 Pac. 355. The language contained in the second amended complaint is unnecessary and even improper in a complaint for assault, and the defendants, at every opportunity, attempted to preserve their rights as against such pleading, and the court erred in overruling the demurrer.

The court gave certain instructions appli-

cable to a cause of action for slander, to which the defendants took no exception and have assigned no errors thereon. Although the court denied their motion and overruled their demurrer directed to the second amended complaint, upon the theory that it stated but one cause of action—that for assault—these instructions allowed the jury to return a verdict for damages for slander, such instructions being but further proof of error made in allowing the case to go to trial on the second amended complaint.

The judgment appealed from is reversed, with order to sustain the defendants' demurrer.

PARKER, C. J., and BRIDGES, MAIN, and HOVEY, JJ., concur.

FULLERTON and TOLMAN, JJ., concur in the result.

HOLCOMB, J. I have grave doubts as to the correctness and wholesomeness of the decision on the motion to dismiss appeal. I concur as to the remainder of the opinion.

STATE ex rel. HOVEY v. CLAUSEN, State Auditor. (No. 16874.)

(Supreme Court of Washington. Nov. 14, 1921.)

Judges ~~to~~ 22(7)—Compensation not increased during term for which elected.

Under Const. art. 4, § 13, providing that justices shall, during their continuance in office, receive the salaries prescribed by law, which shall not be increased after their election nor during the term for which they shall have been elected, and article 4, § 3, providing that the term of judges shall be six years, judge having qualified for the term of six years in January, 1919, his successor appointed in 1921 for the unexpired term is not entitled to the benefit of Laws 1919, p. 154, increasing salaries.

En Banc.

Original application for writ of mandamus by the State of Washington, on the relation of Chester R. Hovey, against C. W. Clausen, as State Auditor. Writ denied.

Chadwick, McMicken, Ramsey & Rupp, of Seattle, for plaintiff.

Lindsay L. Thompson and Nat U. Brown, both of Olympia, for defendant.

TOLMAN, J. Relator, by an original proceeding in this court, has made application for a writ of mandamus to be directed to the state auditor. The facts upon which he bases his application and the relief sought are set forth by him, in substance, as follows: The late Mr. Justice Mount, having

been therefore duly elected, did, on the second Monday of January, 1919, qualify as a judge of the Supreme Court of the State of Washington for the full term of six years then beginning, and ending on the second Monday of January, 1925, and immediately entered upon, and continually thereafter performed, the duties of that office until the 3d day of September, 1921, when he died. On the 7th day of September, 1921, the Governor duly appointed relator to fill the vacancy caused by the death of Judge Mount, and the relator forthwith qualified, entered upon, and has since continuously discharged the duties thus devolving upon him.

Relator alleges that by virtue of the act of March 4, 1919 (chapter 77, Laws of 1919), he is entitled to receive a salary at the rate of \$7,000 per annum, but that the state auditor has refused and will continue to refuse to issue to relator any salary warrant based upon an annual salary greater than \$6,000, and the prayer is:

"That a peremptory writ of mandamus issue out of this court requiring, commanding, and requesting respondent to draw and deliver to relator a warrant in the sum of \$466.67, to cover his salary as judge of the Supreme Court from and including the 7th day of September, 1921, to and including the 30th day of September, 1921."

Respondent's demurrer admits the facts, and the only question presented is, in simple words, Is relator entitled to the increased salary provided by the act of 1919, or is he limited to the amount of salary provided by the law at the time Judge Mount was elected and entered upon his last term? This question has never been squarely presented to or decided by this court, and, being a debatable one, the parties involved have sought, by this proceeding, brought in good faith and in a friendly spirit, to have all uncertainty removed.

Counsel for relator has in his brief given an interesting and exhaustive history of the inception and growth of the idea which is embodied in our Constitution upon this subject, and it should not be assumed, because we do not recite that history here, that we have not given full consideration to it or weighed the argument that the evils sought to be prevented will not follow directly upon a decision in favor of relator.

A like question has been presented in other states, and the decisions are by no means harmonious. In many, if not most, cases, the decision is made to rest upon the peculiar wording of the constitutional provision being considered, though the purpose and intent of all seem to be virtually the same, notwithstanding a difference in the language employed. Tennessee has a constitutional provision (article 6, § 7), which reads:

"The judges of the Supreme Court or inferior courts shall, at stated times, receive a compen-

sation for their services, to be ascertained by law, which shall not be increased or diminished during the time for which they are elected."

The Supreme Court of that state had occasion to pass upon the question now before us, and in *Gaines v. Horrigan*, 4 Lea (Tenn.) 608, it was said:

"* * * The language is that the compensation shall not be increased or diminished during the time for which they are elected. This obviously means during the time and not the term for which the judge is elected."

And accordingly it was there held that the judge appointed to fill out an unexpired term of a deceased judge was entitled to the compensation fixed by law at the time he assumed the duties of the office.

In *Board of Chosen Freeholders v. Lee*, decided by the Supreme Court of New Jersey and reported in 76 N. J. Law, 327, 70 Atl. 925, the constitutional language under consideration was:

"The clerks and surrogates of counties shall be elected by the people of their respective counties, at the annual election for members of the General Assembly, and shall hold their [respective] offices for five years."

And the court held that under this constitutional provision the term of office might be terminated before the expiration of the statutory period for which the incumbent was elected, by impeachment, resignation, or death of the officer; that the happening of any of these contingencies is an implied limitation upon the right of the elected officer to continue in office for the period for which he would otherwise hold; and that when such contingency arises the officer's term expires, there is a vacancy, and upon the appointment or election to fill the vacant office the term of another officer begins. A like holding was made by the Supreme Court of Oklahoma in *Carter v. State*, 77 Okl. 31, 186 Pac. 464.

In *State ex rel. Bashford v. Frear*, 138 Wis. 536, 120 N. W. 216, 16 Ann. Cas. 1019, the Supreme Court of Wisconsin passed upon the same question and reached the same result, though apparently largely influenced by the fact that the executive officers of the state had uninterruptedly, for 50 years or more, acted upon the assumption that the appointee to fill a vacancy was entitled to the salary fixed by law at the time of his appointment. In Montana, by a divided court, the same result was reached in *State v. Porter*, 57 Mont. 343, 188 Pac. 375.

Upon the other hand, under the constitutional provision to the effect that the compensation of any county officer shall not be increased "after his election nor during his term of office," the Supreme Court of California, in *Larew v. Newman*, 81 Cal. 588, 23 Pac. 227, says:

"When Egenhoff took the office, the salary fixed by statute was \$350 per annum. After-

wards, and before he had resigned, the general county government act (approved March 14, 1883), went into effect, by which the salary of said office was fixed at \$350 per annum. This act enacted that its provisions for salaries 'shall not affect the present incumbents'; and also that a vacancy in an office should be filled by appointment by the supervisors, 'the appointee to hold office for the unexpired term.' Section 9, art. 11, of the state Constitution, provides that 'the compensation of any county * * * officer shall not be increased after his election, or during his term of office.' Section 1004 of the Political Code provides that 'any person elected or appointed to fill a vacancy, after filing his official oath and bond, possesses all the rights and powers, and is subject to all the liabilities, duties, and obligations, of the officer whose vacancy he fills.' We think that, under these constitutional and statutory provisions, plaintiff merely stood in the shoes of Egenhoff, and so gained no additional rights. The increased salary did not commence until after the expiration of the term for which Egenhoff had been elected, and that result could not be evaded either by Egenhoff resigning and procuring himself to be appointed, or by his resigning and allowing some other person to be appointed."

The same court applied the same rule in *Storke v. Goux*, 129 Cal. 528, 62 Pac. 68, and in *Harrison v. Colgan*, 148 Cal. 69, 82 Pac. 674, and in the latter case it is said:

"It is a settled rule regarding such restrictions that they forbid any increase during a term, regardless of the fact that different persons may successively hold for successive parts of the term, so that one who is elected or appointed after a part of such term has expired cannot have an increase made after the term began, though prior to his election or appointment."

The Supreme Court of Kentucky, in *Bosworth v. Ellison*, 148 Ky. 708, 147 S. W. 400, under a constitutional provision almost identical with our own, said:

"The rule of uniformity in compensation for like service so clearly intended would be destroyed, and the amount of compensation be controlled, not by the fixed term of office, but by the varying dates at which persons might be inducted into office. Ellison was appointed to fill out a part of Morgan's unexpired term. He had no term of office apart from the term of Morgan. He was merely occupying the place that Morgan, under his election, would have filled, except for his resignation. A term of office, when the period of the term is fixed by Constitution or statute, means the period designated by the Constitution or statute. There should be a certainty and a fixedness about the words 'his term of office.' They were not intended to depend on the mere accident of appointment or election to fill a vacancy for a month or a year. When a person is appointed or elected to fill a vacancy in a term, he merely fills out the term of his predecessor. He does not enter on a new term of office, as does a person who is elected or appointed and takes the office at the beginning of the term as fixed by law."

So, too, the Supreme Court of Illinois, in *Foreman v. People*, 209 Ill. 567, 71 N. E. 35, held that a constitutional provision forbidding a change in the compensation of judges during their continuance in office refers to the term and not to the individual, so that one elected after the passage of the act increasing the compensation, to fill an unexpired term of a judge elected before the passage of that act, was not entitled to receive the increased salary. To the same effect are: *Kearney v. Board of State Auditors*, 189 Mich. 666, 155 N. W. 510, and *Baker v. Kirk*, 33 Ind. 517. There are other cases cited by counsel, but, as we consider them persuasive only, we do not find it necessary to discuss them.

In the light of these authorities let us turn to our own Constitution. Section 13, art. 4, provides:

"The judges of the Supreme Court and the judges of the superior courts shall severally at stated times, during their continuance in office, receive * * * the salaries prescribed by law therefor, which shall not be increased after their election, nor, during the term for which they shall have been elected."

The term of office of judges of the Supreme Court is likewise fixed by the Constitution. Section 3, art. 4, provides:

"After the first election the terms of judges elected shall be six years from and after the second Monday in January next succeeding their election."

The language used is so plain and direct that we see little occasion for construction. In section 13 of article 4 the words "during their continuance in office" refer to the individuals who shall receive the salaries, and the words following, "which shall not be increased after their election nor during the term for which they shall have been elected," in the light of the specific fixing of a six-year term, must be held to refer to that term, whether filled in its entirety by the first incumbent, or successively after his demise, resignation, or impeachment by others appointed or elected to fill out his unexpired term. In other words, the Constitution first carves out a definite and fixed six-year term, and then in the later section refers to that term as an entirety, and forbids an increase of salary during its existence, without regard to the individual who may occupy it at any particular time.

Like the Supreme Court of Wisconsin, we think some weight must be given to the construction placed upon the Constitution by other departments of the state government, and it appears that the Attorney General, as early as 1909, placed a like construction upon section 8, art. 11, which refers to the compensation of county officers in somewhat similar terms, and this construction has been followed since that time. Opinions of the Attorney General 1909-10, p. 8. Moreover, the

construction which we now place upon these provisions of the Constitution is in harmony with the spirit and purpose of the construction heretofore placed by us on other provisions of the Constitution. State ex rel. Davis v. Clausen, 47 Wash. 372, 91 Pac. 1089; State ex rel. Funke v. Board of Commissioners of Pierce County, 48 Wash. 461, 93 Pac. 920; State ex rel. Reynolds v. Howell, 70 Wash. 467, 126 Pac. 954, 41 L. R. A. (N. S.) 1119; State ex rel. Younger v. Clausen, 111 Wash. 241, 190 Pac. 324; and State ex rel. Bagley v. Clausen, 111 Wash. 254, 190 Pac. 329.

Had we the time and space, we might analyze these cases and point out the reasoning therein applicable to the present question and the similarity of the principles involved; but, deeming the language of the Constitution plain and the authorities already cited abundant, we desist.

The writ will be denied.

PARKER, C. J., and HOLCOMB, FULLERTON, MAIN, BRIDGES, and MITCHELL, JJ., concur.

WASHINGTON CRANBERRY GROWERS' ASS'N v. MOORE. (No. 16418.)

(Supreme Court of Washington. Nov. 5, 1921.)

1. Monopolies \S 17(2)—Requiring growers to sell only through association held valid.

A contract between an association and a grower, requiring the latter to ship his berries only through the association, which was intended to stabilize the market and procure uniformity of returns for all growers, but which did not result in limiting the production of berries or in controlling or fixing the price in any particular market, is not void at common law as against public policy, nor does it violate Const. art. 12, \S 22, relating to monopolies and trusts, nor the Sherman Anti-Trust Act of Congress (U. S. Comp. St. $\S\S$ 8820-8823, 8827-8830).

2. Injunction \S 61(1)—Contract, fixing damages which could not be exactly estimated, held not to preclude injunction.

A provision in a contract, requiring a grower to ship all berries grown by him through an association, and fixing damages for each box of berries shipped in violation of the contract, but which recited that it was impossible at that time to estimate the actual damage occasioned by such breach, does not prevent the issuance of an injunction to restrain a breach of the contract by the grower since such provision does not conclusively establish that damages would be an adequate remedy, and the contract can be enforced if it can be deduced from the whole instrument and the circumstances that the parties intended the performance of the covenant, and not merely the payment of damages in case of breach.

3. Injunction \S 61(1)—Impossibility of specific performance does not prevent restraining breach.

The mere fact that a contract requiring the grower to ship all his berries through an association could not be specifically enforced because of the impossibility of the court's supervising the details of such enforcement does not prevent the issuance of an injunction against sale of berries to others, though that indirectly enforces the contract.

Department 2.

Appeal from Superior Court, Pacific County; H. W. B. Hewen, Judge.

Action by the Washington Cranberry Growers' Association against A. B. Moore, to restrain the breach of a contract. From judgment granting a permanent injunction, defendant appeals. Affirmed.

Welsh & Welsh, of South Bend, for appellant.

John J. Langenbach, of Ilwaco, for respondent.

MAIN, J. The purpose of this action was to restrain the breach of a contract. The trial resulted in a permanent injunction, from which the defendant appeals.

The Washington Cranberry Association is a corporation organized under the laws of this state, and is engaged in the business of marketing cranberries for those with whom it has contracts, and in some instances for independent growers. The appellant had entered into a contract with the corporation by which he agreed to deliver to it all the cranberries grown by him in Pacific county on land owned by him. The contract provides as follows:

"Witnesseth: That the grower, for and in consideration of one dollar paid him by the association, receipt of which is hereby acknowledged, and of the covenants and agreements herein contained, hereby nominates, appoints and agrees to employ the association as exclusive sales agents for the purpose of selling and marketing the entire crop of cranberries now growing or which shall be grown for shipment by the grower or for him, or in which he may have any interest as landlord or tenant, upon all those certain tracts of land situated in Pacific County, Washington, described as follows: Metes and bounds in section 27, township 16 north of range 11 west of Willamette Meridian, during the year 1916 and every year thereafter continually, provided, however that the grower may cancel this contract on the 15th day of January in any year by giving notice in writing to the association in writing at least 15 days prior to that date. Upon giving notice the grower shall, prior to said 15th day of January, pay any and all indebtedness due from him to the association and deliver his copy of the said contract to the manager of the association, and the same shall thereupon be canceled.

"The grower agrees at his own expense to cultivate, care for and harvest said crops. All fruit to be delivered by the grower at the warehouse of packing station of the association, at such place and at such time and in such manner as may be designated by the said association, which shall give notice to the grower for such delivery.

"In the event that grower shall fail to fulfill any or all of the requirements set forth in the foregoing paragraph, the association through its manager shall give to the grower written notice setting forth the default of the grower, and in event the defaults so specified shall not have been overcome or corrected within ten (10) days following delivery of such written notice to grower, it is mutually agreed that the association may consider this contract as canceled, and shall be relieved from further responsibility with regard to marketing the grower's fruit hereunder.

"The grower fully understands that the purpose, among others, of this agreement, is to maintain and increase to its greatest efficiency the association as well as the Central Selling Agency, with which it is now or hereafter may be affiliated, and to accomplish this purpose it is necessary that he shall strictly and fully comply with and perform the stipulations and agreements on his part agreed herein to be performed, and therefore he hereby stipulates and agrees that he will not sell or otherwise dispose of his said fruit to any other firm, person, or corporation other than the aforesaid association; and it is hereby further mutually agreed that, inasmuch as it is impossible at this time to fix and estimate the actual damage which will be sustained by the association in the event that the grower shall fail to abide by his agreement to market his said fruit through the association, such damages are hereby estimated and agreed upon as one dollar per box for each box of cranberries grown or sold by the grower, which sum shall be allowed in any action brought by the second party to recover damages for the breach of this agreement by the grower should the association elect, as it may elect, to bring such action.

"In consideration of its appointment as exclusive sales agent of growers' fruit crop, as above set forth, and in further consideration of the agreements made by the grower with the association as hereinbefore set forth, the association agrees to receive, ship and sell all of said fruit to the best possible advantage. To promptly remit returns therefor, less its regular charge for aforesaid services and for any other deduction, including money, due for advances for supplies furnished by the association to the grower, which indebtedness grower agrees may be treated by the association as a first lien on the proceeds from his fruit, and payment therefor to be deducted accordingly.

"In witness whereof the association has caused this contract to be signed and sealed in its name and behalf by its president and its secretary, and all other parties have hereto affixed their individual signatures. Washington Cranberry Growers' Association, C. K. Cooper, President. Attest: W. M. Rounds, Secretary. A. B. Moore."

The Columbia River Cranberry Association is a corporation engaged in the same

business as that of the Washington Cranberry Association, as is also the Oregon Cranberry Association, a corporation. After the contract above referred to was made the three corporations named entered into a contract whereby there was created what is referred to as the Pacific Cranberry Exchange, and appointed one L. S. Martin as the exclusive agent for the sale of all berries controlled by the three corporations. The cranberry exchange was composed of three members, a representative of each of the corporations. In the contract they are referred to as "the associations." It is provided that the cranberries shall be delivered f. o. b. cars at points designated by Martin, and that he agree that—

"He will immediately upon acceptance by his representative of cranberries, upon surrender of bill of lading, advance to the Pacific Cranberry Exchange, the agent of said associations, the sum of \$2.00 per box of the size heretofore indicated, said bill of lading hereinbefore mentioned shall be forwarded by said Pacific Cranberry Exchange, with draft attached to the Bank of California, of Portland, Or.

"The representatives of the said L. S. Martin shall have access to the warehouses of the associations and to the warehouses or store-rooms of the individual members of the associations, to determine the quantity, conditions and quality of berries available at any given time. A representative of the Pacific Cranberry Exchange may at any reasonable time have access to the books of the said L. S. Martin, at his offices in Portland, Or., for the purpose of checking sales and returns made by the said L. S. Martin.

"All returns shall be made to the Pacific Cranberry Exchange, the agent of said associations, on or before thirty days after the expiration of the month in which the berries are shipped to the said L. S. Martin.

"The associations agree that the said L. S. Martin shall receive a five per cent. commission on all gross sales of all berries sold by it to jobbers in the states of Oregon and Washington, and six and one-half per cent. on all other berries sold by the said L. S. Martin, and the said L. S. Martin hereby agrees to accept said commissions in full settlement for his services in the sale of said berries.

"The said L. S. Martin shall only be liable for actual negligence on his part, and no liability shall be attached to him by reason of damages caused to the associations or to individual members thereof, by strikes, embargo, shortage of equipment, or any other cause beyond the control of said L. S. Martin by use of reasonable diligence.

"It is understood and agreed that the fullest co-operation of the associations and of the Pacific Cranberry Exchange will be extended to the said L. S. Martin in the handling and marketing of said berries.

"All sales shall be made at the market price, or at a price to be mutually agreed upon by said L. S. Martin and the Pacific Cranberry Exchange."

[1] In Pacific county there were approximately 80 cranberry growers, and 60 of these had contracts with the respondent similar to the one set out. After the contract was entered into and during the year 1920 the appellant produced 1,300 boxes of cranberries and 500 of these were sold to parties other than the contract provided. As above stated, this action was brought to restrain the appellant from selling cranberries to parties other than the respondent. The appellant makes three principal contentions: First, that the contract is void at common law as against public policy; second, that it is contrary to article 12, section 22, of the Constitution of this state which is a section covering the matter of monopolies and trusts; and, third, that the contract is void as being in contravention of the Sherman Anti-Trust Act passed by the federal Congress on July 2, 1890. (U. S. Comp. St. §§ 8820-8823, 8827-8830). To determine whether the contract is void for any of the reasons stated it is necessary to read the contract in connection with the procedure under it and the result which was produced thereby. The appellant contends that a monopoly is created, trade strained, the output of cranberries limited, and prices are controlled. It may be admitted that if this is the effect of the contract and the business transacted under it, it would be void and unenforceable. The contract required the appellant to deliver all cranberries grown by him to the respondent for marketing until it should be terminated in accordance with the terms therein stated. The purposes of the contract, among others as stated therein, are to maintain to its greatest efficiency the association, as well as the Central Selling Agency with which it is now or may be hereafter affiliated. The corporation is made the exclusive sales agent for the growers' fruit crop. The evidence shows that the purpose of entering into the contracts of which the one above set out is one was as follows:

Before the corporation was organized certain growers at times put upon the market cranberries of an inferior grade, and this caused merchants to refuse to buy berries from Pacific county. In order to avoid this situation it was necessary to enter upon an advertising campaign to stimulate the use of berries and to cause berries of uniform grade to be placed upon the market. Another purpose was to secure a uniform price and avoid flooding any one market, as would be done if a large quantity of berries was shipped to a particular point at one time. Under the selling agency the quantity of berries going to any one market was regulated, and in this way tended to maintain or "hold up," as the evidence shows, the price. It was also for the purpose of enabling all growers to receive for their berries a uniform price.

There is nothing in the contract or the operation under it that limits the production or controls the price in any particular locality. While the selling agency was located in Portland the berries handled through the cranberry exchange representing the three corporations came in direct competition with eastern berries, as well as with the berries of independent growers. The cranberry association controlled about 2 per cent of the berries produced in the United States, the independent growers 32 per cent., and the American Cranberry Exchange, which was an organization operating in New York and Chicago, 65 per cent. The berries sold through the selling agency in Portland created by the three corporations sold at the market price, and the berries were shipped by the corporations to such points as Martin, the selling agent, designated. The evidence is that the price of the berries in the various markets was fixed and controlled by the American Cranberry Exchange. If the Pacific berries could not be sold for the same price as the eastern berries, the selling agent, after conferring with the members of the exchange, would sell for a lesser price. The contract and the delivery of berries under it not resulting in limiting the production, controlling or fixing of the price in any particular market, cannot be said to be void as against public policy, or under the constitutional provision above referred to or under the Anti-Trust Set.

The question as to when a contract is a restraint of trade was fully discussed in *Fisher Flouring Mills Co. v. Swanson*, 78 Wash. 649, 137 Pac. 144, 51 L. R. A. (N. S.) 522. It was there recognized that it was difficult to state the rule which would cover all cases, and that the circumstances of each particular case and the situation of the parties in addition to the effect on the public welfare must be considered in determining the validity of a contract. It was there said:

"The fact that the circumstances of each particular case and the situation of the parties, in addition to the effect on the public welfare, must be considered, and that of all circumstances the dominant consideration is the welfare of the public makes it difficult to state by definition, except in the broadest way, any rule for determining the validity of any such contract as that here involved. Perhaps the following is as near a complete definition as we can formulate from the adjudicated cases: Contracts fixing prices as incidental to some main contract, and involving less than a controlling part of a given commodity in a given market, not proceeding from, nor tending to create, or to maintain a monopoly, will be sustained when the restriction is, under the circumstances of the particular case, reasonable in reference to the interests of the parties, and reasonable in reference to the interests of the public; that is to say, when the price fixed is fairly necessary to the protection of the covenantees, and

fair to the public, in that it furnishes only a reasonable profit to the contracting parties. Lacking these elements, such contracts are invalid as contrary to public policy."

In *Finck v. Schneider Granite Co.*, 187 Mo. 244, 86 S. W. 213, 106 Am. St. Rep. 452, it was stated that in determining the validity at common law of a combination claiming to be in restraint of trade the true test is "whether they afford fair and just protection to the parties [thereto], or whether they are so broad as to 'interfere with the interests of the public.'" In *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122, in determining whether a contract was void at common law or under the Anti-Trust Act the test applied was whether there was a reasonable restraint of trade, "considering whether the restraint is such only as to afford a fair protection of the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy."

A large number of cases cited in the briefs where contracts have been held void as being a restraint of trade, but it does not seem necessary to review these in detail. So far as we are informed, no case holds that a contract is void which does not limit the production or control or fix the price in a particular market. As above pointed out the contract here under consideration, considered in connection with the evidence showing the operation under it, neither limits the production nor fixes the price. The cases of *Mill & Lumber Co. v. Hayes*, 76 Cal. 387, 18 Pac. 391, 9 Am. St. Rep. 211, and *Cravens v. Carter-Crume Co.*, 92 Fed. 479, 34 C. C. A. 479, are cases where the combinations there in question limited the production and increased the price, and are therefore not in point in this case.

[2, 3] The next question which arises is whether the respondent is entitled to injunctive relief. The appellant contends that there should be recourse only for damages. The purpose of the action was not to enforce specific performance directly, but to accomplish that indirect result by restraining the appellant from selling berries to any other person than the respondent. It will be admitted that if the contract by its terms shows an intent to rely upon damages, or if there is an adequate remedy at law, that injunctive relief cannot be had. The contract provides that to accomplish its purpose it is necessary that the appellant strictly and fully comply with and perform the stipulations and agreements on his part. While the

contract provides for damages, it also recites that it is impossible to fix and estimate the actual damage sustained in event the grower shall fail to abide by the agreement, and the damages are only estimated. The contract, we think, fails to show an intent of the parties that in the event of breach the only recourse would be an action for damages. There was not an adequate remedy at law because an action for damages would not be sufficient to protect the respondent and the other growers which it represented in accomplishing the purposes of the undertaking. Those purposes are fully set out above and need not here be repeated. The fact that the contract is one which could not be specifically enforced in a court of equity by reason of the fact that it would require the performance of continuous duties does not prevent the court from entering an injunction restraining its breach, which indirectly accomplishes the same result. *Western Union Telegraph Co. v. Union Pacific Railway Co. et al.* (C. C.) 3 Fed. 423; *Chicago & Alton Railway Co. v. N. Y. L. E. & W. R. Ry. Co.* (C. C.) 24 Fed. 516; *American Electrical Works v. Varley Duplex Co.*, 26 R. I. 295, 58 Atl. 977, 3 Ann. Cas. 975. In the case last cited, upon this question it was said:

"The respondent, however, contends that the injunction should not be granted, because it would result in compelling indirectly a specific performance of the contract in the case, where the court would not directly order such performance. We do not think that this contention is in accord with the best and most modern authorities. The following cases, amongst others which might be cited, sustain the complainant's position [citing numerous authorities].

"A very clear and well-considered statement of the law upon the question under consideration according to the most modern authorities is to be found in the opinion of Judge Lowell in *Singer Sewing Machine Co. v. Union But. & Em. Co.*, supra, in which he says: 'The two points of law are not without difficulty. The relief asked is specific performance and injunction. It is argued with great ability by the defendants that the complainant is not entitled to specific performance, and that therefore it cannot have an injunction which is merely auxiliary. Granting the premises, I am not prepared to concede the conclusion. If the court cannot order a contract for the making of buttonhole machines to be specifically performed by reason of the impossibility of superintending the details of such a business, it does not follow that the bill may not be retained as an injunction bill. It was formerly thought that an injunction would not be granted to restrain the breach of any contract unless the contract were of such a character that the court could fully enforce the performance of it on both sides.' Judge Lowell here examines the authorities and the development of the modern rule, and then proceeds: 'I think the fair result of the later cases may be thus expressed: If the case is one in which the negative remedy of injunction will do substantial justice be-

tween the parties by obliging the defendant either to carry out his contract or lose all benefit of the breach, and the remedy at law is inadequate, and there is no reason of policy against it, the court will interfere to restrain conduct which is contrary to the contract, although it may be unable to enforce a specific performance of it."

The fact that the contract provides that in case of breach the damage shall be as there admitted does not of itself conclusively establish that the parties contemplated that upon the breach thereof damages would be an adequate remedy. It is a question of intention in each case, to be deduced from the whole instrument and the circumstances; and, if it appear that the performance of the covenant was intended, and not merely the payment of damages in case of breach, the contract will be enforced. *Diamond Match Co. v. Roebber*, 106 N. Y. 473, 13 N. E. 419, 60 Am. Rep. 464; *Harris v. Theus et al.*, 149 Ala. 133, 43 South. 131, 10 L. R. A. (N. S.) 204, 123 Am. St. Rep. 17; *Wilkinson v. Colley*, 164 Pa. 35, 30 Atl. 286, 28 L. R. A. 114; *Heinz v. Roberts*, 135 Iowa, 748, 110 N. W. 1034; *Ropes v. Upton*, 125 Mass. 258; *Zimmermann v. Gerzog*, 13 App. Div. 210, 43 N. Y. Supp. 339.

Considering the terms of the contract and all the attendant circumstances, we are of the opinion that it was not intended by the parties thereto that the damages claimed therein should be the only price of the appellant's breach of the agreement, and that the remedy at law would not be adequate.

The judgment will be affirmed.

PARKER, O. J., and MITCHELL, TOLMAN, and BRIDGES, JJ., concur.

STATE ex rel. CITY OF YAKIMA v. KUYKENDALL et al. (No. 16705.)

(Supreme Court of Washington. Oct. 31, 1921.)

Waters and water courses §194—Facts held not to justify requiring water company to substitute iron for wooden main, or to place wooden main outside roadway.

Even if Rem. Code 1915, § 8626—70, authorizing the Public Service Commission (now the Department of Public Works) to direct change, whenever it shall find that changes in a water system ought to be made to promote the security or convenience of the public, gives jurisdiction to interfere with construction in streets made in accordance with franchise, held that the facts developed by the evidence did not justify ordering a water company to substitute an iron for a wooden main in a street about to be paved, or to place the wooden main outside the roadway proper, on the theory of

frequent leaks in the wooden main, necessitating the tearing up of the pavement.

Department 2.

Appeal from Superior Court, Thurston County; John M. Wilson, Judge.

Application of the City of Yakima to E. V. Kuykendall and others, constituting the Public Service Commission (now the Department of Public Works), to order the Pacific Power & Light Company to remove a wooden main from a street, was dismissed. On writ of review, on relation of such city, such action was affirmed by the superior court, and relator appeals. Affirmed.

Thomas E. Grady, of Yakima, and Vance & Christensen, of Olympia, for appellant.

Lindsay L. Thompson and Raymond W. Clifford, both of Olympia, and John A. Laing and Henry S. Gray, both of Portland, Or., for respondents.

MACKINTOSH, J. The Pacific Power & Light Company, a public service corporation, operating a water plant in Yakima, some 13 or 14 years ago laid a 12-inch wooden pipe on Sixteenth avenue, in that city. In 1920 the city became desirous of paving Sixteenth avenue, and requested the power company to remove the wooden main, and either substitute therefor an iron main, or, in the alternative, place the wooden one in the parking strip adjoining the roadway proper, for the reason that, as the city claimed, the wooden main frequently leaked, and in order to make repairs it will be necessary to tear up the pavement, with resulting injury thereto. The power company refused to comply with the city's demand, and application was made to the Public Service Commission (now the department of public works) for the purpose of compelling the power company to accept one of the two alternative changes. On the hearing before the department the application was dismissed, and thereafter a writ of review was sued out to the superior court, where the action of the department was affirmed, and from this judgment of the superior court an appeal has been brought here.

Section 70 of chapter 117, Laws 1911, Rem. Code, § 8626—70, under which the proceeding has been brought, is as follows:

"Whenever the commission shall find, after hearing had upon its own motion or upon complaint, that repairs or improvements to, or changes in, any gas plant, electrical plant or water system ought to be made, or that any additions or extensions should reasonably be made thereto, in order to promote the security or convenience of the public or employees, or in order to secure adequate service or facilities for manufacturing, distributing or supplying gas, electricity or water, the commission may enter an order directing that such reasonable repairs, improvements, changes, additions,

or extensions of such gas plant, electrical plant or water system be made."

The department of public works found that the wooden pipe was reasonably sufficient for the purpose of carrying water, and furnished adequate service and facility, and further found that it had no authority to order a change in a pipe which had been laid under a franchise, even though it might possibly, on account of its leaking, be a detriment to the pavement, by weakening the foundations, so that the pavement itself might be damaged, or occasion injury to persons using it.

On the one hand, it is claimed that the section which we have quoted gives the department of public works no jurisdiction in cases of this kind, for the reason that the section is concerned primarily with the public service furnished by the company, and with the contract or relations between the company and the public in respect to the service. In other words, that the department of public works is not granted the power to modify a franchise relating to the manner of occupying public streets or to require changes in equipment except such changes as are reasonably necessary to furnish adequate service, or to provide safety for the public or employees in the furnishing of such service. On the other hand, it is claimed that the language of the act, "in order to promote the security or convenience of the public or employees," gives the department jurisdiction to determine controversies between a municipality and a public service corporation in regard to the character of the equipment it must maintain on public streets in order to promote the security and convenience of the public. As we view the record in this case, it is not necessary to determine whether the department of public works has jurisdiction or not, as to pass upon the question whether the public functions of the utility are here involved, or whether it is necessary, in order for the department to have jurisdiction, that the matter be one of more than the violation of some private or contractual right, even though it may be one of public interest.

From a reading of the testimony introduced before the department, and the department's findings thereon, it satisfactorily appears that the condition of the wooden pipe complained of in no event necessitated its removal in order to promote the security or convenience of the public, giving that phrase the full meaning contended for by the city. The testimony is clear that the leaks which have heretofore taken place in the avenue were, for the most part, those which were occasioned by another main, the use of which is now discontinued, or those in service pipes which were occasioned by the manner of their connection with the 12-inch main; and that these connections now have been lowered and attached in a different manner and

protected by insulation, and that since the installation of the new system of connections the number of leakages has diminished to a negligible quantity. The evidence is that under the old manner of connections leakages would have just as frequently occurred had the main been of metal. It furthermore appears that the main is so located that in the event leaks should occur they could be taken care of without any serious interference with the hard surface pavement which it is proposed to construct. With the record in this condition, even assuming the department of public works has jurisdiction to interfere with construction in city streets made in accordance with the franchise, still the facts do not justify the action asked by the city, and the conclusions of the department and of the superior court are affirmed.

PARKER, C. J., and MAIN, HOLCOMB, and HOVEY, JJ., concur.

STATE ex rel. GILLESPIE v. KUYKEN-DALL, Director of Public Works.
(No. 16649.)

(Supreme Court of Washington. Nov. 1, 1921.)

1. Pleading \S 214(1)—Facts pleaded admitted by demurrer.

By demurrer to pleading all facts pleaded therein are admitted.

2. Prohibition \S 20—Director of public works held to have exceeded jurisdiction in granting certificate to auto transportation companies.

Application and affidavit for prohibition to the director of public works held to show that he is acting and threatening to act without or in excess of his jurisdiction, by granting certificates to operate auto transportation companies for transporting persons or property for compensation without requiring the owner or operator to first procure liability and property damage insurance from a company licensed to make liability insurance in the state, or the surety bond of a company licensed to write surety bonds in the state, as directed by Laws 1921, p. 341, \S 5.

3. Prohibition \S 10(1)—Lies where officer is acting and threatening to act without jurisdiction.

Where an officer is acting and threatening to act without or in excess of his jurisdiction, prohibition lies.

Department 2.

Appeal from Superior Court, Thurston County; John M. Wilson, Judge.

Application by O. W. Gillespie for writ of prohibition against E. V. Kuykendall, Director of Public Works of the State of Washing-

ton. From an adverse judgment, relator appeals. Reversed and remanded.

Troy & Sturdevant, of Olympia, for appellant.

L. L. Thompson and Raymond W. Clifford, both of Olympia, and Van Dyke & Thomas, of Seattle, for respondent.

HOLCOMB, J. This is an appeal from a judgment of the lower court sustaining a demurrer to the application and affidavit of relator for a writ of prohibition, and restraining the director of public works from accepting liability policies and surety bonds from one Charles Sumner Best, and a concern called the Automobile Insurance Exchange.

It is averred in relator's affidavit, among other things, that respondent, as the duly appointed, qualified, and acting director of public works, is vested with the sole jurisdiction to enforce the provisions of chapter 111 of the Session Laws of 1921, relating to the regulation of motor-propelled vehicles in the transportation of persons and property for compensation over any highway, and that section 5 of that law provides that the owner or operator of a motor-propelled vehicle coming within the terms of such law must furnish security for the payment of recoveries up to certain amounts, on account of personal injuries or property damages, by filing with the director "liability and property damage insurance from [an insurance] company licensed to make liability insurance in the state of Washington or a surety bond of a company licensed to write surety bonds in the state of Washington" on each motor-propelled vehicle. After referring to certain provisions of the Insurance Code of the state of Washington, it is further averred that the director has ruled and announced that as full compliance with section 5, chapter 111, supra, he will permit and allow any owner or operator to file with him an original automobile policy issued to the owner or operator under and by reason of classification 13½ of section 6059-83, Rem. Code, being motor vehicle insurance, providing there is indorsed on such policy certain provisions regarding the liability thereof, and not compel the giving of liability insurance as provided in section 5, chapter 111, supra, by a company licensed to write liability insurance in the state of Washington. The affidavit further avers that this relator is a subscriber to a certain instrument, a copy of which is attached to his affidavit, and made a part thereof, by the terms of which Charles Sumner Best & Co. was appointed attorney in fact, with certain powers given under certain restrictions; that Best assumed the name of the Automobile Insurance Exchange as the name to be used upon policies of insurance to be issued; that the Automobile Insurance Exchange is not a company licensed to do busi-

ness in the state of Washington, and was no articles of incorporation or charter; that the Automobile Insurance Exchange and Best, as the attorney in fact of this subscriber, and relator, has issued a number of automobile policies under subdivision 13½ of section 6059-83, and the director has agreed to, and will, accept such automobile policies so issued out of the exchange, as full compliance with section 5, chapter 111, supra; that the exchange has no right or license to write liability insurance, nor has it any right or license to write the surety business under section 5, being subdivision 5 of section 6059-83, as required by section 5, chapter 111, supra; that the threatened action of the director in taking such character of policies from Best or the Automobile Insurance Exchange, not being issued by a company licensed to write liability insurance or surety bonds in the state of Washington, is without and in excess of jurisdiction in the director by the provisions of chapter 111 supra; that the threatened action on behalf of the director will be oppressive to the relator and that plain, speedy, and adequate remedy can only be had by writ of prohibition.

In the instrument subscribed by relator and attached to his affidavit as "Exhibit A," denominated "Authority from the Subscribers," the only authority granted to issue insurance is as follows:

"To accept applications for and to make and issue policies of insurance on subscribers' property against loss or damage from any casualty, according to the printed and written conditions of the policy form of the Automobile Insurance Exchange, and motor vehicle bonds as required by chapter 57, Session Laws of 1915, on form prescribed by statute, subject to the control of the subscriber as hereby provided for, and to make us severally liable for an amount not exceeding the amount herein set forth; provided no policy of insurance shall be issued except to a subscriber of the Exchange or to a company or association by way of reinsurance as provided in the by-laws."

An alternative writ of prohibition was issued, made returnable June 27, 1921, and respondent appeared by the Attorney General on the return day, and demurred to the application and showing on behalf of the relator. No answer or return to the alternative writ of prohibition was made other than by demurrer. The respondent stood upon his demurrer. On July 9, 1921, the court entered an order sustaining the demurrer and dismissing the action. The only assignment of error on the part of appellant is that the court erred in sustaining the demurrer and dismissing the action.

[1] In the briefs it is argued by respondent as if the case were here on a full return of facts, which is not the case. By standing upon the demurrer respondent admitted all of the allegations of fact in the complaint or affidavit, and that, among other things, avers

that the Automobile Insurance Exchange and Charles Sumner Best have no license to write the kind of insurance and surety bonds that the Director of Public Works has announced he will accept. It is also averred that the Automobile Insurance Exchange is not a company licensed to do business in the state of Washington, and has no articles of incorporation, or charter.

Section 5, chapter 111, Laws of 1921, directs and empowers the director of public works, in granting certificates to operate to any auto transportation company for transporting persons or property for compensation, to require the owner or operator to first procure liability and property damage insurance from a company licensed to make liability insurance in the state of Washington, or the surety bond of a company licensed to write surety bonds in the state of Washington, on each motor-propelled vehicle used or to be used in transporting persons and property for compensation, in an amount not to exceed \$5,000 for any recovery for personal injuries by one person, and not less than \$10,000 and such additional amount as he shall determine for the persons receiving personal injury by reason of one act of negligence, and not to exceed \$1,000 for damage to property of any person other than the insured; and to maintain such liability and property damage insurance or surety bond in force, etc.

[2, 3] There being no return or answer to the alternative writ of prohibition showing otherwise than as alleged in relator's affidavit and application, and the facts alleged being admitted by the demurrer, it is manifest that, if such facts are true, the director is acting and threatening to act without or in excess of his jurisdiction. In such case prohibition always lies.

Under the state of the record we have no option but to reverse the judgment and remand it, with instructions to overrule the demurrer, and require respondent to make return and answer to the alternative writ of prohibition, and for further proceedings thereunder.

Reversed and remanded.

PARKER, C. J., and MAIN, MACKINTOSH, and HOVEY, JJ., concur.

NORTH COAST POWER CO. v. KUYKENDALL et al. (No. 16643.)

(Supreme Court of Washington. Nov. 17, 1921.)

1. Electricity ⇨—Complainant has burden of proof where complaint of rates is made after tariff has become effective.

Where complaint of rates of company furnishing electricity is not made till after its

new tariff has gone into effect, the burden of showing them unreasonable is on complainant.

2. Electricity ⇨—Rates, in view of net profits, not excessive.

Tariff rates of a public service company furnishing electricity to diking districts, yielding only 4.12 per cent. net earnings on the company's capital devoted to the business of such districts, are not excessive.

3. Electricity ⇨—Rates held not higher than value of service.

That rates of a public service company furnishing electricity to diking districts were not higher than the value of the services, within the rule that if they are it may be compelled to render service at a loss, *held* shown by the evidence.

4. Electricity ⇨—How ability to pay rates is determined stated.

The measure of ability of diking districts to pay increased rates of a company furnishing them electricity, within the rule that rates of a public service company should not exceed the ability of the consumer to pay, though the company be compelled to render service at a loss, is their actual financial resources, and not the estimate of their managing officers in providing for expenses without anticipating a raise in rates.

5. Electricity ⇨—Rule that a company making fair return on total capital may be required to furnish a given class at a loss held inapplicable.

The rule that where the general business of a public service company is making a fair return on its total capital invested it may be obliged to furnish a given class with service at less than cost *held* inapplicable in favor of diking districts to which a company is furnishing electricity.

6. Electricity ⇨—Whether rates are fair not affected by business being solicited or offered.

Whether the rates of a company furnishing electricity to diking districts are fair cannot be affected by the question of whether it solicited the business or whether they spontaneously offered it.

Department 2.

Appeal from Superior Court, Thurston County; D. F. Wright, Judge.

On complaint by diking districts of tariff for electricity, filed by the North Coast Power Company, E. V. Kuykendall and others, constituting the Public Service Commission (now the Department of Public Works), made an order adverse to the company, which on writ of review taken by the company was reversed by the superior court, and from the judgment of the court, the Commission appeals. Affirmed.

Lindsay L. Thompson, Raymond W. Clifford, and Nat U. Brown, all of Olympia, and McKenney & Fisk, of Kelso, for appellant.

Hayden, Langhorne & Metzger, all of Tacoma, for respondent.

MACKINTOSH, J. In 1915, 1917, 1918, and 1919, the respondent, North Coast Power Company, entered into contracts with certain diking districts and diking improvement districts in Cowlitz county, Wash., to furnish electric current to the districts at rates fixed in the contracts. The respondent is a public service corporation engaged in furnishing communities along the line of the Northern Pacific Railway, between Tenino and Kalama in this state, with electric power. The diking districts are municipal corporations whose purposes are to render fit for cultivation certain lands which are subject to overflow by the Columbia river. The operation of these districts has been largely successful, and as a result there has been a great increase in the value of the lands affected by such operations. The rates fixed in the contracts were to prevail for a period of 10 years.

On November 19, 1919, the respondent filed a tariff with the Public Service Commission (now the department of public works) which tariff provided for rates largely in excess of those then in effect and provided in the contracts. This new tariff became effective on December 20, 1919. On February 14, 1920, the districts complained to the public service commission of the new rates, and upon a hearing on the complaint it was determined by the commission that the new rates were unreasonable, and the respondent was ordered to furnish power to the districts at rates identical with those provided for in the contracts. A writ of review was taken by the respondent to the superior court, which reversed the order of the commission and held that the new tariff was effective; that the contract rates had been extinguished by the publication of the new tariff, and further held that the new tariff rates were just, fair, reasonable, and sufficient, and that the rates ordered by the commission were not just, fair, reasonable, or sufficient. From that judgment the commission (hereafter referred to as the department of public works) has taken this appeal.

This court, in the case of the North Coast Power Co. v. Public Service Commission, 194 Pac. 587, had before it the same tariff which is the basis of this present action, and there held that the rates fixed in the tariff became effective 30 days after the filing of the tariff, and that the contracts were thus terminated, the rates provided therein becoming inapplicable. The question, therefore, here is the narrow one as to whether the rates established by the tariff filed November 19, 1919, are just, fair, reasonable, and sufficient.

[1] In the case of *State ex rel. Seattle v.*

Public Service Commission, 76 Wash. 492, 136 Pac. 850, it was determined that where a tariff had been filed by a public service corporation, and where, under section 8626—82, Rem. Code, complaint is made before the effective date of the tariff, the burden of proof is upon the public service corporation to show that the proposed rates are just, fair, reasonable, and sufficient, but that where complaint is not made until after the new tariff had become effective, that the burden of proof was shifted, and the complainant is compelled to show that the tariff rates are unreasonable.

So we may start the consideration of the testimony in this case with the burden upon the districts to make showing of the unreasonableness of the tariff of November 19, 1919. The testimony establishes this situation: That the respondent is devoting to the business of these districts property which is of the value of \$67,580, and this, therefore, is the amount upon which the respondent's return must be computed. It is further shown that under the tariff filed November 19, 1919, the gross revenues of the respondent from its business with the districts for 1919 would have been \$7,847.74, and that the cost of doing this business amounted to \$5,063.63, making a net profit of \$2,784.11, or an earning of 4.12 per cent. upon the capital in use. The testimony further shows that under the rates provided for in the contracts (which rates were re-established by the department's order), the gross earnings from the business done by the respondent with the districts in 1919 was \$3,241.46. This, compared with the cost to the respondent of doing the business of \$5,063.63, made a loss to the company thereon of \$1,822.07, or 3.70 per cent. of the capital in use.

[2-4] Those figures on their face must be convincing that the new rates were not exorbitant, and the profits shown thereby would not constitute an unreasonable earning, and also that the contract rates, re-established by the department, were unjust, unfair, unreasonable, and insufficient, and that the department was in error in setting aside the tariff of November 19, 1919, unless there are other facts which justify the establishment of unremunerative rates in this particular case. In certain cases public service corporations may be compelled to render service at a loss. Rates should not be higher than the value of the service rendered, nor exceeding the ability of the consumer to pay. *Puget Sound Electric Ry. v. Railroad Commission*, 65 Wash. 75, 117 Pac. 739, Ann. Cas. 1913B, 763. In this case the proof is convincing that the service is worth its cost. The testimony shows that the value of the property of the districts served has increased manifold by reason of the use of respondent's power, and that principally on

account of this increase in the value of the property the districts are amply able to bear the tariff rates. The argument that, the districts being municipal corporations and having provided for their expenses in September, 1919, without anticipating a raise in rates, no funds would be available to meet the increase, is fallacious, for the reason that the measure of the districts' ability to pay is not the estimate of their managing officers, but their actual financial resources.

[5] Another exception that in some cases compels the furnishing of service at a loss is where the general business is making a fair return upon the total capital invested; the company may be obliged to furnish a given class with service at less than cost, but this exception does not apply here. *State ex rel. Seattle v. Public Service Commission*, 107 Wash. 17, 180 Pac. 913; *Willcox v. Consol. Gas. Co.*, 212 U. S. 19, 29 Sup. Ct. 192, 53 L. Ed. 382, 15 Ann. Cas. 1034, 48 L. R. A. (N. S.) 1134.

The case of *Puget Sound Electric Ry. v. Railroad Commission*, supra, recognizes this right of certain users of public service to that service at the corporation's loss, where the total business of the corporation produces a sufficient return on the investment. In this case there is no evidence that the respondent makes any adequate net earning on its entire business.

[6] We will now notice a few minor questions presented in this case. One of these is that the districts have made a contribution towards the construction of the respondent's plant, and that the respondent voluntarily solicited the business of the districts. The testimony shows that the figures we have hereinabove set out do not take into consideration these contributions, and the figures showing the capital investment exclude the amount donated by the districts. The question whether the rates are just, fair, reasonable, and sufficient cannot be affected by the consideration of the question whether the respondent solicited the business, or whether it received it by the spontaneous offer of the districts.

It is next claimed that the power which was being furnished was surplus power. The evidence does not support this claim.

From the whole record we are satisfied that the lower court was correct in setting aside the order of the department, which, in the circumstances, was arbitrary and capricious, and the judgment of the lower court, re-establishing the rates fixed by the tariff of November 19, 1919, is hereby affirmed.

PARKER, C. J., and MAIN and HOVEY, JJ., concur.

STATE ex rel. LADD & TILTON BANK v. SUPERIOR COURT FOR LEWIS COUNTY. (No. 16609.)

(Supreme Court of Washington. Nov. 16, 1921.)

Certiorari \S 16—Order granting motion to require third party to be made party not reviewable.

An order granting a motion to require a third party to be made a party to the action is not reviewable in the Supreme Court by certiorari in advance of final judgment entered in the case.

En Banc.

Action by the Ladd & Tilton Bank against Frank Rosenstein. An order was made granting a motion of defendant to require R. M. Wade & Co. to be made a party to the action, and application was made by the plaintiff for a writ of certiorari to the Superior Court for Lewis County (John M. Wilson, judge thereof) to review such order. Writ denied.

Hull & Murray, of Chehalis, for plaintiff.
C. A. Studebaker, of Chehalis, for respondent.

HOLCOMB, J. The relator brought the original action as plaintiff against one Frank Rosenstein, as defendant, in the superior court of Washington for Lewis county, upon two trade acceptances for \$1,258.85 each, for the amount thereof, with protest fee, drawn upon the defendant Rosenstein, accepted by him, and thereafter assigned by R. M. Wade & Co., the drawer, to plaintiff, Ladd & Tilton Bank. Payment of the trade acceptances to Ladd & Tilton Bank was refused by Rosenstein, and they were protested.

After the service of summons and complaint in the original action, defendant appeared and moved for an order permitting the defendant to make R. M. Wade & Co., a corporation, a party plaintiff or defendant in the action, and based the same upon an affidavit of the defendant Rosenstein to the effect that the trade acceptances were for two motor tractors sold and delivered to Rosenstein by R. M. Wade & Co., upon certain alleged guaranties which had been breached, all of which R. M. Wade & Co. knew, and it was alleged that Ladd & Tilton Bank, a corporation, was aware of the guaranties of R. M. Wade & Co., a corporation, and of the failure of the guaranties, and that Ladd & Tilton Bank well knew at the time of the existence of the contract between R. M. Wade & Co. and defendant Rosenstein, and of all rights, duties, and equities existing between those parties, and purchased the two trade acceptances with such knowledge.

and with a secret understanding whereby R. M. Wade & Co. agreed to stand back of and protect Ladd & Tilton Bank against any loss which the plaintiff might incur on such trade acceptances; and that R. M. Wade & Co. and Ladd & Tilton Bank were in collusion to compel defendant Rosenstein to pay the amount of the trade acceptances to Ladd & Tilton Bank, as though Ladd & Tilton Bank were an innocent party. It was also deposed in the affidavit that, unless R. M. Wade & Co. be made a party to the action, defendant Rosenstein might be required to pay the trade acceptances, and also pay damages to the persons to whom such tractors had already been sold, to the loss of defendant Rosenstein in not less than the sum of from \$5,000 to \$6,000, all of which would be occasioned by the fraud of R. M. Wade & Co. and due to its failure to keep its contract, and to the fact that R. M. Wade & Co. had induced plaintiff to bring an action as though plaintiff were an innocent party, when in fact plaintiff was not an innocent party, but had full knowledge of all matters and things alleged by defendant, and had such knowledge at the time the trade acceptances came into its possession, and that plaintiff Ladd & Tilton Bank was not the holder of such paper in good faith.

The respondent judge, on June 8, 1921, made an order reciting that the motion of defendant to require R. M. Wade & Co., a corporation, to be made a party to the action, came on regularly for argument, and having taken the matter under advisement he found that R. M. Wade & Co., a corporation, is a proper and necessary party to the full and complete determination of the action, and ordered that R. M. Wade & Co., a corporation, be made a party plaintiff or defendant.

This action is before us on an application for a writ of certiorari to review the order of the respondent judge, and the return of the respondent thereto, setting forth that the order was made upon the motion and affidavit, and upon a hearing of both parties. We have no appearance or brief on behalf of the adverse party to the original suit, or respondent in this proceeding.

Relator relies upon Rem. & Bal. Code, §§ 271½, 272, 273, and 267, and our late decision in *State ex rel. Alaska-Pacific Navigation Co. v. Superior Court*, 194 Pac. 412. In the case above cited the procedure seems not to have been questioned.

We have held in *State ex rel. Langley v. Superior Court*, 73 Wash. 110, 131 Pac. 482, that such an order as the one here involved differs "in no respect from interlocutory orders generally. * * * As such, they are not reviewable in this court in advance of the final judgment entered in the cause, and must be reviewed here, if reviewed at all,

on an appeal or writ of review taken from the final judgment." This case was reaffirmed in *State ex rel. Rutter v. Superior Court*, 91 Wash. 304, 157 Pac. 684. On the authority of these cases, the writ must be denied.

Denied.

PARKER, O. J., and TOLMAN, MITCHELL, HOVEY, MACKINTOSH, BRIDGES, FULLERTON, and MAIN, JJ., concur.

REED v. TACOMA RY. & POWER CO. (No. 16691.)

(Supreme Court of Washington. Nov. 16, 1921.)

1. Street railroads \S 98(12)—Error of judgment not necessarily negligence on part of driver.

Error of judgment on the part of the driver of an automobile in believing, when suddenly confronted with danger, that she had time to cross a car track, was not necessarily negligence; the correct test being whether she acted as a reasonably prudent person would have acted under similar circumstances.

2. Street railroads \S 118(11)—Instruction allowing consideration of familiarity with tracks and streets, in determining contributory negligence, held incorrect.

In an action for injuries in a collision between an automobile and defendant's street car at a street intersection, court properly refused plaintiff's request to instruct that error of judgment is not necessarily negligence, where the request further stated, "and in this connection you have the right to take into consideration her familiarity, or lack of familiarity, if any has been shown, with the location and situation of the defendant's street car tracks and the several streets at the place of the accident"; such matter having nothing to do with the subject.

3. Street railroads \S 118(1)—Instruction on duty of motorman held confusing.

In an action for injuries in a collision between an automobile and defendant's street car, an instruction concerning the duty of the motorman on approaching the crossing where the accident took place held confusing and erroneous.

4. Trial \S 279—Exceptions to instruction held sufficient without stating grounds.

An exception reading, "The plaintiff excepts to the instruction given by the court to the jury as follows," and then quoting the instruction, was sufficient without giving the reasons or grounds therefore, under Rem. Code 1915, § 384.

Department 1.

Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by B. F. Reed against the Tacoma Railway & Power Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Williamson, Freeman & Broenkow, of Tacoma, and Warren H. Lewis, of Seattle, for appellant.

F. D. Oakley, of Tacoma, for respondent.

BRIDGES, J. This is a personal injury case. It has once before been in this court. *Reed v. Tacoma Railway & Power Co.*, 110 Wash. 334, 188 Pac. 409. The general facts are stated in that case, where the judgment of nonsuit was reversed. At the second trial there was a verdict for the defendant, and the plaintiff has appealed from a judgment dismissing the action.

For the purpose of our discussion here, it will not be necessary to say more than that the plaintiff was in his automobile, being driven by his daughter. At about midnight they were driving northerly on that part of Yakima avenue which goes through Wright Park. That avenue intersects Division avenue, from which at this point starts North First street. The street car tracks come from the west on Division avenue, and at the general intersection leave that avenue and run northeasterly on First street. The driver of the automobile testified that she did not see the oncoming street car till she was very close to the track; that she suddenly found herself in a position of danger; that in the emergency she decided she was too close to the car track to stop, and that she concluded the best thing to do was to attempt to get across the tracks before the street car, which was close by, could strike her; that she was unable to get across in time to avoid a collision; that the street car hit the rear portion of the automobile, and plaintiff, her father, was injured and the automobile damaged.

The appellant complains of the following instruction given by the court to the jury:

"You are further instructed that if the plaintiff's daughter thought she had time to drive upon the tracks of the defendant and off of them again before the car of the defendant would reach her, and did not have sufficient time so to do, then it was an error in judgment on the part of the plaintiff's daughter, and the plaintiffs cannot recover, and your verdict must be for the defendants."

[1] This instruction does not correctly state the law. Error of judgment is not necessarily negligence. The correct test in cases of this character is, Did the person act as a reasonably prudent person would have acted under similar circumstances? The mere fact that one errs in judgment is not conclusive proof that he did not act as a reasonably prudent person would have acted under like circumstances. The driver of the automobile admitted that, in the emergency, she thought

she would be safer in making an effort to get across ahead of the street car. It will not do to say that simply because her judgment proved to be bad she did not act as a reasonably prudent person would have acted under the circumstances. One may be mistaken as to the best course to pursue without being guilty of negligence as a matter of law. Mistaken judgment is not necessarily negligence.

On page 216, *Shearman & Redfield on Negligence* (6th Ed.) the rule is stated as follows:

"Care must be proportioned to the circumstances. In either case the plaintiff is bound to take that degree of care which persons of ordinary care and prudence are generally accustomed to use under similar circumstances, but no more. It is not enough that he should use 'his own best judgment.' That is not the proper test. Nor, on the other hand, is it always necessary 'to exercise the best judgment, or to use the wisest precaution.'"

In the case of *Berg v. City of Milwaukee*, 83 Wis. 599, 53 N. W. 890, the court said:

"In the same connection the court charged the jury, in effect, that if the plaintiff was at the time 'using his best judgment,' and it turned out that in doing so he had fallen into error, that was 'not to be imputed to him as negligence.' This made the plaintiff's best judgment the standard of care which he was required at the time to exercise, instead of the well-established standard fixed by the law."

In the case of *Lent v. N. Y. Cent. & H. R. Co.*, 120 N. Y. 437, 24 N. E. 653, the court said:

"The test of contributory negligence or want of due care is not always found in the failure to exercise the best judgment, or to use the wisest precaution. Some allowance may be made for the influences which ordinarily govern human action, and what would under some circumstances be a want of reasonable care might not be such under others."

In the case of *The Germanic*, 196 U. S. 589, 25 Sup. Ct. 317, 49 L. Ed. 610, the court said:

"But it is a mistake to say, as the petitioner does, that if the man on the spot, even an expert, does what his judgment approves, he cannot be found negligent. The standard of conduct, whether left to the jury or laid down by the court, is an external standard, and takes no account of the personal equation of the man concerned. The notion that it 'should be coextensive with the judgment of each individual' was exploded, if it needed exploding, by Chief Justice Tindal, in *Vaughan v. Menlove*, 3 Bing. N. C. 468."

The following cases support the doctrine announced: *Wolff Manufacturing Co. v. Wilson*, 152 Ill. 9, 38 N. E. 694, 26 L. R. A. 229; *McKenna v. Omaha & C. B. Ry. Co.*, 97 Neb. 281, 149 N. W. 826; 20 R. C. L. p. 26; 2 *Thompson on Negligence*, § 1669; 29 *Cyc.* 521; *Labatt on Master & Servant* (2d Ed.)

(201 P.)

p. 2413. The case of *Olson v. Erickson*, 53 Wash. 458, 102 Pac. 400, although not directly in point, is so in substance.

In this connection we may discuss the following instruction requested by the appellant and refused by the court:

"I instruct you that contributory negligence is not necessarily the same as mere mistake of judgment. A person may make an error of judgment which may in some degree contribute to his injury, and he may yet be free from contributory negligence. In determining in this case whether the plaintiff's daughter was guilty of contributory negligence, the test is whether she acted as an ordinarily careful and prudent person would have acted under all the circumstances which surrounded her at the time and place of the collision; and in this connection you have the right to take into consideration her familiarity, or lack of familiarity, if any has been shown, with the location and situation of the defendant's street car tracks and the several streets at the place of the accident. Her guilt or innocence of contributory negligence is not necessarily based upon the accuracy of her judgment."

[2] For the most part this requested instruction correctly stated the law on the subject. But that portion of the request reading as follows was improper:

"* * * And in this connection you have the right to take into consideration her familiarity, or lack of familiarity, if any has been shown, with the location and situation of the defendant's street car tracks and the several streets at the place of the accident."

Familiarity, or lack of familiarity, by the driver of the automobile, with the location, could have nothing to do with the subject. Consequently, the court did not err in refusing to give the request.

[3] Appellant also claims that the following instruction given by the court was error:

"You are further instructed that if you find from the evidence that the plaintiff's daughter was guilty of contributory negligence in driving the automobile upon the defendant's tracks without looking for an approaching car, or otherwise using her faculties to ascertain whether or not a car was approaching, and if you further believe from the evidence that the defendant motorman in charge of said car, after he saw the said plaintiff drive said automobile near the tracks in front of the said car, before the said car struck him, used such care and diligence as an ordinarily prudent and careful person would have used under the circumstances in which he was placed to slacken the speed of the said car in time to avoid the collision, then there was not negligence on the part of the defendant, and the plaintiff cannot recover."

We have had difficulty in getting at the meaning of this instruction. If the court meant by it to lay down a rule of duty on the part of the motorman, it is too narrow, and in general conflict with other instruc-

tions wherein the duties of the motorman were properly given. If by it the court meant to give the law of last clear chance, it is not sufficiently specific. In another instruction the court properly announced the last clear chance doctrine. The instruction was also defective in assuming that the motorman "saw the plaintiff drive said automobile near the tracks," etc. Whether the motorman saw the automobile in the position indicated was for the jury. To say the best of it, this instruction was confusing and ought not to be given at another trial of the case.

Appellant complains that other of his requested instructions were not given. In so far as they correctly stated the law, they were amply covered by instructions given.

[4] We have not overlooked the argument of the respondent to the effect that the exceptions taken by the appellant to the instructions which we have discussed were insufficient. Its argument is that the exceptions taken do not specifically point out the error alleged to be contained in the instruction. As to the first instruction discussed by us, the exception was as follows: "The plaintiff excepts to the instruction given by the court to the jury as follows," and then quotes the instruction. Exception taken to the second instruction discussed by us was substantially the same as above. We have no doubt that these exceptions were amply sufficient. Section 884, Rem. Code, provides that exceptions to a charge to the jury may be taken by "specifying by numbers of paragraphs or otherwise the parts of the charge excepted to. * * *" It will be observed that the statute only requires the exception to point out the particular instruction or part of instruction which it is claimed is erroneous; it does not require that the reasons or grounds for the exception be given.

In the case of *Sexton v. School District*, 9 Wash. 5, 36 Pac. 1052, it was contended that the exceptions taken were insufficient because they did not point out wherein the instructions were wrong. Referring to the statute which we have quoted, this court said:

"This act seems to provide that an exception can be taken to an instruction by simply stating to the court that the party excepts to the same and specifying the instruction excepted to, * * * and we are constrained to hold that the exceptions in this case are sufficient."

In the case of *Harkins v. Seattle Electric Co.*, 53 Wash. 184, 101 Pac. 836, the exception taken to the instruction stated the specific objection to it. When the case reached this court the specific objection was waived, but other objections were urged, and we held that no objection except that which is specifically made as a part of the exceptions could be reviewed. But in that case

we recognised the correctness of the rule which we have stated, for we said:

"We are not unmindful of the general rule in this state that exceptions to instructions can be properly taken by simply so stating to the court and specifying the parts excepted to without assigning reasons or grounds of exception."

In the case of *Hofreiter v. Schwabland*, 72 Wash. 314, 130 Pac. 364, concerning exceptions similar to those in this case, we said:

"The charge to the jury was in writing and the exceptions were taken by 'specifying by numbers of paragraphs * * * the parts of the charge excepted to,' and were sufficient under the statute."

Counsel for respondent cites the following cases as holding to a contrary doctrine: *Shoemaker v. Bryant Lumber & Shingle Mill Co.*, 27 Wash. 637, 68 Pac. 880; *Harkins v. Seattle Electric Co.*, supra; *Johnson v. City of Seattle*, 194 Pac. 417. In the *Shoemaker Case*, supra, we said:

"These errors are alleged as to a number of instructions, and are general, such as 'they improperly state the law; are confusing, conflicting, misleading, and present false issues not pleaded or proven.' No attempt is made to point out the respects in which they do not state the law or are confusing, etc. * * * These assignments are too general, and for this reason we shall not examine them."

It does not clearly appear from the opinion that the exceptions were taken by specifying paragraphs or parts of the charge, as the statute requires, and it may be that the exceptions were general as to a large number of instructions, and for that reason the court considered the assignments too general.

We have already referred to the *Harkins Case*, supra, and have sufficiently noticed it. In the *Johnson Case*, supra, we said:

"The appellant complains of certain of the instruction given by the court to the jury. To all of these, save one, we think, the exceptions were too general to apprise the trial court of the precise contention made, and that they cannot, for that reason, be reviewed in this court."

This case is not in point because it does not appear from the opinion that the exceptions were taken to particular paragraphs or parts objected to.

We desire to announce the rule that, under the statute, it is not necessary that the exceptions shall state wherein the instruction is wrong.

For the error pointed out the judgment is reversed and the cause remanded for a new trial.

PARKER, C. J., and FULLERTON, MITCHELL, and TOLMAN, JJ., concur.

MEEKER v. MEEKER. (No. 16725.)

(Supreme Court of Washington. Oct. 31, 1921.)

1. Divorce \S 165(1)—Petition in action proper to vacate decree obtained by fraud.

Under the plain provisions of Rem. & Bal. Code, \S 467, that a party may obtain the benefit of section 464, subd. 4, authorizing vacation of a judgment procured by fraud by petition in the action in which the judgment was rendered, defendant against whom a default divorce decree was rendered need not institute a separate action to have it set aside for the plaintiff's false affidavit he did not know defendant's address.

2. Divorce \S 165(5½)—Statutory denial of fraud in obtaining decree waived by demurrer to petition.

The statutory denial of a petition to vacate a decree for fraud in procuring it, under Rem. & Bal. Code, \S 468, is waived where the plaintiff appeared and demurred generally to the petition, thus admitting its allegations.

Department 2.

Appeal from Superior Court, Thurston County; D. F. Wright, Judge.

Action for divorce by George Delos Meeker against Ella Elizabeth Meeker. From a decree vacating a default decree rendered for plaintiff and giving leave to defendant to answer and defend the action, plaintiff appeals. Affirmed.

Troy & Sturdevant, of Olympia, for appellant.

Vance & Christensen, of Olympia, for respondent.

HOLCOMB, J. This is a case where the wife, in a divorce action brought by the husband, has petitioned the trial court for a vacation of the decree of divorce granted the husband, and for permission to appear in, answer, and defend the action. The petition was filed in the original action and recites that the husband, at the time of filing his complaint, also filed an affidavit for the publication of summons, wherein he stated under oath that his wife was not a resident of the state of Washington, and that her whereabouts and her post office address were not known and had not been for some time. Summons was thereupon published, and subsequently the divorce was granted the husband upon the default of the wife.

The petition further recites that the wife had no notice whatsoever of the pendency of the action, and that for many years last past, except for such time as they have lived together in the state of Washington, her address has been Oswayo, Potter county, Pa., at which place she has received her mail. She further alleged that when she returned

to Pennsylvania from the state of Washington her husband shipped her personal belongings to this same address, and before the divorce action was instituted sent deeds to her for her signature at this address, and during the time the divorce action was pending the husband wrote her letters, and also had communication by mail with one of their sons at the same address. It is alleged that immediately after the wife learned of the divorce decree this proceeding was commenced, stating that she had a good and valid defense to the complaint, and asking that the decree be vacated and she be permitted to answer and defend therein.

This petition was accompanied by a notice which was filed, directed to the plaintiff in the original action and to Troy & Sturdevant, his attorneys, in which they were notified that the defendant had filed a petition praying that the decree of divorce granted in the action be vacated and set aside, and plaintiff was required to answer the petition within 20 days after the service of the notice upon him, exclusive of the day of service; otherwise, upon failure so to do, judgment would be rendered vacating and setting aside the decree according to the demand of the petition, which had been filed with the clerk of the court. The notice and petition were filed in the lower court on January 22, 1921.

To the petition, plaintiff, appearing by his attorneys, interposed a general demurrer upon the grounds: First, that the court was without jurisdiction; and, second, that it did not state facts sufficient to entitle the respondent to the relief demanded in her petition. The superior court overruled the demurrer, whereupon plaintiff refused to proceed further, and the court decreed the vacation of the judgment and gave leave to the defendant therein to answer and defend the alleged action, without taking any evidence.

The errors urged are: (1) In overruling plaintiff's demurrer, and (2) in decreeing vacation of the judgment alleged in respondent's petition, and allowing the defendant to answer and defend the action alleged in her petition without taking any evidence in proof of the allegations of her petition.

Appellant argues that respondent's procedure by petition in the original case is wrong, and that there is no proper procedure to set aside the judgment in the original cause except by an original, independent action, citing Rem. & Bal. Code, §§ 466 to 469, inclusive; *Roberts v. Shelton & Northwestern R. R. Co.*, 21 Wash. 427, 58 Pac. 576; *Cooper v. Cooper*, 83 Wash. 85, 145 Pac. 66; *Ruge v. Ruge*, 97 Wash. 51, 165 Pac. 1063; *Anderson v. Anderson*, 97 Wash. 202, 166 Pac. 60.

[1] The Code, § 467, plainly provides that the proceedings to obtain the benefit of subdivision 4 of section 464, which is that a judgment may be vacated or modified after the time of which it was rendered "for fraud prac-

ticed by the successful party in obtaining the judgment or order," shall be by petition verified by affidavit setting forth the judgment or order and the facts or errors constituting the cause to vacate or modify, and if the party is a defendant the facts constituting a defense to the action.

Section 468 of the Code provides that—

"In such proceedings the party shall be brought into court in the same way, on the same notice as to time, mode of service and mode of return, and the pleadings shall be governed by the same principles, and issues be made up by the same form, and all the proceedings conducted in the same way, as near as can be, as in original action by ordinary proceedings, except that the facts stated in the petition shall be deemed denied without answer," etc.

It will be observed that the respondent followed the above procedure.

It is true that in *Anderson v. Anderson*, supra, we used language quoted by appellant, which seems to condemn that procedure, as follows:

"The filing of a petition in the original suit is contrary to the practice as defined by our former decisions. An attack upon a judgment, for fraud in its procuring, by petition is the inception of a separate, independent action."

We observe that that opinion was concurred in by only two of the judges. It is also observed that in that case the trial judge took cognizance of the proceeding by petition, but was reversed on the ground that the petition did not set forth facts sufficient, and because the trial court found there was no fraud. We are impelled to the opinion that this dicta, for that it evidently was in this case, is in no wise controlling, and, furthermore, that our former and subsequent decisions have approved this procedure. In the cases of *Roberts v. Shelton & Northwestern R. R. Co.*, supra, and *Cooper v. Cooper*, supra, we approved the procedure, but held that for every practical purpose such a proceeding, involving issues and requiring evidence which may be wholly independent of the issues and evidence in the original action, and "in which the parties, regardless of their designation in the original action, occupy the relation of plaintiff and defendant according to the issues presented by the petition, and in which those issues may take all the range of an independent bill in equity for relief against the judgment, is, in its very nature, a new proceeding." *Cooper v. Cooper*, supra. See, also, *Pringle v. Pringle*, 55 Wash. 93, 104 Pac. 135; *Chaney v. Chaney*, 56 Wash. 145, 105 Pac. 229; *Jarrard v. Jarrard*, 198 Pac. 741.

[2] As to the second ground for reversal, of course the petition stands denied without answering, under the statute, but, instead of standing on his constructive answer, the

husband appeared and demurred generally, and stood upon that, thus admitting the allegations of the petition and waiving the denial the statute gives.

The judgment must be, and is, affirmed.

PARKER, C. J., and HOVEY, MAIN, and MACKINTOSH, JJ., concur.

LONGMIRE et al. v. YELM IRR. DIST.
(No. 16177.)

(Supreme Court of Washington. Nov. 15, 1921.)

En Banc.

Appeal from Superior Court, Thurston County; D. F. Wright, Judge.

On reargument en banc. Opinion of the Department sustained.

For the opinion in Department, see 195 Pac. 1014.

Geo. F. Yantis and Troy & Sturdevant, both of Olympia, for appellant.

Thos. M. Vance, of Olympia, for respondents.

PER CURIAM. This cause was reargued before the court en banc on October 25, 1921.

Deeming ourselves fully advised in the premises, and a majority of the judges being of the opinion that the cause was correctly disposed of by the decision of department 2, reported in 195 Pac. 1014, the judgment of the trial court is reversed, as in the department opinion directed.

WRIGHT v. ENGRAM et al. (S. F. 9952.)

(Supreme Court of California. Aug. 19, 1921.)

Certiorari \Rightarrow 24—Does not lie to review decision of city clerk as to signing of recall petition by sufficient qualified voters, his action not being judicial.

Under St. Ex. Sess. 1911, p. 128, § 1, providing that after a recall petition has been filed in the office of a city clerk he shall examine and "from the records of registration" ascertain whether the petition is signed by the requisite number of qualified voters, his action is not judicial, but merely clerical, so that certiorari will not lie to review his decision.

In Bank.

Original application by James D. Wright against Leslie Engram and others for certiorari. Application denied.

Carr & Kennedy and Chenoweth & Leining-er, all of Redding, for petitioner.

PER CURIAM. The petitioner has filed an application for a writ of certiorari to review the action of the defendant Engram as city clerk of the city of Redding in determining that a certain petition filed in the office of said clerk for the recall of certain of the city trustees of said city is sufficient to authorize a recall election, as provided in section 1 of the act of January 2, 1912, providing for the recall of elective officers of incorporated cities and towns. Stats. Ex. Sess. 1911, p. 128.

We are satisfied that the action required of the clerk by that act is not judicial in character, and that, consequently, certiorari will not lie to review his decision. The act provides that, after the recall petition has been filed in his office "within ten days from the date of filing such petition, the clerk shall examine and from the records of registration ascertain whether or not said petition is signed by the requisite number of qualified voters, and he shall attach to said petition his certificate showing the result of said examination." It is this action which is claimed to be judicial and to be, therefore, subject to review. We think all that is required of the clerk to accomplish this duty is to use his eyesight and capacity for counting to determine whether the names on the petition which also appear on the record of registration constitute enough persons to authorize the recall under the statute; that is, whether or not they number 25 per cent. of the entire vote cast in such city at the last preceding regular municipal election at which the officers to be recalled were voted for. The record of registration will be sufficient for his information upon the question whether or not the persons signing the petition are qualified voters. The law does not require him to go outside for information, but he must determine "from the records of registration" whether or not the fact exists. Such an examination involves merely ministerial acts and is in no sense judicial.

If it should happen that names were forged to the petition in sufficient number to reduce the lawful signatures to the petition below the statutory requirement, persons legally interested perhaps might have a remedy, the nature and character of which we need not here decide. It is enough for the disposition of this application to say that the action of the clerk is not judicial, and hence certiorari is not the proper remedy.

The petitioner relies upon *Baines v. Zemansky*, 176 Cal. 376, 168 Pac. 566, and *Fickert v. Zemansky*, 176 Cal. 443, 168 Pac. 891. These cases hold that the action of the registrar of election of the city of San Francisco in determining whether or not a recall petition is sufficient under the provisions of the charter of that city is judicial in character. That conclusion was, however, based entirely on the elaborate provisions of the

city charter, which are wholly different from the above-quoted provisions of the recall act applying generally to the cities within the state. The charter provided for an investigation which involved notice to the voters to come forward and prove their eligibility to sign the petition, and involved the decision of various other facts which were appropriate for judicial proceedings and which were not ministerial or clerical in their character. It was held that under the provisions of the Constitution relating to the powers of the city of San Francisco it was competent for that city to commit the determination of judicial questions, such as were or might be involved in a recall proceeding, to an officer specially authorized for that purpose, and that such exclusive jurisdiction was not subject to review in the superior courts on certiorari, nor even by way of injunction. This was put upon the ground that the matter was political, and that all officers elected were presumed to take their office subject to the conditions imposed by the charter and the provisions thereof for their recall. The cases above mentioned can have no application to the question here presented for consideration. Our complicated system of city government, which gives each city above a certain size power to adopt a charter for its own government, and our numerous statutes relating to and providing for the recall of elective officers, tend to create great confusion on the subject, and, when a decision of a court is resorted to for information, close attention must be paid to the particular city and the particular law on which the decision is predicated; otherwise the legal profession is likely to be misled in regard to the construction of the particular law in controversy.

The application for the writ is denied.

All concur, excepting ANGELLOTTI, C. J., absent.

Ex parte BRUCE. (Cr. 812.)

(District Court of Appeal, Second District, Division 1, California. Sept. 21, 1921.)

1. Municipal corporations §122(2)—Presumptions in favor of regularity of revenue ordinances.

Every reasonable presumption will be indulged in as to the regularity of a municipal ordinance imposing license taxes for revenue, and if its terms, in any condition of the subject dealt with, appear valid, it will be sustained.

2. Constitutional law §230(3)—Licenses §7(4)—Ordinance licensing auctioneers held not discriminatory.

A municipal ordinance requiring auctioneers to procure a license at \$50 per year for those

who sold real estate, live stock, or secondhand goods, and at \$10 per day for those who sold other property, or other property in connection with that mentioned, held not invalid as discriminatory, since a difference in the amount exacted may be justified, where it can be referred to the volume of business done.

Application by A. G. Bruce for a writ of habeas corpus, to be directed to the chief of police of the city of San Diego, to secure petitioner's release after conviction of conducting the business of an auctioneer without a license. Writ discharged, and petitioner remanded.

L. E. Dadmun, of San Diego, for petitioner.

O. G. Selleck, City Pros., of San Diego, for respondent.

JAMES, J. Petitioner was convicted in the police court in the city of San Diego of the offense of having conducted a business of an auctioneer without having first procured a license from said city entitling him so to do. He seeks to be discharged from custody of the chief of police on the ground that the ordinance, under the terms of which his conviction resulted, is unconstitutional and void. The particular contention made is that the ordinance in question, as its terms affect the business of auctioneering, is discriminatory. A copy of the ordinance is attached to the petition, and in section 29 thereof we find the following provisions:

"Class A. For every person who sells or offers for sale at public auction any real estate, live stock, or secondhand goods, wares, or merchandise, the sum of fifty dollars (\$50.00) per year.

"Class B. For every person who sells or offers for sale at public auction any other property than real estate, live stock, or secondhand goods, wares, or merchandise, or who sells or offers for sale at public auction any real estate, live stock, or secondhand goods, wares, or merchandise together with other property, the sum of ten dollars (\$10.00) per day."

The charge as made by the complaint filed against petitioner declared that he did willfully and unlawfully "sell and offer for sale at public auction new goods, wares, and merchandise, without having first secured a license." From the whole text of the ordinance in question it appears that its provisions were designed to be in part regulatory and in part for purposes of revenue. If that portion of it having to do with this petitioner's case could be said to be of a purely regulatory nature, and hence to be justified under the police power, there would be little room for any contention to be made against its validity.

"The police power, the power to make laws to secure the comfort, convenience, peace, and health of the community, is an extensive one, and in its exercise a very wide discretion as to what is needful or proper for the purpose is

necessarily committed to the legislative body in which the power to make such laws is vested.' *Ex parte Whitwell*, 98 Cal. 73, 32 Pac. 870, 19 L. R. A. 727, 35 Am. St. Rep. 152. * * * The manner and extent of such regulation are primarily legislative questions, and the courts will not interfere unless it clearly appears that the Legislature has, under the guise of regulation, imposed an arbitrary or unreasonable burden upon the use of property or the pursuit of an occupation." *County of Plumas v. Wheeler*, 149 Cal. 758, 87 Pac. 909.

[1] And the purposes of a taxing ordinance may be of a mixed nature and include both regulatory provisions and those designed to produce a revenue. *San Francisco v. Ins. Co.*, 74 Cal. 113, 15 Pac. 380, 5 Am. St. Rep. 425. Conceding that an ordinance of the kind here presented, of mixed purpose and intent, is to be measured according to constitutional limitations affecting revenue measures, nevertheless every reasonable presumption will be indulged in as to its regularity, and if its terms, in any condition of the subject dealt with, appear valid, it will be sustained.

"A municipal ordinance must be very clearly obnoxious to such objections as those made, or some one of them, before it will be declared invalid by the courts. Every intendment is to be indulged in favor of its validity, and all doubts resolved in a way to uphold the law-making power; and a contrary conclusion will never be reached upon light consideration. It is the province and right of the municipality to regulate its local affairs—within the law, of course—and it is the duty of the courts to uphold such regulations, except it manifestly appear that the ordinance or by-law transcends the power of the municipality, and contravenes rights secured to the citizen by the Constitution, or laws made in pursuance thereof. * * * The very power to license for purposes of regulation and revenue involves the right to make distinctions between different trades and between essentially different methods of conducting the same general character of business or trade." *Ex parte Haskell*, 112 Cal. 412, 44 Pac. 725, 32 L. R. A. 527.

Under an ordinance imposing a license tax for revenue, an apparent discrimination may appear to be made between persons engaged in the same general business. The difference in the amount exacted is justified, where it can be referred to the volume of business done or profits realized. The bare terms of such an ordinance may not demonstrate that such a difference exists, but that is a matter which the legislative body of the municipality must be presumed to have considered and determined. In the case of the provisions of the ordinance before us, we are not required to say that it appears that persons such as would fall within "Class B" necessarily must transact a business greater in volume or profit than those included in "Class A." It seems altogether within reason that such may be the case; that being true, we must

here assume, in support of the ordinance, that such would be the condition of the business.

[2] In *Ex parte Lemon*, 143 Cal. 558, 77 Pac. 455, 65 L. R. A. 946, there was considered an ordinance of a city which required persons conducting a restaurant or boarding house to pay a license tax of \$3 per month where the meals were cooked and served by the proprietor or members of his family, and to pay \$8 per month in other cases. The ordinance was attacked as being discriminatory. It was sustained by the Supreme Court. In the light of that decision and the reasoning of it, we find no difficulty in concluding that the terms of the ordinance under which petitioner was prosecuted are valid.

The writ is discharged, and the petitioner remanded to the custody of the chief of police of the city of San Diego.

We concur: CONREY, P. J.; SHAW, J.

TITLE GUARANTY & SURETY CO. v. DUARTE et al. (Civ. 2288.)

(District Court of Appeal, Third District, California. Sept. 19, 1921. Hearing Denied by Supreme Court Nov. 17, 1921.)

Subrogation §31(3)—Surety on bond of sheriff paying judgment entitled to recover under bond indemnifying sheriff.

Surety on the bond of a sheriff, which paid a judgment rendered against the sheriff and the surety jointly in favor of one whose property had been sold under attachment, was entitled to bring action and recover under a bond executed by the attaching creditor to indemnify the sheriff against loss by reason of the selling of the property under the writ, under Civ. Code, §§ 2777, 2848, 2849.

Appeal from Superior Court, Merced County; E. N. Rector, Judge.

Action by the Title Guaranty & Surety Company against Joe Rose Duarte and others. Judgment for plaintiff, and certain defendants appeal. Affirmed.

F. W. Henderson and Terry W. Ward, both of Merced, for appellants.

Edward Bickmore, of Reno, Nev., for respondent.

HART, J. This is an action against the defendants, Vincent, as principal, and Joe Rose Duarte and Gonzales, as sureties, on a bond executed and given by said defendants as indemnity to the sheriff of Merced county on a sale of certain personal property seized by said officer under a writ of attachment.

The plaintiff, a corporation, is and was, at all the times mentioned in the complaint, en-

gaged in a general guaranty and surety business, and at all said times one S. C. Cornell was sheriff of said county of Merced; that the plaintiff was at all said times and down to the date of the death of said Cornell, on the 27th day of May, 1914, the surety on the official bond of said Cornell as sheriff of said county.

It appears that the writ of attachment referred to was issued out of a justice's court in said county, in an action wherein the defendant Vincent was plaintiff and one Frank Duarte defendant, and that on the 26th day of February, 1912, at Atwater, in said county, said Cornell acting in his official capacity of sheriff, levied upon and attached a certain carload of sweet potatoes as the property of said Frank Duarte, and noticed the sale thereof for the 28th day of February, 1912, at 2 o'clock p. m. It further appears that, prior to the sale, the ownership of the carload of potatoes so levied upon was claimed by a third party, and that, to protect himself as said sheriff, from any claim or claims of damages made by any third person claiming that said potatoes were not the property of said Frank Duarte at the time of the seizure thereof under said writ of attachment or thereafter, said Cornell, as sheriff, demanded of and received from said Fred Vincent, the attaching creditor, an indemnity bond whereby he (said sheriff) would be held free or immune from any liability for damages resulting to him in the event said potatoes at the time of said attachment and sale were not the property of said Frank Duarte, defendant in said justice's court action. The condition of said bond which, as stated, was executed by the defendants, Vincent, Joe Rose Duarte, and Gonzales, was in the sum of \$500, "to be paid to the said Sam Cornell, against any loss arising from the attachment of one carload of sweet potatoes, now supposed to be the property of Frank Duarte." It appears that the ownership of the potatoes in question at the time of their seizure and sale under the writ of attachment was claimed by a corporation designated and known as Brinkley-Douglas Fruit Company; that said corporation, after the sale of said potatoes by the sheriff, brought an action in the superior court of the county of Merced against the sheriff and the plaintiff in this action, the latter as surety on the official bond of said sheriff, claiming damages for the conversion and sale of said potatoes; that said S. C. Cornell died on the 27th day of May, 1914, and that on the 15th day of June, 1914, and in the superior court of Merced county, A. L. Silman was duly appointed administrator of the estate of said Cornell, deceased, and on the 17th day of June, 1914, duly qualified as such administrator and continuously after said last-named date until the 29th day of October, 1917, was the duly qualified and acting administrator of said estate; that on

the 15th day of May, 1915, said Silman, as such administrator, was duly substituted as a party defendant in said action instituted by said Brinkley-Douglas Fruit Company, as plaintiff, in the place and stead of S. C. Cornell, as sheriff of Merced county, and that on the 1st day of August, 1916, a joint and several judgment in the sum of \$472, with costs taxed in the sum of \$34.20, was duly rendered and entered against said A. L. Silman, as administrator, etc., and said Title Guaranty & Surety Company, as said surety on the official bond of said sheriff; that a motion for a new trial in said action was denied and thereafter said defendants appealed from said judgment and said order denying said motion for a new trial to the District Court of Appeal for the Third District and that said Court of Appeal affirmed the judgment and the order in said action; that the amount of said judgment with all costs of suit incurred during the trial of said action and the appeal thereafter and the interest thereon amounted to the total sum of \$625.30; and that the same was paid by the plaintiff in this action. The complaint alleges:

"That at all times after the execution of said instrument of indemnity, hereinbefore set forth, and up to the said death of said S. C. Cornell, he was the owner and holder of the same, and that at all times after said death, until the execution of the assignment of said instrument of indemnity hereinafter alleged and set forth, the said estate of said S. C. Cornell, and the heirs of the same, each represented by said A. L. Silman, as administrator of said estate, were the owners and holders of said instrument of indemnity and all rights secured thereunder; that on or about the 27th day of August, 1917, said A. L. Silman, acting as the administrator of said estate, and in consideration that the said plaintiff herein would duly pay and discharge said judgment so rendered against said plaintiff and said A. L. Silman, as administrator of said estate, did sell, assign, and set over unto the said plaintiff herein, all the right, title, and interest of the said estate of said S. C. Cornell, deceased, in and to said instrument of indemnity hereinbefore set forth; and said plaintiff herein did so pay and discharge said judgment and that said assignment to plaintiff was duly confirmed by this court in the matter of said estate of S. C. Cornell, deceased, on the 29th day of October, 1917, and that plaintiff, at all times since said assignment and confirmation has been, and now is, the legal owner and holder of said instrument of indemnity and all the right, title, and interest of said estate, and said heirs in and to said instrument of indemnity, and any and all rights accruing thereunder and any and all right of recovery thereon."

Upon findings substantially in accord with the averments of the second amended complaint, of which the above statement represents an epitomized résumé, the plaintiff was awarded judgment, from which the defend-

ants Joe Rose Duarte and J. J. Gonzales appeal, under the alternative method.

There was no oral evidence received at the trial, the evidential features of the record consisting wholly of certain facts stipulated by the parties and certain documents. The fact of the execution of the indemnity bond, the fact of the bringing of the action by the Brinkley-Douglas Fruit Company against plaintiff here and said Cornell, the fact of a judgment having been given in favor of said fruit company in said action against the plaintiff here and Silman, as administrator and substituted defendant, and the satisfaction of said judgment by the plaintiff here, were admitted at the trial. The documentary evidence, which was admitted over objection by appellants, consisted of the petition in the estate of said Cornell, deceased, for an order confirming the sale and transfer of said indemnity bond to plaintiff and the order confirming said sale and transfer.

The discussion in the briefs revolves around attacks upon the findings, upon the ground that there is no evidence in the record which supports them and the rulings allowing in evidence the documents above mentioned. It is first contended by appellants that there was no legal assignment of the indemnity bond to plaintiff because said bond was an asset of the estate of Cornell and had, previously to the purported assignment, been distributed to the heirs of the deceased, and for the further reason that there was some irregularity in the proceeding in which the order purporting to authorize the administrator of Cornell's estate to transfer said bond was made. It is, however, argued that, even assuming the transfer or assignment to have been valid, still the plaintiff in this case cannot claim any rights thereunder, inasmuch as the bond was given for the express purpose of indemnifying Cornell against loss by reason of selling the potatoes under the writ of attachment and so expressly provided, and, indeed, that the bond is even of no avail to the estate of Cornell, since to justify action by the administrator of said estate upon said bond it must have been made to appear that Cornell or his estate had suffered some loss by reason of the sale of the potatoes; but we regard all this discussion beside the legal propositions which are determinative of this appeal. The important or real questions in this case are whether the plaintiff, having paid the judgment awarded against it and Cornell in the action for damages against them for the seizure and sale of the potatoes, and the payment of said damages having been made for the benefit of the estate of said Cornell, is entitled to have recourse to the indemnity bond as in recoupment for the moneys so expended, and, if so, whether upon the payment of said damages it was subrogated to the rights of Cornell under said undertaking. It is clear that these proposi-

tions are answered by the Civil Code. Section 2777 of said Code provides:

"One who indemnifies another against an act to be done by the latter, is liable jointly with the person indemnified, and separately to every person injured by such act."

The above section requires no construction. Its terms are plain and unambiguous and obviously applies to a case of this character. There can be no possible doubt that the plaintiff in this case was damaged by the act of the sheriff in seizing and selling the potatoes. See *Lewis v. Johns*, 34 Cal. 629, 635; *Stewart v. Wells*, 6 Barb. (N. Y.) 79, 81; *Freeman v. Adams*, 9 Johns. (N. Y.) 116. And that upon the payment of the damages there ipso facto accrued to plaintiff the right of subrogation to the rights of Cornell under the indemnity bond, is a proposition free from doubt. The rules pertaining to subrogation are succinctly stated in the Civil Code as follows:

"A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, * * * at the time of entering into the contract of suretyship, or acquired by him afterwards." Civ. Code, § 2849.

"A surety, upon satisfying the obligation of the principal, is entitled to enforce every remedy which the creditor then has against the principal." Civ. Code, § 2848.

As is said by Mr. Justice Shaw in *Martin v. De Ornelas*, 139 Cal. 41, 49, 72 Pac. 440, 444, referring to the above Code sections:

"These sections are but a re-enactment of the well-settled rules of equity on the subject of subrogation or substitution. Story's *Equity Jurisprudence*, §§ 495-502; *Brandt on Suretyship*, § 260 et seq." "This right does not depend upon any contract, express or implied, but grows out of the relation of surety and creditor, and the principles of natural justice. *Brandt on Suretyship*, § 260; *Hidden v. Bishop*, 5 R. I. 29; *Mathews v. Alkin*, 1 N. Y. 586."

See, also, 37 Oyc. 406 and 391; *Bankers Loan, etc., Co. v. Hornish*, 94 Va. 608, 27 S. E. 459; *Berry v. Bullock*, 81 Miss. 463, 33 South. 410; *Boone Co. Bank v. Byrum*, 68 Ark. 71, 56 S. W. 532; *Hawpe v. Baumgardner*, 103 Va. 91, 48 S. E. 554; *Coffee v. Tevis*, 17 Cal. 239.

It is true that as a general rule the surety only becomes subrogated to any rights of the judgment creditor, but this is not always so. As was said in *Townsend v. Cleveland, etc., Co.*, 18 Ind. App. 568, 47 N. E. 707, 709:

"More broadly, [subrogation] is the substitution of one person in the place of another, whether as a creditor, or the possessor of any other rightful claim."

See also *Leavitt v. Can. Pac. R. Co.*, 90 Me. 153, 37 Atl. 886, 38 L. R. A. 152; *Jack-*

son Co. v. Boylston Ins. Co., 189 Mass. 508, 2 N. E. 103, 52 Am. Rep. 728.

From the above authorities it is obvious that it was not necessary that the administrator of the estate of Cornell should have assigned the indemnity bond to plaintiff in order that the rights of Cornell thereunder should inure to the benefit of said plaintiff. It will also be observed that, in view of the above considerations, the rulings of the court admitting the documents above referred to in evidence and of which complaint is here made are not material to this decision. Nothing more can be added to what the Code sections above say upon the questions involved in this appeal.

The judgment is affirmed.

We concur: FINCH, P. J.; BURNETT, J.

In re WASSON.

WASSON v. WALDROP.

(Civ. 3940.)

(District Court of Appeal, First District, Division 1, California. Sept. 20, 1921.)

1. Adverse possession §100(4)—Deed is color of title only to land actually described.

A deed is color of title only as to land actually described by it.

2. Adverse possession §100(4)—Possession of land conveyed not constructive possession of land not included in deed.

Use and possession of land conveyed did not amount to constructive possession of a portion outside the boundaries in the deed consisting of part of a sand bar on the opposite side of the river forming the boundary line.

3. Adverse possession §24—Clandestine acts held not to amount to continuous and uninterrupted possession.

Isolated acts of ownership, not exclusive and more clandestine than open and notorious, held not to amount to the continuous and uninterrupted possession which is necessary to constitute an adverse possession sufficient to bar the claim of one holding the record title.

4. Adverse possession §95—Payment of taxes on very land in controversy must be proved.

Where payment of taxes is claimed as an element of adverse possession, claimant must prove payment of taxes on the very land in controversy, and it is not sufficient to show payment of taxes on a tract of land which he supposed contained the portion in dispute.

5. Trial §139(1)—When directed verdict proper, stated.

A directed verdict is proper only when there is no substantial evidence tending to prove, in favor of the party upon whom the burden rests, all the controverted facts neces-

sary to establish his case; but whenever, upon the whole evidence, the court would be compelled to set aside a finding as unsupported by the evidence, it should direct a verdict.

6. Records §9(3)—Purpose of application to register title is to settle title.

The general purpose of an application under the registration act, or Torrens Law, is to clear up and settle the title to land; it is a proceeding in the nature of an action to quiet title.

7. Records §9(4)—Applicant for registration of title must prove possession title in fee claimed.

The applicant for initial registration of title, as a title in fee, must produce proof that he is possessed of such title, either by a chain of conveyances from the general governor or by title by adverse possession.

Appeal from Superior Court, Sonoma County; Thomas C. Denny, Judge.

Application by Louis Logan Wasson for initial registration of title to land, to which Helen L. Waldrop objects. From a judgment denying the application as to part of the land applicant appeals. Affirmed.

A. W. Hollingsworth, of Healdsburg, Carl Barnard, of Santa Rosa, and Russell P. Tyler, of San Francisco, for appellant.

E. M. Norton, and Fred W. McConnell, both of Healdsburg, for respondent.

WASTE, P. J. This proceeding was instituted by the appellant Wasson as applicant under the provisions of the act for the certification of land titles (Stats. 1897, p. 138), commonly known as the Torrens Land Act, for initial registration of title to 78 acres of land situated in Sonoma county. He predicated his claim to the land upon the fact that he had been in actual, peaceful possession of the property, adversely to all other persons, for a period of more than five years next preceding the filing of his application, and during all of the time he had paid all taxes assessed against the property. The application for registration was opposed by the respondent, Helen L. Waldrop, denied that the applicant had been in adverse possession of 8.12 acres of the land described in the petition, lying westerly and southwesterly of the Russian river, and alleged that she was, and for more than 10 years prior to the filing of her answer had been, the owner in fee simple absolute of that portion of the property; and, further, that she had during all of that time been in actual, open, exclusive, notorious, continuous, and adverse possession of the land, and had paid all taxes levied or assessed against that particular parcel. When the evidence was in the court granted a motion, made by the objector, for an instructed verdict in accord with her contention. From the judgment entered thereon,

denying his claim to the 8.12 acres, the applicant has appealed, contending that there is ample testimony in the record to support a verdict, if one had been rendered in his favor, and that the trial court, therefore, erred in withdrawing the case from the jury, and instructing it to return a verdict for the objector.

The applicant claims to be the owner of, and entitled to registration of title to, 78 acres of land. In 1908 Levi Sutton and others deeded to him, in the same instrument, two parcels of land, aptly described by metes and bounds, lying east and northeast of the Russian river, and containing 47 acres, "and also all lands of the said parties of the first part, lying southwest of and adjoining the above-described premises, commonly called the gravel bar or waste land." Appellant went into possession of the property and has continuously lived on the place ever since. He seeks in this proceeding to have registration of title to the 47 acres conveyed to him by metes and bounds in the Sutton deed, and in addition asks for confirmation of ownership to 31 acres of gravel bar, 8.12 acres of which are cut off from the rest of the tract by the bed of the Russian river. This severed portion lies to the west and southwest of the stream and is contiguous to the lands of the respondent. The controversy here waged over this small tract.

The appellant takes the position that he has established title to the 8.12 acres of gravel bar west of the Russian river by adverse possession and payment of taxes for a period of five years. Such possession is of two kinds: First, where possession is taken by bow and spear without color of title; second, where possession is taken under a claim of title founded upon a written instrument. *Kimball v. Lohmas*, 31 Cal. 154, 159.

Appellant introduced in evidence a number of deeds carrying the chain of title backward from his immediate grantors to the year 1886, when B. M. Jones conveyed a tract of land containing 363 acres, more or less, to W. B. Reynolds. There is nothing in the record by which appellant can assert title to any land not embraced in the deed from Jones to Reynolds, yet the general description and the particular description by metes and bounds contained in that instrument fix the bed of the Russian river as the south and westerly boundary line of the property conveyed. One of the calls in the description runs "thence down Russian river near center." The land conveyed by the Jones deed is referred to as, and was a part of, the Alexander tract of the Sotoyome ranch. From various exhibits it is made to appear that the southerly and westerly boundary line of that tract is the Russian river. The 8.12 acres of land in controversy was never a part of the Alexander tract. The appellant sought to show that the Russian river is a changeable stream, and

that its bed has shifted within recent years to such an extent that it has severed the 8.12 acres of gravel bar from his larger portion. The proof was vague and unsatisfactory, and was apparently disregarded by the trial court as not worthy of consideration. At most, it only tended to prove that the bed of the stream occasionally changed from bank to bank.

[1, 2] In tracing the title from Jones through various transfers to appellant to that portion of the property conveyed to Reynolds by Jones, now owned by the appellant, we find that the bed of the Russian river constantly appears in the various descriptions in the deeds, wherever appropriate, as the west or westerly boundary line. One of the monuments frequently referred to is "an iron pin near the bed of the Russian river." Another is "a station in the bed of the Russian river." We can reach no other conclusion than that when the Suttons deeded to appellant "all lands of the parties of the first part lying southwest of and adjoining the above-described premises, commonly called the gravel bar or waste land," such general description was intended to, and did, carry only the portion of the gravel bar to which the grantors had title, the westerly boundary line of which was the Russian river. To hold otherwise would be to give effect to a deed conveying more property than the grantors owned. It is elementary law that a deed is color of title only as to land actually described by it. 2 C. J. 177, par. 339. That being so, the deed from Sutton to appellant is color of title only as to land lying east of the river. Having gone beyond the limits of the land described in his deed, and claiming to hold adversely, he can only claim possession by bow and spear, without color of title. Consequently appellant's use and possession of and residence on the land on the east side of the river, the only land conveyed by his deed, did not amount to constructive possession of that portion of the gravel bar on the other side of the stream, owned by the respondent. *Wheatley v. San Pedro, etc., R. R. Co.*, 169 Cal. 505, 516, 147 Pac. 135.

[3] The respondent, Mrs. Waldrop, satisfactorily proved good title in herself to a large tract of land on the west side of the Russian river, opposite the holdings of the appellant, and including the 8.12 acres of gravel bar in controversy. She was in actual possession of the property, had lived on a portion of it many years, and devoted the whole to the ordinary purposes for which it was adapted. Most of her land was fenced, but the part nearest the river, being gravel and sand and closely overgrown with willows, was of little use and was open. The respondent from time to time allowed parties to cut wood on this open land, and to cut the willow trees for props for supporting prune trees, and to take out sand and gravel. In other ways she exer-

cised the ordinary acts of dominion of an owner over the property. She testified that she knew nothing of the hostile claim of the appellant, and did not know that he had ever attempted to exercise any acts of possession over the gravel bar on her side of the river. In rebuttal the appellant produced witnesses who testified that under permission from him, they had gone on the land, cut wood and prune props, and removed gravel. He himself claimed to have once planted a crop on a portion of the gravel bar. But these acts were isolated, some of them occurring before the five-year period relied upon by appellant, and from their nature were more clandestine than open and notorious. They were not exclusive, and did not amount to the continuous and uninterrupted possession which is necessary to constitute an adverse possession sufficient to bar the claim of one holding the record title. *Unger v. Mooney*, 63 Cal. 586, 590, 49 Am. Rep. 100; *Thompson v. Pioche*, 44 Cal. 508, 517; *Mauldin v. Cox*, 67 Cal. 387, 392, 7 Pac. 804; *De Frieze v. Quint*, 94 Cal. 653, 663, 30 Pac. 1, 28 Am. St. Rep. 151.

[4] One of the requisites of title by adverse possession is the payment of all taxes for the statutory period. Appellant was assessed and paid taxes for the years 1914 to 1919, inclusive, upon 78 acres of land; but, as shown by the record, it was on land located on the easterly side of the Russian river. On the other hand, Mrs. Waldrop, the respondent, conclusively established the fact that she had been assessed and paid the taxes during that period on all the adjacent lands on the westerly side of the stream. Manifestly, appellant did not pay the taxes levied and assessed on the 8.12 acres of gravel bar involved in this controversy. One of the statutory requirements to the acquisition of a title by adverse possession was, therefore, not fulfilled. *Mann v. Mann*, 152 Cal. 23, 29, 91 Pac. 994. It was not sufficient for appellant to show that he had paid taxes on 31 acres of gravel bar land, supposing them to include the portion in dispute. He was bound to prove that he had actually paid the tax on the very property in controversy. *Reynolds v. Willard*, 80 Cal. 605, 608, 22 Pac. 262.

[5] A directed verdict is proper only when there is no substantial evidence tending to prove, in favor of the party upon whom the burden rests, all the controverted facts necessary to establish his case. But whenever, upon the whole evidence, the court would be compelled to set aside a finding of the jury as unsupported by the evidence, it should direct the verdict. It is not necessary that there should be an absence of conflict in the evidence, but to deprive the court of the right to exercise this power, if there be a conflict, it must be a substantial one. *Estate of Baldwin*, 162 Cal. 471, 473, 123 Pac. 267; *Los An-*

geles F. & M. Co. v. Thompson, 117 Cal. 594, 601, 49 Pac. 714.

[8, 7] The general purpose of an application under the registration act, or Torrens Law, is to clear up and settle the title to land. It is a proceeding in the nature of an action to quiet title. 3 *Tiffany on Real Property* (2d Ed.) § 581, p. 2275; *Peter v. City of Duluth*, 119 Minn. 96, 103, 137 N. W. 390, 41 L. R. A. (N. S.) 1044. The applicant for initial registration of a title, as a title in fee, must produce proof that he is possessed of such title, either by the production of a regular chain of conveyance from the general government, or by proof of the creation of a title by adverse possession, and evidence establishing title good as against the world is essential to warrant a decree awarding such registration. *Glos v. Kingman*, 207 Ill. 28, 34, 69 N. E. 632; *Glos v. Holberg*, 220 Ill. 167, 170, 77 N. E. 80. The applicant was unable to make the required showing. His claim of ownership of the 8.12 acres of disputed gravel bar was not entitled to be registered. There was no dispute as to the remainder of the land. The action of the trial court in directing the verdict was proper, and the finding of the jury correctly disposes of the rights of the applicant and the objector in the land, title to which was sought to be registered.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

CONRAD v. FOERST. (Civ. 3930.)

(District Court of Appeal, First District, Division 1, California. Sept. 21, 1921. Hearing Denied by Supreme Court. Nov. 17, 1921.)

1. Contracts —296—Authorized or trivial alterations do not bar recovery.

The rule that one who has acted by virtue of a written contract has no right of recovery unless he can show that he has completed his contract, or that completion had been waived or excused, has no application, where the contract stipulates that the owner or architect may request alterations or deviations, and the deviations were either ordered or were trivial in character.

2. Contracts —302—Recovery by contractor not barred by trivial defects.

A contractor, who has substantially performed his contract to construct a building, will not be held to have forfeited his right of recovery by reason of trivial defects or imperfections in the work performed.

3. Appeal and error —842(1)—What constitutes trivial imperfections in work under contract, question of fact and not reviewable.

What constitutes "trivial imperfections," which will not bar recovery by a contractor

who has substantially performed his contract to construct a building, is a question of fact in each case, and the decision of the trial court upon proper evidence cannot be reviewed on appeal.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Henry Conrad against Wilhelmine Foerst. Judgment for plaintiff, and defendant appeals. Affirmed.

F. J. Castelhun, of San Francisco, for appellant.

Leon Samuels and Chas. J. McDonnell, both of San Francisco, for respondent.

KERRIGAN, J. Action to foreclose a mechanic's lien. Plaintiff contracted with defendant to furnish all the work on a two-story and basement frame building, with certain exceptions, for the sum of \$4,644, payable at specified times as the work progressed. Plaintiff entered upon the performance of the contract, and thereafter, so it is alleged, completed all the conditions on his part to be performed. Notice of completion of work was filed, and thereafter the architect delivered to plaintiff a certificate that the last payment mentioned in the contract was due. This payment amounted to the sum of \$1,164. Plaintiff also claimed the further sum of \$112, alleged to be the reasonable value of certain extra work ordered by defendant. The sum of \$600 was paid by defendant upon these claims, leaving a balance due thereon of \$676, for which sum plaintiff filed his claim of lien. The amount not being paid, this action was brought to recover the same.

Defendant, answering, alleged that plaintiff had not performed all the conditions of the contract, and charged that the building was not completed in a good and workmanlike manner as required by the contract, and, further, that the building was never completed. The answer specifies 24 particulars wherein it is alleged that the plaintiff failed to construct the building in accordance with the plans and specifications. Then follows a cross-complaint by which defendant seeks to recover from plaintiff an amount in excess of one-half of the entire cost of the building for alleged defects and delay in its construction.

[1-3] The trial court found that all the alleged objections and defects were of a trivial nature, and that the same could be readily remedied and repaired at a cost not exceeding \$30. After signing the findings and decision, however, the court ordered and the respondent stipulated that the judgment provided for by the findings should be reduced, and that

the sum of \$76 thereof should be remitted. Accordingly judgment was entered for the sum of \$600, from which judgment defendant appeals.

It is here contended that, as the plaintiff never completed his contract in strict compliance with the plans, drawings, and specifications, it is insisted that the law will not for this reason permit him to recover on the contract, for the reason that his pleadings do not recite that such changes were either waived or justified by defendant's conduct. We are cited to the case of *Herdal v. Sheehy*, 173 Cal. 163, 159 Pac. 422, as supporting this contention. It is true that it is there held that one who has acted by virtue of a written contract has no right of recovery unless he can show that he has completed his contract or that completion had been waived or excused. This principle, however, has no application to the instant case. One of the provisions of the contract stipulated that should the owner or the architect at any time during the progress of the work request any alterations or deviations in the work provided for, either of them should be at liberty to do so, and that the same should in no manner affect the contract, but that the same should be held to be completed when the work was finished in accordance with the original plans as amended by such changes. There was a conflict in the evidence upon the subject as to the completion of the building according to the plans and specifications, but it is sufficient to support the finding of the trial court that the changes or omissions complained of were either ordered by the architect or were trivial in character. A contractor who has substantially performed his contract will not be held to have forfeited his right to recovery by reason of trivial defects or imperfections in the work performed. *Connell v. Higgins*, 170 Cal. 541, 150 Pac. 769; *Schindler v. Green*, 149 Cal. 752, 87 Pac. 626. What constitutes "trivial imperfections" is a question of fact in each case, and the decision of the trial court upon proper evidence cannot be reviewed here. *Bianchi v. Hughes*, 124 Cal. 27, 56 Pac. 610.

Respondent also claims that the certificate issued by the architect, who had power to accept or reject the work, is binding and conclusive against appellant. He also claims that the lower court was without jurisdiction to settle appellant's bill of exceptions for the reason that it was presented too late. Considering the conclusion we have reached, a discussion of these questions can answer no useful purpose.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

McMORRY et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR SUTTER COUNTY. (Civ. 2347.)

(District Court of Appeal, Third District, California. Aug. 24, 1921. Rehearing Denied Sept. 23, 1921. Hearing Denied by Supreme Court Oct. 20, 1921.)

1. Prohibition \S 10(2) — Defendants not granted writ against trial of other previously instituted actions involving same question.

Contractor's sureties, being sued by laborers and materialmen in actions transferred from one county to another, will not be granted writ of prohibition against first county entertaining jurisdiction in actions by the laborers and materialmen against the county, based on stop notice, on theory that same question was involved and that jurisdiction was first acquired in the action against the sureties, where one of the stop notice actions which had not been transferred to the second county was commenced prior to the commencement of actions against the sureties.

2. Prohibition \S 27—Petitioners seeking to prevent trial of actions on theory that other court first acquired jurisdiction have burden of proof.

On application for writ of prohibition to prevent court from trying certain actions on theory that other court acquired prior jurisdiction in actions involving same question, petitioners have the burden of showing that the other actions were filed before the actions the trial of which was sought to be prevented.

3. Courts \S 30—Superior court, by transfer of case to other county, did not divest itself of jurisdiction to try previously filed cases between other parties.

Superior court, by transfer of case to court of other county, did not divest itself of jurisdiction to try other cases between different parties which had been begun before complaints in the transferred actions were filed.

4. Prohibition \S 10(1)—Insufficiency of complaint not ground for issuance of writ to prevent trial.

Writ of prohibition will not be granted to prevent the trial of certain actions on the ground that the complaints of the plaintiffs in such actions did not state a cause of action, since the insufficiency of the complaint does not deprive the court of jurisdiction.

5. Prohibition \S 10(2)—Contractor's sureties held not entitled to writ to prevent trial of materialmen and laborers' stop notice action against county.

Highway contractor's sureties, being sued by laborers and materialmen, under St. 1919, p. 487, held not entitled to writ of prohibition to prevent the trial of actions by the laborers and materialmen against the county pursuant to stop notice given county under Code Civ. Proc. \S 1184, to subject reserve fund to payment of their claims, on theory that such stop notice actions involve the same question and that jurisdiction was first acquired in the actions on the bond, since the laborers and

materialmen had no right to such fund, and the sureties, who claimed merely to be subrogated to the rights of laborers and materialmen, could have no right thereto.

6. Highways \S 113(4)—Statute providing for stop notice to owner inapplicable to materialmen and laborers with claims against public contractor.

Code Civ. Proc. \S 1184, requiring owner to withhold amount due contractor on service of stop notice, and making fund withheld subject to claims of laborers and materialmen by whom notice was given, held inapplicable to claims of laborers and materialmen against contractor constructing public highway, required to give bond under St. 1919, p. 487.

On Hearing in Supreme Court.

7. Prohibition \S 10(1)—Not granted unless lower court is proceeding in excess of its lawful jurisdiction.

Writ of prohibition directed against superior court to prevent trial of certain actions will not be granted in the absence of a showing that the superior court is proceeding in excess of its lawful jurisdiction.

Application for writ of prohibition by W. H. McMorry and another against the Superior Court of the State of California in and for the County of Sutter. Denied.

Thomas B. Leeper and Robert H. Schwab, both of Sacramento, for petitioners.

Arthur Coats, Dist. Atty., and A. H. Hewitt, both of Yuba City, and Harry Delrup, of Chico, for respondent.

BURNETT, J. The petition shows that in 1920 one D. C. Howard entered into four separate contracts with the county of Sutter for the construction of four different highways in said county; that bonds were given by said contractor as required by the statute (Stats. 1919, p. 487), and that petitioners herein were the sureties on said undertaking; that said contractor failed to complete his contracts and failed to pay a large number of laborers and materialmen who furnished labor and material for said construction; that said laborers and materialmen thereafter filed their respective claims as provided by said act and brought suit therefor against said sureties in the superior court of the county of Sutter; that subsequently said actions were transferred to the superior court of the county of Sacramento for trial; that said laborers and materialmen also served upon the county of Sutter a "stop notice" or "withhold notice," as provided by section 1184 of the Code of Civil Procedure, for the same claims, and have commenced actions against said county to subject to the payment of their claims said reserve fund withheld by the county from the money due upon said contracts; that petitioners are not parties to said ac-

tions against said county, but they are interested in how said money is paid out; that, if said actions against the county are prosecuted separately from the actions upon said bonds, then petitioners will be deprived of their right to preserve said fund for the payment of said claims for which petitioners are liable; that said actions against the sureties were commenced and transferred to Sacramento county prior to the commencement of the actions against the county; that "the Commercial Bank of Durham, a corporation, and the First National Bank of Yuba City, a corporation, have filed their separate complaints in intervention in said stop notice actions, in which they allege they are the owners of the balance withheld by said county on said contracts by reason of an assignment thereof from said contractor, D. C. Howard; that, if said banks were permitted in said actions to recover said money so withheld on said contracts, these petitioners will be denied their rights to have said money applied upon the claims upon which they are being sued; * * * that, if said actions on said claims and on said stop notices are heard and determined by one court, it will avoid a multiplicity of suits and will save all the parties to said action the labor and costs of prosecuting two actions for the same thing."

The foregoing statement comprises all the material facts that appear in the petition, although there are many allegations of legal conclusions, which we deem unnecessary to set out. The theory of petitioners is that the vital question in all this litigation is as to the proper disposition or payment of said reserve fund, in other words, to whom it should be paid by the county, and that two different courts of concurrent jurisdiction have before them in different actions for adjudication this important controversy, and that in such situation the court first acquiring jurisdiction has the exclusive right to dispose of the whole matter. In support of their contention as to the law of the case they cite: *State v. Tallman*, 29 Wash. 411, 69 Pac. 1115; *Spiller v. Wells*, 96 Va. 598, 32 S. E. 46, 70 Am. St. Rep. 878; *State v. McClure*, 17 N. M. 694, 133 Pac. 1063, 47 L. R. A. (N. S.) 744, Ann. Cas. 1915B, 1110; *Adams v. Tri-City*, 124 Va. 473, 98 S. E. 647; *Ryan v. Donley*, 69 Neb. 623, 96 N. W. 234; *State v. Davis*, (Mo. App.) 190 S. W. 964; *Reugger v. De Breueys*, 146 La. 283, 83 South. 556; *State v. Fredlock*, 52 W. Va. 232, 43 S. E. 153, 94 Am. St. Rep. 932; *Sangamon v. Eminger*, 257 Ill. 281, 100 N. E. 906; *Keefe v. Dist. Court*, 16 Wyo. 381, 94 Pac. 459.

We deem it unnecessary to comment upon these decisions. It may be admitted that the rule is as stated by petitioners, and that prohibition may issue in such cases; but we may add that this remedy is allowed, not for

the reason, as is generally true, that the other court has no jurisdiction, but the practice is based upon necessity and comity, and so it is held:

"That when the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it, for the purposes of its jurisdiction." *Heidritter v. Oilcloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135, 28 L. Ed. 729.

[1] The application of this principle, however, to the situation herein results in the undoing of petitioners. This follows from the fact that the superior court of Sutter county was first in time as to the jurisdiction of the subject-matter. It does not so appear by the petition, but in accordance with the allegations of respondent's answer and the agreement of counsel at the oral argument the facts are these: The action of Diamond Match Company against petitioners on the bond was begun in the superior court of Sutter county on November 29, 1920, and it is still pending therein; no application having been made for a transfer to Sacramento county. On the same day the said company brought an action against said county of Sutter on said stop notice, and it is still pending therein. The action of the Standard Oil Company against the county of Sutter on said stop notice was commenced in the superior court of said county on December 16, 1920, and is still pending therein. These actions were all commenced before any of the actions that were transferred to the superior court of Sacramento county, and, if it can be said that the latter actions involved the proper disposition of said reserve fund, with equal propriety can the same thing be affirmed of said action of Diamond Match Company against petitioners, and with still greater reason may it be said that the superior court of Sutter county acquired dominion over said fund by reason of said actions against the county.

[2] Again, in reference to the actions on the bond which were transferred we may notice this: *Butcher v. McMorry and Kaster* was commenced on February 8, 1921, but on the same day the same plaintiff brought an action against the county on said stop notice. It does not appear which action was filed first, but, of course, the burden is upon petitioners, and we must therefore conclude that the stop notice action is entitled to precedence. The same thing may be said of the two actions filed by Murphy on January 5, 1921.

[3] Moreover, the superior court of Sacramento county did not acquire jurisdiction to try any of these actions until the order of transfer was made, which was subsequent to the filing of all the complaints in Sutter coun-

ty. But, conceding that, for the purposes of this case, its jurisdiction would relate back to the time when said actions were begun, it is manifest that by said order of transfer the superior court of Sutter county did not divest itself of jurisdiction to try the other cases between different parties which had been begun before the complaints in said transferred actions were filed. After the transfer the superior court of Sacramento county could have no greater jurisdiction than if the actions had been originally brought in said court; but, if so brought, under the rule already stated, they would be subject to said prior actions commenced in Sutter county.

[4] Petitioners claim that the so-called "stop notice" actions should not be allowed to weigh in the proceeding, for the reason that, under the decisions of the appellate courts of the state, the laborers and materialmen have no interest in said reserve fund, and therefore their complaints against the county fail to state a cause of action. *Adamson v. Paonessa*, 179 Pac. 880; *Hunt v. Continental Nat. Bank*, 188 Pac. 300; *Slayden v. O'Dea*, 182 Cal. 500, 189 Pac. 1066; *Hunt v. Empire Securities Co.*, 194 Pac. 744. In these cases it is held that—

"Section 1134 of the Code of Civil Procedure does not apply to contracts for the improvements of streets or highways, and that therefore a stop notice given pursuant to that section, under such a contract, does not have the effect of sequestering the funds in the hands of the person who is charged with their disbursement." and that the rights of the assignee of the contractor in and to said fund, where the assignment precedes the contracts for labor and material, are superior to any claim of the laborer or materialman.

As to this contention, however, it may be observed that the insufficiency of the complaint as to its allegations does not deprive the court of jurisdiction to try the action. Besides, if such ground be tenable, it must operate to defeat this proceeding by petitioners. This is true for the reason that the pleadings herein show that they also have no interest in said funds. They are claiming by right of subrogation, but no such right exists, as they have not paid any of the claims of the laborers or materialmen. But if they had paid any such claims they would be subrogated only to such right as existed in favor of such claimant, which, under the said decisions, does not embrace any of said fund in face of the prior assignment of the contractor. Not having made such payment, the sureties could have no greater claim to said fund than the principal, who was the contractor, but he, as we have seen, has no interest in said fund, having assigned it to interveners.

[5, 6] From the foregoing it is apparent that the sureties need not concern themselves about the trial of the actions against the

county of Sutter as to the application of said fund. As said fund cannot be used to reduce their liability on their bond, they are not interested in said actions, and the question of superior jurisdiction is really of no practical importance to petitioners. Their position is based upon an erroneous construction of section 1134 of the Code of Civil Procedure and of said statute of 1919 under which the bonds were executed. Under the decisions in this state, as we have seen, said section of the Code does not afford any relief to laborers and materialmen in a case like this where the work is done upon a public highway. It may also be said that under said statute of 1919 the bond—

"must provide that if the contractor, person, company, or corporation, or his or its subcontractor, fails to pay for any materials, provisions, provender or other supplies, or teams, used in, upon, for or about the performance of the work contracted to be done, or for any work or labor done thereon of any kind, that the surety or sureties will pay the same in an amount not exceeding the sum specified in the bond, and also, in case suit is brought upon such bond, a reasonable attorney's fee, to be fixed by the court."

It is quite apparent that this bond is entirely for the benefit of the laborers and materialmen, and they must depend for their compensation upon the personal responsibility of the contractor and sureties.

As to the sureties, the bond does not obligate them to complete the work, nor does it make them responsible for the fulfillment of the obligations of the contractor to the state or the county. It follows that, as sureties, they are not authorized to complete an abandoned contract, nor can they claim any interest in the fund, which is reserved primarily for the purpose of securing the completion of said contract and saving the county or state from loss. Under such circumstances, there would be also, of course, no reason for the principle of estoppel to operate in favor of said sureties as against one to whom the contractor has assigned his claim for value. It may be added that we are not here concerned with any claim that the county may urge to any portion of said fund by reason of having to complete the work.

The well-considered cases from Oregon (*Derby v. United States Fidelity & Guaranty Co.*, 87 Or. 34, 169 Pac. 500, and *Wasco County v. New England Equitable Insurance Co.*, 88 Or. 465, 172 Pac. 126, L. R. A. 1918D, 732, Ann. Cas. 1918E, 656) are so essentially different from this as not to impair the confidence we feel in the conclusion which we have reached.

The order to show cause is discharged, and the writ is denied.

We concur: FINCH, P. J.; HART, J.

**Opinion of Supreme Court in Bank
Denying Hearing.**

PER CURIAM. [7] The application for a hearing in this court after decision by the District Court of Appeal of the Third appellate district is denied solely on the ground that there is no sufficient showing that the superior court of Sutter county is proceeding in excess of its lawful jurisdiction.

All concur, except SHAW, J., absent.

**WALKER v. HARBOR BUSINESS BLOCKS
CO. (Civ. 3959.)**

(District Court of Appeal, First District, Division 2, California. Sept. 23, 1921. Hearing Denied by Supreme Court Nov. 21, 1921.)

1. Appeal and error \S 1097(1) — Former opinion is law of case on subsequent appeal.

An opinion on appeal is the law of the case on subsequent appeal.

2. Appeal and error \S 1170(7)—Irregularity in admission of evidence held not ground for reversal.

Where the merits of the case are overwhelmingly in favor of the plaintiff, and the entire record demonstrates the justice of the decision in his favor irregularity in admitting in evidence a copy of a letter without sufficient preliminary proof would not, under Const. art. 6, \S 4½, warrant the court on appeal in reversing the decision.

Appeal from Superior Court, City and County of San Francisco; A. F. St. Sure, Judge.

Action by Archibald Heesom Walker against the Harbor Business Blocks Company. From a judgment for plaintiff for recovery of the money paid as price of certain lots, defendant appeals. Affirmed.

J. F. Riley, of San Francisco, for appellant.

B. M. Jackson, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against it in an action brought by the plaintiff to recover on his own behalf, and as the assignee of his sister-in-law, money paid by them under contracts with the defendant for the purchase of two lots, on the ground that the defendant had breached the contracts, in that it had failed to put in street improvements as agreed within the time specified in the contracts.

[1] This case has been before the Supreme Court of this state on a prior appeal, and the opinion of that court appears in 181 Cal. 773, 186 Pac. 356. A reading of that opinion, which is the law of this case, reveals

the fact that it covers all matters disclosed by the evidence in the present record. The legal questions involved are discussed by the Supreme Court from every possible angle, and it would, therefore, be a useless proceeding for us to indulge herein in a similar discussion of the same legal principles.

Upon both appeals, the defendant made the contention that the action was prematurely brought. Upon the former appeal, that argument was answered by the Supreme Court by pointing out that the president of the defendant corporation, on its behalf, had made statements to plaintiff and his assignor which were tantamount to a declaration that the corporation could not and would not perform its obligations under the contract within the time prescribed therein, and the well-settled rule was applied that the failure or refusal to perform an obligation assumed expressly or by implication, or the voluntary abandonment of a contract, * * * gives the obligee an immediate right of action for the breach and to rescind. To meet this situation, in the second trial of the action, the president of the defendant company testified that he had offered to perform the obligations of the defendant corporation under the contracts, but had stated to plaintiff that to do so would be inadvisable, and that the plaintiff had acquiesced in this. The most that can be said for the defendant as a result of this testimony of its president is that a conflict is created in the evidence, which was resolved in favor of plaintiff by the trial court upon this point. For plaintiff testified that the president of defendant corporation had told him, on May 17, 1917, that it would take about three years to do the work required by the contract. The time limited for doing the work expired on June 1, 1917. The defendant had had three and one-half years previous to June 1, 1917, within which to do the work called for by their contracts, and the work had not been done, and, indeed, the record shows that up to the time of the trial (May, 1920) the work had not been done.

Upon the question of waiver by the plaintiff and his assignor of the conditions of the contracts requiring the defendant to put improvements upon this property, the record discloses ample evidence justifying the application of the language and holding of the Supreme Court on this point on the former appeal.

[2] Numerous technical objections are made by appellant, such as the objection that the trial court admitted in evidence a copy of a letter to the defendant by the attorney for the plaintiff upon an insufficient showing. It is urged that the letter was improperly admitted because the witness, who was the attorney for the plaintiff, merely testified that—

"On the 18th of May, I addressed a letter to the Harbor Business Block Company, reading as follows."

It is urged that no presumption of receipt follows from "addressing" a letter, and that the witness should have stated that he placed the letter in the mail. The objection made to the testimony was general, and to the effect that the letter was incompetent, irrelevant, and immaterial. No point was made that the statement of the witness was ambiguous and insufficient in this particular, and it is perfectly clear that, had the point been raised, it would have been met at the trial. There was no attempt by the defendant to deny the receipt of this letter. But conceding an irregularity in the admission of this evidence, the merits of this case are so overwhelmingly in favor of the plaintiff, and the entire record, taken as a whole, so clearly demonstrates that justice has been done by the judgment, that no error in the admission or rejection of evidence, or in the matter of pleading or procedure, would warrant this court in reversing this judgment. Section 4½, art. 6, Const. Cal. The remaining matters urged by the appellant are either specifically covered by the opinion of the Supreme Court on the prior appeal or they are covered by the salutary provisions of the Constitution of this state referred to above.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

PRODUCERS' HAY CO. v. HARNEY. (Civ. 3908.)

(District Court of Appeal, First District, Division 2, California. Sept. 23, 1921.)

1. Appeal and error §684(2) — Refusal to grant continuance cannot be considered where not shown in the record.

Where the papers contained in the record do not show that a motion for continuance was made, or the grounds of the motion, or the contents of the moving papers, or the ruling of the trial court thereon, a refusal to grant a continuance cannot be considered on appeal.

2. Appeal and error §714(4)—Statements of attorneys outside record may not be considered by appellate court.

Statement of attorneys in briefs concerning a motion for a continuance not contained in the record may not be considered by the appellate court.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by the Producers' Hay Company against Joseph G. Harney. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Olaj, of San Francisco, for appellant.

Albert Picard, of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant for the sum of \$1,081.50 for a balance due upon a book account for goods sold and delivered by the plaintiff to the defendant. The defendant answered the complaint, and a trial was had by the trial court sitting without a jury in the absence of the defendant and of the attorney for the defendant. The judgment went for the plaintiff, and the defendant has appealed under section 953a of the Code of Civil Procedure. In the record on appeal the appellant has presented to this court copies of the complaint, the answer to the complaint, the judgment, the county clerk's certificate to the judgment roll, the defendant's notice of appeal, the defendant's request for a transcript, and the county clerk's certificate to his transcript. The appellant has also produced the reporter's notes duly certified.

[1, 2] The appellant complains because he was not granted a continuance of the date of the trial. The point is one that we are not at liberty to consider. The papers contained in the record, and which we have enumerated above, do not show to this court that a motion for a continuance was made, or the grounds of the motion, or the contents of the moving papers, or the ruling of the trial court thereon. The attorneys in their briefs have stated certain facts which they respectively claim occurred, but this court may not consider such statements so made outside of the record.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

MEYER v. WHITE.

WHITE v. MEYER.

(Civ. 3937.)

(District Court of Appeal, First District, Division 1, California. Sept. 22, 1921.)

1. Sale §389—Findings in action for breach of contract held inconsistent.

In a seller's action for breach of contract, findings that the seller offered to deliver goods and performed all the conditions of the agreement on his part to be performed, and was at all times ready, able, and willing to deliver, but that the buyer, in violation of his contract and without just cause, refused to accept the goods, and that their reasonable market value at the time of the offer of delivery was less than the selling price, and a further finding that the seller had not suffered damage in any amount, and was not entitled to recover damages, were inconsistent.

2. Appeal and error \Rightarrow 1169(7)—Judgment reversed when findings on appeal on judgment roll are contradictory.

On appeal on the judgment roll alone, where the findings are so contradictory and uncertain as to leave the appellate court in doubt as to their meaning, the judgment will be reversed.

3. Appeal and error \Rightarrow 1172(5), 1178(6)—Judgment reversed for further evidence and findings on question of damages.

Where plaintiff sued for the price of goods sold and damages for refusal to accept other goods and recovered judgment on the first count, but not on the second, though the trial court made findings entitling him to recover, also making an inconsistent finding that he had not suffered any damages, the judgment refusing relief under the second count will be reversed, and the cause remanded to the court below to take evidence and make a proper finding as to damages.

Appeals from Superior Court, City and County of San Francisco; Henry O. Gesford, Judge.

Action by Victor E. Meyer, doing business as Victor E. Meyer & Co., against Albert White, and cross-complaint by Albert White against Victor E. Meyer, doing business, etc. From a judgment for plaintiff for an insufficient amount, he appeals. Reversed and remanded.

Charles Baer, of San Francisco, for appellant.

Albert White, in pro. per.

KERRIGAN, J. Action for goods sold and delivered, and also for damages. Plaintiff and defendant entered into an agreement whereby plaintiff agreed to sell and defendant agreed to purchase 48 pieces of cloth known as velour at the agreed price of \$4.17½ a yard for each yard contained in the 48 pieces; and also 40 pieces of broadcloth at the agreed price of \$4.12½ for each yard contained therein. In pursuance of this agreement plaintiff alleges that he delivered to defendant, and defendant accepted as part of the goods so contracted for, 30 pieces of velour, containing 1,598¾ yards, and 4 pieces of broadcloth containing 230¾ yards. The purchase price of the portion so delivered amounted to the sum of \$7,626.64, and defendant paid on account thereof the sum of \$3,000, leaving a balance due of the sum of \$4,626.64. This amount constitutes the first count of the complaint. By a second count plaintiff alleges that thereafter he offered to deliver to defendant under the terms of the contract an additional amount of 5 pieces of velour, containing 299¾ yards, and also 5 pieces of broadcloth containing 263¾ yards, both being tendered at the agreed price. Defendant, so it is alleged, refused to accept

these further deliveries; and plaintiff claims that on account of such refusal he has been damaged in the sum of \$709.59. Defendant by answer and cross-complaint claimed that the goods sold and delivered to him were not up to sample, and he prayed for the return of the sum of \$3,000 paid by him under the contract. Relief on both counts was prayed for by plaintiff in the sum of \$5,336.23. Judgment, however, was rendered in his favor for the full amount prayed for in the first cause of action, but the court refused to award any damages under the second count. Plaintiff appeals from that portion of the judgment denying these damages.

Upon the second cause of action the trial court found that plaintiff, in pursuance of his agreement, offered to deliver the 10 pieces of cloth as alleged, but that defendant, in violation of his contract and without any just cause or reason, refused to accept the same. It also found that the reasonable market value of the velour was only \$3 per yard, and the broadcloth \$2.85 per yard at the time of the offer of delivery. Further findings are to the effect that plaintiff performed all the conditions of the agreement on his part to be performed, and was at all times ready, able, and willing to deliver all the merchandise in accordance with the agreement.

The court further found, however, that plaintiff had not suffered damage in the amount claimed or in any other sum by reason of the failure and neglect of the defendant to receive, accept, and pay for the goods mentioned, and was not entitled to recover damages from the defendant on account thereof.

[1, 2] The findings are therefore inconsistent. We are unable to account for this inconsistency; the appeal being on the judgment roll alone. Under such circumstances, and where, as here, the findings are so contradictory and uncertain as to leave the appellate court in doubt as to their meaning, the judgment will be reversed. *Sloss v. Allman*, 64 Cal. 47, 80 Pac. 574.

[3] The appeal is directed solely to that portion of the judgment refusing damages under the second count of the complaint. The judgment on the first count will therefore stand, and that portion of the judgment refusing plaintiff the relief sought under his second count will be and the same is hereby reversed, and the cause remanded to the court below to take evidence and make a proper finding upon the question of damages. *Mayberry v. Whittier*, 144 Cal. 322, 78 Pac. 16; 2 Hayne, N. T. & App. p. 1692 et seq.

We concur: **WASTE, P. J.; RICHARDS, J.**

SCHOMAKER v. ROEMER et al. (Civ. 3942.)

(District Court of Appeal, First District, Division 1, California. Sept. 16, 1921.)

1. Appeal and error — 110—Order granting new trial not appealable.

Appeals from orders granting motions for new trial in actions such as to quiet title were abolished by Code Civ. Proc. § 963, as amended by St. 1915, p. 209.

2. Appeal and error — 870(6)—Order granting new trial not reviewable on appeal from judgment in subsequent trial.

An order of the trial court vacating a judgment and granting a new trial is not reviewable upon an appeal from a second judgment rendered and entered upon the retrial of the cause, under Code Civ. Proc. § 956, as amended by St. 1915, p. 328.

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by Johann Schomaker against A. P. Roemer and others. From judgment for defendants, plaintiff appeals. Affirmed.

Reisner & Honey, of San Francisco, for appellant.

T. W. Hubbard and Hubbard & Johnson, all of San Francisco, for respondents.

RICHARDS, J. [1] This is an appeal by the plaintiff from a judgment in favor of the defendants in an action to quiet title. There were two trials of this cause. Upon the first trial thereof the court on October 10, 1916, rendered and entered its judgment in the plaintiff's favor, but thereafter and on January 2, 1917, made an order granting the defendant's motion for a new trial. No appeal was or could have been taken from this order, since appeals from orders granting motions for new trials in cases of this character were abolished by the amendment of section 963 of the Code of Civil Procedure made in 1915 (St. 1915, p. 20). A retrial was had of the cause, at the conclusion of which the court on May 19, 1920, rendered and entered its judgment in favor of the defendants. The plaintiff did not move for a new trial, but appealed directly from this judgment, and the only point which the appellant urges upon this appeal is that the trial court was in error in making its order granting the defendant's motion for a new trial after the first judgment in the case.

[2] It is unnecessary to consider the merits of this contention, since the order of the trial court vacating the first judgment and granting a new trial is not reviewable upon an appeal from the second judgment rendered and entered upon the retrial of the cause, for the reasons fully set forth by the Supreme Court in its recent decision of *Furlow Pressed Brick Co. v. Balboa L. & W. Co.*, 200 Pac. 625, reading in part as follows:

"While the second sentence of section 956, Code of Civil Procedure, as amended in 1915, providing that the court may, on an appeal from the judgment, review any order on motion for a new trial, is broad enough, considered alone, to justify the court in reviewing the order granting the new trial in every case, we think it apparent from the entire context and purpose of section 956, taken in connection with the scheme for appeal adopted by the Legislature in 1915, that it was not intended that any order granting a new trial should be reviewed unless it affects the second judgment and where the entire case is tried de novo, the order granting a new trial could not affect the judgment, however much it might affect the parties to the action."

No other point being urged upon this appeal, the judgment is affirmed.

We concur: **WASTE, P. J.; KERRIGAN, J.**

SCHOMAKER v. ALL PERSONS.
(Civ. 3941.)

(District Court of Appeal, First District, Division 1, California. Sept. 16, 1921.)

Appeal from Superior Court, City and County of San Francisco; George E. Crothers, Judge.

Action by Johann Schomaker against All Persons, etc. From an adverse judgment, plaintiff appeals. Affirmed.

Reisner & Honey, of San Francisco, for appellant.

T. W. Hubbard and Hubbard & Johnson, all of San Francisco, for respondents.

PER CURIAM. Upon the authority of *Schomaker v. Roemer et al.*, 201 Pac. 803, this day decided by this court, the judgment herein is affirmed.

CHICAGO, R. I. & P. RY. CO. v. VAIL.
(No. 10434.)

(Supreme Court of Oklahoma. Nov. 1, 1921.)
(Syllabus by the Court.)

1. Carriers ⇐221—Form of action for failure to furnish cars held not important.

The form of the action for damages for failure of a carrier to furnish cars to a shipper of live stock is not important. The grounds of the liability is unjustifiable omission to furnish the cars, and it is not material that, in an action for damages for failure to furnish cars requested for a particular day, the shipper predicates liability on breach of contract to furnish cars on that day.

2. Carriers ⇐228(5)—In action for failure to furnish cars, evidence held to show defendant negligently breached contract to plaintiff's damage.

The evidence examined, and held to warrant the jury in finding that there was an agreement between the shipper and the local agent of the carrier to furnish cars to the shipper for a particular day, and that such agreement was negligently treated, and that the carrier was not excused from complying with the same, and that the shipper was damaged as a result of the carrier's failure to comply with such agreement.

Appeal from District Court, Oklahoma County; John W. Hayson, Judge.

Action by O. P. Vail against the Chicago, Rock Island & Pacific Railway Company. Judgment for the plaintiff, and the defendant appeals. Affirmed.

C. O. Blake, Roy St. Lewis, W. R. Bleakmore, and R. A. Tolbert, all of El Reno, for plaintiff in error.

Walter & Hilpert, of Oklahoma City, for defendant in error.

JOHNSON, J. The defendant in error herein, plaintiff below, brought an action in the district court of Oklahoma county, Okl., December 8, 1917, against the Chicago, Rock Island & Pacific Railway Company, praying for damages in the sum of \$528.52 for failing to furnish cars as requested, in order to ship hogs and cattle from Apache, Okl., to Oklahoma City, Okl., November 5, 1917.

The petition in said cause, omitting the formal parts, is as follows:

"Plaintiff stated that all times hereinafter mentioned the Chicago, Rock Island & Pacific Railway Company, the defendant named above, was and is a corporation duly organized and authorized under the laws of the state of Oklahoma as a common carrier for hire, and as such engaged in the transportation of live stock between and beyond the points mentioned.

"That on the 28th day of October, 1917, he ordered three cars in the usual manner from the local freight agent of the defendant at Apache, Okl., for the shipment of cattle and

hogs from Apache, Okl., to Oklahoma City, Okl., and to be loaded out on the 30th; that on the 29th of October the agent told him that he could not load before the 31st; that on the 30th the agent said he would have no cars for the 31st, but promised and agreed to furnish him the three cars for November 2d; no cars were furnished on this date; that after various other statements, that plaintiff could load out on November 3d, the agent said he would have a train of cars for the plaintiff for Sunday, November 4th; that on the 4th of November the agent promised and agreed again to have three cars ready for the plaintiff to ship Monday, November 5th, and that, acting and relying on the promise of said agent to furnish said cars, he delivered to the defendants at Apache, Okl., two carloads of hogs, consisting of 221 head, and one carload of cattle, consisting of 36 head of cattle, all in good order and condition and of which he was the owner, for transportation and delivery for the market and immediate sale at Oklahoma City, Okl., and consigned to the C. M. Keys Commission Company at the National Stockyards; that the same were to be transported and delivered in the usual and ordinary time and manner and that the defendants so received the same.

"That it was within the power and province of said defendants to have furnished said cars within the time as agreed by their agent as aforesaid, but that, on the contrary, said defendants and their agent delayed said shipment and wholly and wrongfully failed, refused, and neglected to furnish said cars even after the delivery of the live stock to their line for some four days and did not deliver the same to Oklahoma City until the 9th day of November, 1917.

"That for reasons aforesaid, in failing to furnish said cars as aforesaid, and in delaying said shipment for such unusual and extraordinary time, the plaintiff was and is actually damaged to said hogs and cattle in the sum of \$528.52.

"That the usual and ordinary time and a reasonable time for said shipment to have been delivered had the cars been furnished was 12 hours.

"Wherefore plaintiff prays judgment against said defendant in damages in the sum of \$528.52, 6 per cent, interest on said amount from November 5, 1917, his costs of this action, and any further relief to which he may be entitled under the law."

The defendant answered by general denial and by admitting the corporate capacity of the defendant, and that it was on the dates mentioned engaged in the business of common carrier.

The cause was tried to the court and jury on the 28th day of May, 1918, and resulted in a verdict and judgment in the sum of \$528.52, the amount sued for by the plaintiff.

The defendant filed timely motion for a new trial alleging the usual statutory grounds, which was overruled by the court and exceptions saved, to reverse which aforesaid judgment this proceeding in error was commenced.

Petition in error assigns as error the overruling of the defendants' motion for a new trial, which, among other grounds, includes as error the overruling by the trial court, at the close of the evidence, of the defendants' motion for a directed verdict, and the trial court overruling the objection of the defendant to instruction No. 4, which submits a state of facts not supported by the evidence. It is desired to present these matters under five fundamental specifications:

- (1) No contract or promise to furnish cars.
- (2) Failure to supply cars.
- (3) Corporation Commission orders as laws.
- (4) Revised Laws of Oklahoma 1910, § 788, to be followed.
- (5) Court erred in giving instruction No. 4.

[1] These propositions are related and will be considered together. The plaintiff alleged in his petition that on the 4th day of November, 1917, the agent of the defendant promised and agreed to have three cars ready for the plaintiff to ship Monday, November 5th, and that, acting and relying on the promise of the said agent to furnish said cars, he delivered to the defendant at Apache, Okla., two carloads of hogs, consisting of 221 head, and one carload of cattle consisting of 36 head of cattle, all in good order and condition, and of all of which he was the owner, for transportation and delivery for the market and immediate sale at Oklahoma City, Okla., and consigned to the C. M. Keys Commission Company at the National Stockyards; that the same were to be transported and delivered in the usual and ordinary time and manner, and that the defendant so received the same; that it was within the power and province of said defendant to have furnished said cars within the time as agreed by their agent as aforesaid, but that, on the contrary, the said defendant and their agent delayed said shipment and wholly and wrongfully failed, refused, and neglected to furnish said cars after the delivery of the live stock to their line for some 4 days, and did not deliver the same at Oklahoma City, Okla., until the 9th day of November, 1917; that the usual and ordinary time and a reasonable time for said shipment to have been delivered had the cars been furnished was 12 hours; and that, in failing to furnish said cars and in delaying said shipment for such unusual and extraordinary time, the plaintiff's actual damages to said hogs and cattle was the sum of \$526.52.

The testimony of the plaintiff was not disputed, and he testified that he had ordered these cars several times, as alleged in his petition, over the telephone from his residence, seven or eight miles in the country from Apache, Okla., and on Sunday evening November 4th, the agent promised and agreed again to have three cars ready for the plaintiff to ship Monday, November 5th, and testi-

fied that he told him, the agent, that he, the plaintiff, would be ready to ship by 10 o'clock Monday without fail, and the agent replied that he would have a stock special that day, and would have cars for plaintiff's shipment; that Sunday evening about 5 o'clock the agent called plaintiff and said that he had a few cars and "wanted to know how many cars I could possibly get along with, as few as I could, and I told him, and he said, 'All right,' that he would leave me cars, and I had my cattle out home, and he said that he had to move some other stuff, so I went ahead and notified the people to get my stuff ready, and that I would be ready to ship the stuff on Monday by 10 o'clock I had all the stock there."

The plaintiff testified on cross-examination as follows:

"Q. And you say you were disappointed because you could not get the cars? A. Yes, sir.

"Q. And you were in Apache practically all day Monday, Wednesday, and Thursday? A. Yes; trying to get the cars.

"Q. And it was your impression that you could get the cars when you ordered them? A. Yes; for I had telephoned in and told them, and they had advised me that I could get the cars, and that was all that I wanted to know, and I got my stuff all ready to ship, and then they informed me that they had sent the cars out and I would have to wait for some cars.

"Q. You had ordered the cars over the telephone? A. Yes, sir.

"Q. You had ordered these cars over the telephone? A. Yes, sir.

"Q. You did not send in a written application or demand for the cars? A. No; I did not.

"Q. Just had a telephone conversation with the agent or cashier? A. I had a conversation with the agent on Friday, before the train left on Sunday. Mr. Jeffery didn't want any written order; it was all right. I have always just ordered the cars from him this way, and he had promised me some cars on Friday.

"Q. And it was your understanding that you would get the cars from Mr. Jeffery? A. Yes; and then when he said that he did not have the cars he telephoned to me, and that was when he found that he could not provide the cars as promised.

"Q. And did you tell him to get the cars for you as soon as possible, you still wanted them? A. Yes, of course; I was anxious to get my stuff shipped.

"Q. And you say that you had your stock there in the pens to be shipped Monday? A. Yes; by 10 o'clock that morning, and they never left until Wednesday, and did not arrive in Oklahoma City until the 9th."

The defendant's agent at Apache did not deny this testimony of the plaintiff further than to say that he did not remember all that was said.

The plaintiff further testified that he had lived at his present location west of Apache and been engaged in farming and shipping stock for seven or eight years, making ship-

ments during the last five or six years on an average of six shipments a month, and during that time the testimony showed that Mr. Jeffery had been agent of the defendant at Apache, and that the plaintiff ordered cars for his shipments of live stock by telephone, and that the agent or defendant's cashier would make a memorandum of the orders for cars on the blanks of the company, giving them a serial number, and that the number for this shipment was 25, and was made in the first conversation over the phone on October 28.

Mr. Jeffery, the agent, testified concerning this order, as follows (cross-examination):

"Q. I believe you said, Mr. Jeffery, the first conversation you had with Vail about the cars in this particular shipment was October 28th? A. Cashier. He phoned the order to the cashier.

"Q. For how many cars? A. Three cars.

"Q. And your custom is to make a written memorandum of those orders? To the best of your recollection, what was that order? A. Two cars for hogs and one for cattle.

"Q. And for what day? A. For the 31st.

"Q. And what word did you give him on this order? A. I was not talking with him. The cashier received the order.

"Q. What answer was given him on this order of October 28th as to your ability to furnish cars for November 2d? A. That we did not know whether we could furnish the cars or not and not to bring the stock in until we found out whether we could get the cars.

"Q. Is it the usual custom here to order cars by written order or by phone? A. By phone.

"Q. How long have you been acquainted with Mr. Vail? A. About 13 or 12 years.

"Q. He has shipped other stock during that period other than this shipment? A. Yes, sir.

"Q. Can you give a reasonable estimate of about how much? A. The past 3 or 4 years probably averaged four or five cars per month.

"Q. Do you remember what day of the week November the 2d was on? A. November 2d was Friday.

"Q. When did you next hear from Mr. Vail in regard to ordering cars for this shipment? A. The next I remember of was on Friday afternoon.

"Q. Between November 2d and November 8th did you have any stock cars at the station from November 2d to November 8th? A. Yes, sir.

"Q. How many? A. Six.

"Q. At what time, those cars after November 2d, or any part of them? A. The evening of November 4th.

"Q. Did you notify Mr. Vail that these cars were here? A. No, sir.

"Q. You had no conversation with him regarding these six cars? A. Not these six that I remember of.

"Q. When did you next hear from him after November 2d in regard to this shipment? A. On November 4th I called him up and told him that we were going to run a stock extra that day and could handle all the stock that was ready.

"Q. What did he say? A. He said it was impossible for him to get this stock in on such short notice and would have three cars ready to ship Monday.

"Q. And what did you say in response to that? A. I do not remember.

"Q. Do you remember whether you said, 'all right,' or not? A. No, sir.

"Q. Do you remember whether you said anything? A. No, sir; I don't.

"Q. When did you next hear from Mr. Vail? A. I talked to him some time Sunday evening.

"Q. What did you say? A. That was Sunday evening. I don't remember.

"Q. Well, do you remember whether the conversation was anything about the cars or not? A. Yes, sir; it was about the cars.

"Q. Do you remember whether he said he would have his stock in Monday, the next day? A. No, sir.

"Q. This conversation was over the phone also? A. Yes, sir.

"Q. Do you remember whether Mr. Vail said he would order the stock sent in, or words to that effect? A. No, sir.

"Q. Do you remember whether he said that he would have four cars of stuff, but that he would leave one car at home and bring three? A. No, sir.

"Q. After the Sunday evening conversation, when did you next hear from or see Mr. Vail? A. On Monday, about noon, I think.

"Q. And where was that? A. I think he came in the depot to see about the cars.

"Q. Do you know whether or not you had his cars here? A. I think so.

"Q. And what did you tell him? A. Had no cars.

"Q. What reason, if any, did you give for not having any? A. Did not give him any. * * *

"Q. What became of the six cars that you had on hand Sunday evening? A. They were loaded that night.

"Q. By what parties? A. I cannot recall their names. I can look it up.

"Q. I wish you would please look at your records and get those names. A. W. T. Sparks, one car for Wichita; C. J. Laughlin, one car Oklahoma City, November 4th; Mays & Burns, one car, Oklahoma City, November 4th; Clyde Merriman, three cars, Oklahoma City, November 4th.

"Q. About what time of the day was the Sparks car loaded? A. 11:45 p. m.

"Q. And the Laughlin car? A. 11:45 p. m.

"Q. And the Mays & Burns car? A. 11:45 p. m.

"Q. Clyde Merriman's three cars? A. 11:50 p. m.

"Q. A part of those cars were cars intended for Mr. Vail's shipment, were they not? A. These were brought in on the order of the stock extra that day, but I did not pay any attention to their orders because we had orders to get them in—would handle all the stock.

"Q. Where did you get these orders from? A. From the dispatcher's office at El Reno.

"Q. Then your instructions that day were to disregard these numerically numbered orders? A. They did not tell me about that, but I did.

"Q. You have testified that Mr. Vail's order was No. 25? A. Yes, sir.

"Q. In relation to that number, what were the numbers of the orders of Sparks, Laughlin,

Mays & Burns, and Clyde Merriman? A. Laughlin's order was 26. Mays & Burns and Sparks, they did not have any orders of their own. They bought the cattle and were on order No. 23, by H. L. Johnson and O. B. Thompson, No. 23, and No. 26. * * *

"Q. What did Mr. Vail do, if you know, with his cattle after their arrival prior to the time they were shipped out on November 8th? A. He fed and took care of them; fed and watered them.

"Q. Did he hold them here at the stockyards? A. Yes, sir.

"Q. Was he here personally taking care of them? A. Yes; I think he was here every day.

"Q. Exhibit No. 2 (dated Apache, 11/23, 9:25 a. m.), your telegram to the dispatcher at El Reno in which you say: 'Will have 1 hogs and two cattle for stock special today. O. P. Vail advises impossible to get his stock here on so short notice, but will have three stock in pens by noon to-morrow and ready to load.' Did you send that telegram? A. Yes, sir.

"Q. Did you receive a response to it? A. No, sir.

"Q. Did you notify Mr. Vail that you were doing this? A. No, sir.

"Q. Did you tell him anything about any orders that you had from your superiors that he would not be able to get these cars he had ordered for Sunday, as you say, for the following Monday morning? A. No, sir.

"Q. In Exhibit No. 3, which purports to be a telegram from the dispatcher to yourself, dated El Reno, November 6, 8:50 p. m., which says: 'Ordering your 5 stk cars on 761 in a. m. See shippers load promptly. Advise if cannot use at once so car take to points where badly needed.' You say you received that telegram at that time? A. Yes, sir.

"Q. Was that before or after Mr. Vail had his stock here in the pens? A. That was after.

"Q. Was he ready to load at that time? A. Yes, sir."

The plaintiff testified as to the expense incurred by him for feed for the stock while in the pens at Apache, and as to the shrinkage in weights of the stock showing that the same were weighed at Apache, and also when sold in Oklahoma City, and as to the price the same was sold for, leaving it an easy matter for the jury to figure and cast up the amount of damage. However, it is not claimed that the award of the jury was excessive in case the defendant was at all liable.

The defendant's defense was upon the theory that there was no liability of the defendant shown; that no contract to furnish cars was proven, and no negligence of delay in furnishing cars was proven.

The defendant offered quite a mass of testimony going to the question of a general shortage of cars throughout the country during the year 1917, and the demands made upon the defendant for cars by the government

of the United States, and its effort to comply with such demands, and urging, therefore, that under the circumstances of this case the defendant was not negligent; also orders of the Corporation Commission of this state defining what was a reasonable time in which to furnish cars, and arguing that, disregarding the manner in which the plaintiff ordered the cars, the testimony of both parties is that the cars were placed within the time fixed by the Corporation Commission.

We cannot agree with defendant's contention thus made that the same constituted a defense to the plaintiff's cause of action in the circumstances shown by the record. Had the defendant company stood upon its rights in the circumstances shown by its testimony and declined to agree to furnish cars except on a written order made therefor by the shipper, and at an earlier date than that fixed by order of the Corporation Commission defining a reasonable time, quite a different situation would have been presented, and doubtless this suit would not have been here for determination by this court.

It is apparent from the record hereinbefore recited that the plaintiff's cause of action is based upon an agreement of the defendant's agent made in the customary way, he making such agreement to furnish a definite number of cars at a specified time, charging a failure on the defendant to comply with such agreement, and that the plaintiff suffered detriment on account of such breach.

[2] We think the testimony was amply sufficient to take the question of the alleged breach of the agreement to the jury, and was also sufficient to support the findings of the jury as to the amount of damages that the plaintiff suffered as a result of the breach of such agreement by the defendant. Therefore the defendant's demurrer to the evidence was properly overruled by the trial court.

The defendant complains of the fourth paragraph of the court's instructions to the jury. We have carefully examined the instructions, and find that the same show a fair and reasonable statement of the law applicable to the facts of this case, and that this contention of the defendant is without merit.

It has been the universal holding of this court that, where there is any testimony reasonably tending to support the verdict of the jury in such circumstances, the same will not be disturbed by this court on appeal. *Armstrong, etc., Co. v. Crump*, 25 Okl. 452, 106 Pac. 855; *McKennon v. Pentecost*, 8 Okl. 117, 56 Pac. 958; *Missouri, Kan. & Tex. Ry. Co. v. Shepherd*, 20 Okl. 626, 95 Pac. 244; *Choctaw, Okl. & Gulf Ry. Co. v. Burgess*, 21 Okl. 653, 97 Pac. 271; *Gt. Western Mfg. Co. v. Davidson M. & E. Co.*, 26 Okl. 626, 110 Pac.

1096; *McCoy v. Wosika*, 75 Okl. 3, 180 Pac. 967.

The judgment of the trial court is affirmed.

HARRISON, C. J., and KANE, MILLER, and KENNAMER, JJ., concur.

MISSOURI, K. & T. RY. CO. et al. v. CITY OF EUFAULA et al. (No. 12263.)

(Supreme Court of Oklahoma. Nov. 1, 1921.)

(Syllabus by the Court.)

1. Municipal corporations \S 425(2, 3)—Railway right of way and station grounds granted by Congress are subject to assessment for street improvement.

The right of way and station grounds of a railway company in Oklahoma, which were granted by Congress, are subject to special assessments for betterments for a street improvement.

2. Municipal corporations \S 425(3), 536—Railway right of way, not included between rails and tracks, held liable for special street improvement assessments.

That portion of a railway right of way and station grounds not included between the rails and tracks of the railroad and for two feet on the outside of such rails and tracks is liable for a special assessment for a street improvement, where set forth in proper quarter block districts, and the premises assessed were those quarter blocks thereon designated as abutting on that portion of the street which was improved; mere insufficient description or other irregularities in a proceeding for a special assessment for a street improvement, would not entitle such abutting owner to have the assessment declared void, but its rights under the statute of Oklahoma would, at most, be limited to having a reassessment made conforming to the statutory regulations.

3. Record held to show no reversible error.

Record examined, and held that there is no reversible error in the record, and the judgment of the trial court is affirmed.

Appeal from District Court, McIntosh County; Harve L. Melton, Judge.

Action by the Missouri, Kansas & Texas Railway Company and another against the City of Eufaula and others. Temporary injunction denied, demurrer to petition sustained, and the plaintiffs appeal. Affirmed.

M. D. Green and H. L. Smith, both of Muskogee, for plaintiffs in error.

E. C. Hopper, Jr., of Eufaula, Randolph, Haver & Shirk and H. M. Gray, all of Tulsa, for defendants in error.

JOHNSON, J. This is an appeal from the district court of McIntosh county. This was

an action commenced by the Missouri, Kansas & Texas Railway Company to prevent the city of Eufaula from enforcing certain paving assessments and from issuing paving bonds therefor. A temporary injunction was denied, and defendant's demurrer to plaintiffs' petition was sustained, to reverse which judgment this proceeding in error was commenced.

The record discloses that the city of Eufaula was engaged in paving certain streets which crossed the Katy right of way at right angles. The right of way was 500 feet wide and 2,000 feet long. The company uses for tracks, including 2 feet on the outside of the outside tracks, but 128 feet of this 500 feet of right of way in the center thereof, leaving 372 feet for other uses. The city proceeded in the regular way under the statutes, the city having no charter form of government, and when it came to letting the contract it included all the work, both within and without the railroad tracks and the 2-foot strip on each side thereof. Thereafter, an assessing ordinance was passed in which the abutting railroad land within proper quarter blocks was all assessed, but that between the tracks and 2 feet on each side thereof was separately assessed from that outside such limits. Thereafter the city adopted its bond resolution, which did not include the expense of paving between the tracks and 2 feet on each side thereof, but did include the expense of paving assessed to the remainder of the railroad property. At this time the Katy brought this injunction suit to restrain the city from taking any steps to collect the assessments and from issuing the bonds. Neither at the time of the commencement of the suit or since has there been any paving between the tracks. This is admitted in the record, and was also admitted in the oral argument of the case.

[1-3] The railroad company admits that it may be required to pave the 128 feet used for its tracks as aforesaid, but insists that it cannot be assessed for such paving, but its main contention is that the remainder of the right of way, the 372 feet, cannot be assessed at all.

The specifications of error argued in the brief of its counsel are as follows:

"(1) The trial court erred in finding that plaintiffs in error's motion for a temporary injunction should be denied, and refusing to grant them a temporary injunction.

"(2) The trial court erred in finding that defendants in error's demurrer to plaintiffs in error's petition should be sustained, and in sustaining said demurrer.

"(3) The court erred in making and rendering its order and judgment denying plaintiffs in error a temporary injunction, and sustaining defendants in error's demurrer, and entering

judgment dismissing the case at plaintiffs in error's costs."

The only two propositions argued by counsel for plaintiff in their brief are as follows:

"The contract which was led by defendants in error for paving between the railway tracks and the assessments for the estimated costs thereof, are void, and the paving bonds are void.

"All the assessments against the railway company and its station grounds for paving that part of the streets outside of the railway tracks are void, and the bonds issued therefor are also void."

These propositions are closely related and will be considered together. Concerning these propositions, counsel for plaintiff say in their brief:

"The evidence introduced in support of plaintiffs in error's application for a temporary injunction to enjoin the defendants in error from collecting the paving assessments involved in this suit has heretofore been set out fully in this brief, and consisted of the plaintiffs' verified petition and the various resolutions, ordinances, and other documents referred to. The allegations of fact in the verified petition, which are admitted by the demurrer filed on behalf of defendants, and the other evidence introduced, show that the railway company acquired its right of way and station grounds through Eufaula under congressional land grant, and that the same is necessary for its uses in conducting the business of a common carrier in interstate and intrastate commerce; that these station grounds where they are crossed at right angles by High street and McKinley avenue, which are being paved, are 500 feet in width, and there are four railroad tracks traversing same within 100 feet of each other, and that it is almost 200 feet from the outside track to the outer edge of the station grounds on both the east and west sides thereof, all as more fully shown on the blueprint map; that on January 22, 1919, defendants passed a resolution declaring the necessity for the paving of High street and McKinley avenue, including that part of same crossing said station grounds and railway tracks; that on June 23, 1919, they passed a further resolution looking to this improvement; that on June 24, 1919, the defendants advertised for bids for letting the contracts for said paving, including that part of High street and McKinley avenue across said station grounds and between the tracks, and on July 8, 1919, they let the contract for said paving to Comstock & Hanson. The contract provided, among other things, that the contractors were to be paid in street improvement bonds, and the defendants thereby agreed to take the necessary action to have such bonds issued and delivered to the contractors upon the completion and the acceptance of the work, and to take such action as would facilitate the collection of the assessments levied in payment of the paving.

"Thereafter the defendants undertook to have the appraisers appraise the benefits of said paving to the abutting property, including the said station grounds, and on February 3, 1921, they passed Ordinance No. 21, by which they

undertook and attempted to assess both the abutting property and the owners thereof, including the plaintiff railway company and its station grounds, with the cost of said paving, and provided for the time and manner of payment thereof, and the interest to be charged, and for the issuance of bonds to cover assessment not paid."

Counsel then cite chapter 10, art. 12, §§ 608 to 646, R. L. 1910, being the statutes regulating paving and improving streets, and levying assessments to pay for the same, and counsel take the position that because the statutes impose upon the railway the duty of paving between the rails and two feet on each side, the remainder of the right of way, regardless of area or of use, is not subject to assessment. They base this contention upon section 611 of the statute supra, which is as follows:

"And where any steam railroad company shall cross with any street that is being or has been paved, the city council may require such railway company to pave so much of said street as may be occupied by its track or tracks and two feet on each side, and when more than one track crosses such street within a distance of one hundred feet, measuring from inside rail to outside rail, said railway company shall grade, gutter, drain, curb, pave or improve between its said tracks in the same manner as the city may be improving or has improved the other portion of said street."

They also set out section 619, which governs the manner of making assessments, and section 635, governing the issuance of bonds, but say in their brief:

"The last-quoted general provisions of the paving law do not apply, however, to the matters now presented to the court herein, because the other and special provisions of the law fully cover the matter"

—taking the position that the last-quoted provisions have no reference to the balance of the right of way property involved herein. With this contention of counsel we cannot agree. This precise question has been decided both by this court and the Supreme Court of the United States clearly the other way, by this court in the case of *M., K. & T. Ry. Co. v. City of Tulsa*, 45 Okl. 382, 145 Pac. 398. In that case, in construing section 6 of the charter of the city of Tulsa, the provisions of which are substantially the same as those of the statute quoted supra, this court, in paragraph 2 of the syllabus, stated:

"Section 6 of the charter of the city of Tulsa provides: 'After excluding the cost of making any improvement between and 2 feet on each side of the track and rails of railroads, * * * and the entire cost of any improvements crossing the right of way of any railroad, which costs are to be * * * paid by the owners of such railroads, * * * the city * * * shall have the power to assess the whole cost of construction, * * * against the owners

of the property abutting upon the street * * * upon which such improvements are to be constructed, and who are specially benefited thereby. * * * Assuming that certain lots owned by the railroad company and within its right of way are within the taxing district and are benefited by the improvement, held, that the company are the 'owners of the property abutting upon the street' improved within the meaning of the charter."

The Supreme Court of the United States, in the case of *Choctaw, Okl. & Gulf Ry. Co. et al. v. B. W. Mackey, as Co. Treas. of Hughes County, Okl., and the City of Holdenville, Okl.* et al., 256 U. S. —, 41 Sup. Ct. 582, 65 L. Ed. 639, in paragraphs 2 and 3 of the syllabus, stated:

"2. The right of way and station grounds of a railroad in Oklahoma, which were granted by Congress, and which, through leasing, have become an integral part of through lines of a great railroad system, are not exempt from special assessment for a local improvement on the theory that, because among the public served by the railroad are some mines on land leased from the Choctaw Nation, such railroad is an instrumentality of the federal government.

"3. A railroad right of way and station grounds in Oklahoma are sufficiently identified in a proceeding for a special assessment for a street improvement to satisfy due process of law, where, the premises not having been platted, the mayor and common council adopted a map of the city engineer on which the right of way and station grounds were set forth in proper quarter block districts, and the premises assessed were those quarter blocks thereon designated as abutting on that portion of the street which was improved, and the designation was clear, although, some time after the passage of the ordinance providing for the assessment, this map was inadvertently removed from the city files, the railroad companies having full knowledge of the proceedings relating to the assessment, and of the commencement, progress, and completion of the improvement, and there being no suggestion that they were injured or misled by the temporary absence of the map from the city files."

Also, see *Okl. Ry. Co. v. Severns Paving Co. et al.*, 170 Pac. 216, 10 A. L. R. 157.

As hereinbefore stated, as to the space between the tracks, while the same was included in the contract, it is admitted that neither the city nor the contractor has assumed to act thereunder, and the same has not been paved. However, the record discloses that the railway company was notified to pave after the contract was let. Concerning this matter, counsel for defendants say in their brief:

"The plaintiff also complains that the assessment was void, and hence the bonds will be void because the assessments were not only against the various items of property, but also personally against the various property owners. The city of Eufaula is governed by the state law as to paving, and not by charter provisions, and we do not contend that a personal liability assessment can be made. We admit also that the assessments in the instant case may be interpreted to impose a personal liability on the property owners. If it does, then this part of the assessment is clearly a nullity. But this does not give merit to plaintiff's contention. The assessment against the railroads—except that for paving between the tracks—is also against specific quarter block tracts of land. * * *

"It is obvious that the attempt to impose a personal liability is void, if the assessing ordinance is to be construed as such an attempt. This is apparent from the ordinance itself. Such portion of the ordinance is a nullity as a matter of law. But it can be excluded and a valid assessing ordinance still remain. This part of the ordinance certainly does not tend to cloud plaintiff's title, and as the petition does not allege that the city is attempting or threatening to enforce the assessments as personal obligations, then the petition clearly does not state a cause of action arising from the personal assessment. Moreover, as there is no legal procedure by which the assessment could be enforced as a personal obligation, it seems impossible to conceive how a cause of action could be so stated."

These statements of counsel are and will be considered by this court as solemn admissions in the record in the instant case, and the effect of the same is that the question of levying assessments upon the part of the railroad company's right of way between its tracks and for 2 feet on the outside thereof, for which no bonds will be issued by the city, and the question of personal liability assessments against the defendant, are out of the case, as the provisions of the statute in relation thereto must be followed. And in the event the railroad company fails to pave that part of its right of way between its tracks and for 2 feet on the outside thereof as prescribed by the statute, then the city may proceed to pave the same and enforce payment therefor by the railway company in a proper proceeding in the district court in the way and manner provided by the statute.

The judgment of the trial court, refusing an injunction, is affirmed.

HARRISON, C. J., and KANE, MILLER, and KENNAMER, JJ., concur.

SHAW v. CROSS. (No. 9927.)

(Supreme Court of Oklahoma. Nov. 1, 1921.)

(Syllabus by the Court.)

1. Continuance \S 7, 54—Party going to trial without motion for continuance being acted upon is deemed to have waived it.

An application for a continuance on the ground of absence of a material witness is addressed to the discretion of the court, and where the party making the application proceeds with the trial of the cause without having the court act upon his motion for continuance, he will be deemed to have waived it.

2. Malicious prosecution \S 56 — Burden on plaintiff to show want of probable cause and malice.

In an action for malicious prosecution the burden of proof is upon the plaintiff to establish by the evidence want of probable cause and malice in instituting the proceedings, but where the evidence of the plaintiff fails to show malice and the absence of probable cause in prosecuting the proceedings complained of, it is not error for the trial court to sustain a demurrer to the testimony.

3. Conspiracy \S 1—Malicious prosecution \S 27—Lawful acts by lawful means not actionable.

There can be no malice or conspiracy where the acts complained of are lawful and the means employed in doing the acts are lawful.

4. Trial \S 139(1), 156(3)—Demurrer to evidence admits all facts which evidence reasonably tends to establish; demurrer to evidence may be sustained where evidence insufficient to sustain a verdict.

A demurrer to the evidence admits all of the facts which the evidence reasonably tends to establish, and all the inferences and conclusions which may reasonably be drawn therefrom, but, where the evidence introduced is insufficient to sustain a verdict or judgment in favor of the party introducing the evidence, it is not error for the court to sustain a demurrer to such evidence.

Appeal from District Court, Comanche County; Cham Jones, Judge.

Action by Charles H. Shaw against S. N. Cross, revived on his death in the name of his administrator. From a judgment for defendant and an order denying a new trial, the plaintiff appeals. Affirmed.

Charles C. Black, of Lawton, for plaintiff in error.

J. A. Diffendaffer, of Lawton, for defendant in error.

KENNAMER, J. Charles H. Shaw, as plaintiff, prosecuted this action in the district court of Comanche county against S. N. Cross, as defendant, to recover damages. S. N. Cross having died, this cause has been revived in the name of the administrator of his estate.

Petition of the plaintiff charged the defendant with malicious acts done individually and in conspiracy with others to the injury of the plaintiff by delaying him in the performance of a contract which he had entered into with the city of Lawton in constructing certain pavement, in maliciously prosecuting certain injunction suits attempting to enjoin the defendant and the city of Lawton in paving streets of said city of Lawton and levying and collecting the special assessments for such paving.

The defendant filed answer to the petition of the plaintiff, denying generally the allegations of the petition except he admitted the filing of the suits, but alleged that the same were filed in good faith and under the advice of counsel.

The cause was tried to a jury November, 1917, and after the plaintiff had introduced his testimony the defendant filed a demurrer to the evidence of the plaintiff, which demurrer was by the court sustained, and judgment entered decreeing that the plaintiff had failed to establish any cause of action against the defendant. Plaintiff filed a timely motion for a new trial, which was by the court overruled, and exceptions allowed. To reverse and vacate the judgment of the trial court and order overruling plaintiff's motion for a new trial this appeal is prosecuted.

The plaintiff has assigned seven assignments of error. The first assignment argued by counsel for plaintiff is that the court erred in overruling the motion of the plaintiff for a continuance.

[1] We have examined the record and fail to find where the court made any ruling upon the application for continuance, and the plaintiff, having gone to trial without having his motion acted upon by the trial court, will be deemed to have waived his motion. However, we have examined the affidavit for continuance, and, in our judgment, sufficient diligence is not shown to have secured the attendance of the witness, as the plaintiff only had a *præcipe subpoena* issued two days prior to the cause. Furthermore, the evidence, which the plaintiff expected to establish by the absent witness, as disclosed by the record would have only been cumulative of the evidence introduced.

The second error urged in the brief of the plaintiff is a rejection of evidence offered by the plaintiff. Upon an examination of the record we find that, if any error was committed in this respect, the same was cured by the court subsequent to his sustaining and objection to the evidence by permitting the plaintiff to introduce the evidence, and that error would be immaterial by reason of the conclusion that we have reached upon the third proposition argued by counsel in his brief.

[2] The only and remaining error complained of in brief of counsel for plaintiff is action of the trial court in sustaining the demurrer of the defendant to the evidence of the plaintiff. Counsel in his brief for plaintiff directs the court's attention to the following rule:

"The question presented by a motion for a directed verdict is whether or not, admitting all the evidence to be true and all inferences to be drawn therefrom, there is enough competent evidence to sustain a verdict. *Gwinup v. Walton Trust Co.*, 172 Pac. 936.

"It is only where the evidence and all inferences to be drawn from it will not justify a verdict for the plaintiff that the trial court should give a peremptory instruction to find for the defendant. *Oklahoma Automobile Co. v. Goulding*, 176 Pac. 400.

We have no fault to find with the rule, but counsel in his brief has failed to direct our attention to any testimony which he contends was sufficient to have the case submitted to the jury. In substance, the plaintiff complained of the action of the defendant in testing the legality of the proceedings and contract which the plaintiff had with the city of Lawton to do certain paving. This the defendant had a lawful right to do.

[3] In the case of *Barton v. Rogers et al.*, 21 Idaho, 609, 123 Pac. 478, 40 L. R. A. (N. S.) 681, Ann. Cas. 1913B, 192, the court held:

"In contemplation of law, there can be no malice or conspiracy where the thing to be done is lawful and the means employed in doing the thing are also lawful."

In the case at bar, upon an examination of the petition, it appears that the plaintiff also attempted to state a cause of action for malicious prosecution, and in such a case the burden of proof is upon the plaintiff to prove want of probable cause and malice, and in the trial of such a case, where the evidence wholly fails to show malice in instituting the proceedings, it is the duty of the court upon a demurrer to the evidence to sustain the demurrer and dismiss the action. *Jones Leather Co. v. Woody*, 169 Pac. 878.

[4] While it is the duty of counsel to point out in their brief such testimony as would entitle the plaintiff to have the cause submitted to the jury in order that this court may determine whether there was any error in the action of the court in sustaining the demurrer to the evidence, nevertheless we have carefully examined the record, and we have failed to find any evidence tending to establish malice or the want of probable cause in instituting the injunction actions.

Finding no reversible error in the record, the judgment of the trial court is affirmed.

HARRISON, C. J., and KANE, MILLER, and NICHOLSON, JJ., concur.

GOBEN v. STATE. (No. A-4002.)

(Criminal Court of Appeals of Oklahoma.
Oct. 10, 1921. Rehearing Denied
Nov. 30, 1921.)

(Syllabus by the Court.)

1. Criminal law § 633(1)—Court should uphold guaranty of fair and impartial trial.

Every person charged with crime, whether guilty or innocent, is entitled to a fair and impartial trial according to the due and orderly course of the law, and it is a duty resting upon the courts to see that the guaranty of such a trial, conferred by the laws upon every citizen, shall be upheld and sustained.

2. Criminal law § 629—Defendant cannot be tried for capital offense until after being furnished with list of state's witnesses.

The Bill of Rights (Const. art. 2, § 20) provides that "in capital cases, at least two days before the case is called for trial, he [the accused] shall be furnished with a list of the witnesses that will be called in chief, to prove the allegations of the indictment or information, together with their post office addresses." *Held*, that under this provision of the Constitution the defendant in a capital case does not have to demand a list of the witnesses to be called in chief, because the Constitution makes the demand for him, and the trial court is without authority to force him to trial until this provision has been complied with, unless the defendant has waived this right.

3. Criminal law § 577—Defendant's counsel must have reasonable time to prepare for trial.

Under the constitutional guaranty that a person accused of crime shall have the right to the assistance of counsel, counsel appointed to defend the accused must be given a reasonable time within which to prepare for trial, to investigate the facts, and examine the law applicable to the case.

4. Criminal law § 590(2)—Denying continuance for lack of time to prepare in murder case held abuse of discretion.

In this case the information was filed, and on the same day defendant was brought from another county, where he had been held in custody from the time of his arrest, and counsel appointed to defend him, then arraigned, a demurrer filed and overruled, and then a plea of not guilty entered. Thereupon the case was called for trial, and defendant filed his affidavit for a continuance, on the ground of want of time to prepare for trial, which was overruled, and on the same day the case proceeded to trial. *Held*, that the denial of a continuance to another day of the term was a manifest abuse of judicial discretion.

(Additional Syllabus by Editorial Staff.)

5. Criminal law § 608—Substance rather than form considered in continuance affidavit.

The court will look at the substance rather than the form, with a view to promote justice, in considering an affidavit for continuance.

6. Criminal law §590(2) — Discretion as to continuance must be judicial, not arbitrary.

The court's discretion in granting or refusing an application for continuance for want of time for counsel to prepare for a defense to a murder charge must be judicial, not arbitrary, and be exercised in conformity with law.

7. Criminal law §433 — Admission of letter held improper.

In a murder trial, a letter found in the bottom of a trunk containing clothes bearing initials the same as defendant's, read to the jury over defendant's objection, and not dated nor addressed to defendant or any other person, and not signed, except by the name "Jack," and not a statement in writing by defendant or his codefendant, and not shown whether written before or after the homicide, held improperly admitted.

8. Criminal law §304(5, 6) — Judicial notice taken of state and county boundaries and location of towns.

The courts take judicial notice of the boundaries of the state and counties therein and the geographical location of cities and towns within the state.

Appeal from District Court, Comanche County; A. S. Wells, Judge.

C. W. Goben was convicted of murder, and he appeals. Reversed and remanded for new trial.

Lewis R. Morris, of Oklahoma City, for plaintiff in error.

S. P. Freeling, Atty. Gen., and E. L. Fulton, Asst. Atty. Gen., for the State.

DOYLE, P. J. Plaintiff in error, O. W. Goben, was convicted in the district court of Comanche county of murder, and the death penalty assessed, upon an information charging him and one William Tait with the murder of Russell Sprague in said county on the 25th day of March, 1921. To reverse the judgment and sentence of death rendered in pursuance of the verdict, an appeal was duly perfected.

One of the grounds of the motion for new trial, and assigned as error, is that the court erred in refusing to grant a continuance. On the 31st day of March, 1921, said defendants were arrested at Perryton, Tex.; from there they were taken by the sheriff of Comanche county to Oklahoma City and placed in the county jail. On the 8th day of April, they were taken from Oklahoma City to the town of Fletcher, in Comanche county, for their preliminary examination, and on the same day they were taken back to the county jail at Oklahoma City. On the 12th day of April, 1921, the information was filed in the district court of Comanche county, and on the same day the defendants were taken to Lawton and arraigned. The court, being then advised by the defendant Goben that

he had not secured counsel and was without means to employ counsel, appointed A. J. Burton, a member of the bar presents, to represent him.

The defendant Tait entered a plea of guilty, and the court fixed the 14th day of April as the time at which judgment should be pronounced upon his plea of guilty, at which time the court pronounced judgment and sentenced the defendant Tait to suffer death by electrocution. See Opinion of the Judges, 17 Okl. Cr. —, 197 Pac. 546. Upon his arraignment on the 12th day of April, the defendant Goben filed a demurrer to the information, which was overruled and exception allowed. He then entered his plea of not guilty and the case was called for trial. Thereupon the defendant Goben filed a motion for continuance, supported by his affidavit, which was overruled, and the jury was impaneled to try the case, which trial resulted in a verdict as above stated, rendered on the 14th day of April. Motions for new trial and in arrest of judgment were duly filed and overruled. On April 18th the court rendered judgment, and the defendant was sentenced to suffer death by electrocution, appointing June 18, 1921, as the day of execution.

It is contended that the court violated the defendant's rights in compelling him to go to trial without sufficient time for him or his counsel to prepare for his defense. The defendant's affidavit for continuance, duly verified, among others, contained the following statements:

"That he was arrested on the night of the 31st day of March, 1921, at Perryton, Tex., and was taken by the sheriff of Comanche county directly to Oklahoma City, and was never brought to the county seat of Comanche county until brought here by the sheriff of Comanche county on the day set for his trial, namely, April 12, 1921. That he was wholly unable to secure any attorney in Oklahoma City, for the reason that he was not acquainted with any one at that place, and that affiant is informed and believes, and therefore states as a fact, that his wife and parents did not know and could not find out where he was placed by the said sheriff of Comanche county after his arrest, and for that reason they were not able to assist him in securing counsel. That on the 5th day of April, at the efforts of his father at Lawton, affiant secured audience with an attorney. That from that time to the present, to wit, the 12th day of April, 1921, the day for trial, affiant has not seen nor had any counsel whatever with any attorney, except about 15 minutes on the day of his preliminary at Fletcher, which preliminary was on Friday, the 8th day of April, 1921.

"Affiant further states that the fact of his not being prepared and ready for trial at this time is not due to any fault or neglect on his part, but due to his being unable to see and to consult with an attorney, because of his ab-

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"Regardless of our feelings in the matter, or any resentment we might have against the atrocious crime charged against the plaintiff in error, the violation of a plain, simple, and unambiguous demand of the Constitution must not be tolerated by the courts, and responsibility in such cases must rest upon the tribunal in which it is practiced or attempted. * * *

Under the last provision of this section of the Constitution, the accused in capital cases does not have to demand a list of the witnesses, together with their post office addresses, but the Constitution makes that demand for him; and, unless he waives it, he cannot be legally put upon trial until that demand has been complied with. Ordinarily, in applications for continuance, the court may exercise a sound judicial discretion; but it would be absurd to say that this discretion could go to the extent of nullifying a plain, simple, unambiguous de-

mand of the fundamental law of the state, made exclusively for the benefit of the accused. The court in the case at bar had no more authority to force the plaintiff in error to trial until he had waived this demand of the Constitution, or it had been complied with, then he would have had to force him to trial without an information or a jury. For both of these rights rest upon the same authority and are guaranteed to the accused in the same section of the Constitution; and no one can nullify them, and the accused alone can waive them."

[5] While the affidavit for continuance does not particularly state these grounds, it cannot be said that the defendant thereby waived any right guaranteed by the Constitution. This court has repeatedly held that with respect to exceptions the court will look at the substance, rather than the form, with a view to 'promote justice.

[6] The granting or refusal of an application for continuance on the ground of want of time for the defendant's counsel to prepare for trial is ordinarily discretionary with the trial court. However, the discretion which the trial court exercises must be judicial, not arbitrary, and must be exercised in conformity with the laws of the state.

[3] The right of the accused to the assistance of counsel in making his defense has long been regarded in this country as essential to the due administration of justice in criminal cases. Says Mr. Cooley:

"With us it is a universal principle of constitutional law that the prisoner shall be allowed a defense by counsel." Const. L^{im}. 334.

In order that the accused may have the full benefit of this constitutional right, the Code of Criminal Procedure provides:

"If the defendant appear for arraignment, without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desire the aid of counsel. If he desires, and is unable to employ counsel, the court must assign counsel to defend him." Section 5773, Rev. Laws.

The constitutional right of representation by counsel certainly includes a reasonable time within which to prepare for trial. In the case of *Lawson v. Territory*, 8 Okl. 1, 56 Pac. 698, it is said:

"One accused of crime has the right to have the aid of counsel to defend him, and the constitutional guaranty that he shall have the right to the assistance of counsel means that he shall have the benefit of the best skill and thought that his counsel can give him; and an attorney cannot, under the most favorable circumstances, properly defend one charged with murder, without having a reasonable time to prepare his case for trial. We are of the opinion that the trial court, in compelling the defendant to go to trial the next day after the indictment was returned, and immediately upon the overruling of the demurrer, exceeded

its discretionary power. The defendant should have been granted further time."

In *Hensley v. Comm.* (Ky.) 74 S. W. 677, the conviction for murder was reversed because the court refused to grant a continuance and forced the defendant into a trial on the day the indictment was found. In *State v. Collins*, 104 La. 629, 29 South. 180, 81 Am. St. Rep. 150, four days was held to be too short a time in which to prepare a defense in a murder case. In the opinion it is said:

"This was a capital case. The life of a human being was at stake, and for the time being it was sheltered by the presumption of innocence. Great deliberation—an utter absence of precipitancy—should have characterized every movement of the court leading up to the conviction. 'The law travels with a leaden heel, but strikes with an iron hand,' is a maxim pregnant with obvious meaning. In this instance it doffed the 'leaden heel,' yet struck with the iron hand. It is not unlikely that the previous attempt at lynching, and apprehension felt by the officers of the law of a second attempt being made in case of delay in bringing the accused to trial, may have influenced the situation to his detriment and caused the undue haste complained of. But this cannot be accorded the weight of justifying departure from the rule of calm deliberation. The right 'to have the assistance of counsel' is one conferred by the Constitution itself. Reasonable time to prepare for his defense should have been allowed the counsel, who had, by direction of the court, undertaken its responsibility. Only in this way could their 'assistance' be made effective."

We have examined all the cases accessible bearing upon this question, and the rule appears to be well settled that, under the constitutional guaranty that the accused shall have the right to the assistance of counsel, counsel appointed to defend the accused in a capital case must be given a reasonable time to prepare for trial, to investigate the facts, and examine the law applicable to the case, and this without being forced to a showing as to witnesses, and what is expected to be proven by them. It may be stated here and in this connection that the failure of counsel appointed to defend to take 24 hours to plead, and to specifically demand that the defendant be accorded these constitutional rights, is strong and convincing proof of the necessity of the rule.

In cases of this kind, where the defendant is to be placed on trial for his life, he should have the advantage of every right which the law secures to him upon his trial. A fair and impartial administration of the laws is one of the most sacred rights of the citizen, and it is the duty of trial courts in the administration of the law to see that the accused, however guilty he may be, shall have a fair trial according to the due and orderly

course of the law, and this duty is emphasized in a capital case.

[4] Under the circumstances of this case, as shown by the record, counsel appointed to defend, was not allowed sufficient time to prepare for trial, and the refusal of the court to continue the case, at least to another day in the term, was clearly an abuse of judicial discretion. It follows that forcing the defendant into trial against his objections on the same day that the information was filed and counsel appointed to defend was error prejudicial to the substantial rights of the defendant.

This is sufficient to dispose of the appeal; but, in view of the fact that the case will have to be retried, it is proper for us to notice other rulings that were, some of them, at least, objected to by the defendant, and, if repeated, may be urged as error upon another appeal.

Some objections were made and exceptions taken during the course of the trial to the rulings of the court in the admission of evidence. The testimony of the first witness for the state, who it seems had charge of the detention home in the city of Lawton, we are inclined to think could have no legitimate connection with any issue in the case, and was therefore incompetent.

[7] The witness Moncrief produced a letter, and stated that he found it in the bottom of a trunk containing clothes with the initials "O. W. G." Thereupon the state offered the letter in evidence, and the defendant interposed proper objections, which were overruled, and the letter read to the jury. It appears that this letter was not dated, and was not addressed to this defendant, or any other person; it was not signed, except by the name of "Jack," and is not a statement in writing made by this defendant or his co-defendant, and it was not shown that the same was written before or after the commission of the homicide. It follows that the defendant's objections should have been sustained and the letter excluded.

No instructions were asked, and no objections made or exceptions taken to the instructions given by the court, which fairly covered the law of the case.

[8] Under the assignment that "the verdict is contrary to law and the evidence," it is urged that there was no proof of venue. The only direct testimony offered by the state to prove venue was that of the witness Walters, who testified that the house occupied by the defendants belonged to his mother; that it was 11 miles east and a quarter north of Lawton, and that he had been told that the house was in Comanche county.

It is true that the courts of this state take judicial notice of the boundaries of the state and of the counties in the state, and also of

the geographical location of cities and towns within the state; however, in view of the fact that the case must be retried, we deem it only necessary to call attention to the question of venue, so that on another trial the proof of venue may unquestionably be sufficient.

Of course, nothing said in this opinion should be construed as in any way reflecting upon the defendant's guilt or innocence. That is a question for the jury, and is one which we have not at all considered. Upon the record before us, and for the reasons hereinbefore stated, we are clearly of the opinion that the defendant did not have that fair and impartial trial to which he was entitled under the law.

The judgment of the trial court is therefore reversed, and the cause remanded for a new trial.

MATSON and BESSEY, JJ., concur.

SHEARS v. STATE. (No. A-3713.)

(Criminal Court of Appeals of Oklahoma.
Nov. 21, 1921.)

(Syllabus by the Court.)

Criminal law §786(1)—Defendant has right to a clear affirmative instruction based on hypothesis of truth of his testimony affecting a material issue.

The defendant has a right to have a clear and affirmative instruction given to the jury applicable to his testimony, based upon the hypothesis that it is true, when such testimony affects a material issue in the case.

Appeal from District Court, Muskogee County; Benjamin B. Wheeler, Judge.

L. Shears was convicted of the crime of grand larceny, and he appeals. Reversed and remanded.

Crump & De Graffenried, of Muskogee, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

MATSON, J. This an appeal from the district court of Muskogee county, wherein at the November term, 1919, the defendant, L. Shears, was convicted of the crime of grand larceny and sentenced to serve a term of one year in the state penitentiary.

The Attorney General has filed a confession of error as follows:

"This was a prosecution and conviction for the crime of grand larceny, to wit, stealing a sack of brass that had been ripped out of the machinery of a cotton gin in the town of Haskell.

"The defendant, of course, denied stealing the brass, and, produced evidence, which was probably false, that he did not leave his house the night the brass was stolen, and that two men came to his place that very night and wanted to sell him a sack of brass, and that he refused to purchase it for the reason it was nighttime. The brass was found on his premises by the officer, and his defense was that he did not steal the brass or have anything to do with stealing it, and that the parties who came to sell him the brass left it there, without his knowledge or consent.

"Counsel for defendant offered an affirmative instruction covering his defense, which instruction told the jury that if they believed 'that some person or persons other than the defendant put the brass at his house without the defendant's connivance that the verdict should be not guilty.' This instruction states the law. The judge supplemented that instruction with the further instruction that if the brass was put there without the 'knowledge or consent' of defendant they should acquit him. Therefore it cannot be said that this instruction is harmless, because from defendant's own testimony they might infer that the person left the brass at his house with his consent, or at least his knowledge. That instruction even would have been erroneous where the charge was receiving stolen property, because to make one guilty of receiving stolen property the person must know, or have such knowledge as a reasonably prudent man would know, the property was stolen. If the court desired to instruct the jury on the law of receiving stolen property, he should have stated to them the elements of the crime.

"We therefore respectfully submit that the judgment in this case should be reversed and that same should be remanded for a new trial."

An examination of the record convinces this court that the confession of error of the Attorney General should be sustained, and for reasons stated therein the judgment is reversed and cause remanded to the trial court for a new trial, or for further proceedings not inconsistent with this opinion.

DOYLE, P. J., and BESSEY, J., concur.

CARDWELL v. STATE. (No. A-3272.)

(Criminal Court of Appeals of Oklahoma. June 4, 1921. Rehearing Denied Nov. 19, 1921.)

(Syllabus by the Court.)

1. Criminal law \S 1141(2), 1163(1)—Appellant must establish error and resulting prejudice.

On appeal, burden is upon appellant to establish both error and prejudice resulting therefrom.

2. Criminal law \S 1115(2)—Overruling defendant's challenge for cause to individual jurors held not reversible error, in view of record.

In prosecution for murder, held not reversible error to overrule defendant's challenge for cause to individual jurors on ground contained in subdivision 8, \S 5859, Rev. Laws 1910, where the record does not disclose that jurors' scruples or opinions are such as to preclude them from returning a verdict of guilty with death penalty.

3. Jury \S 108, 110(8)—Court, on objection made before jury is sworn, should exclude jurors having conscientious scruples against death penalty.

In cases where death is provided as a punishment for crime, trial courts should exclude all jurors who have conscientious scruples or opinions against the infliction of the death penalty, whether the challenge comes from the state or the defendant, or, without challenge, where such is made to appear before the jury is sworn to try the cause.

4. Criminal law \S 769—Instructions fairly stating law, and as favorable to defendant as evidence warrants, held not to show error.

Where the instructions fairly state the law of the case as applied to the evidence, and are as favorable to defendant as the evidence warrants, they are sufficient.

5. Criminal law \S 1028—Errors not properly raised in court below cannot be considered.

Alleged errors occurring during the progress of the trial, and not properly raised and presented in the court below, will not be considered on appeal.

Appeal from District Court, Tillman County; Frank Matthews, Judge.

Eula Cardwell was convicted of manslaughter in the first degree, and he appeals. Affirmed.

Mounts, Davis & Williams, of Frederica, for plaintiff in error.

S. P. Freeling, Atty. Gen., and Sam Hooker, Asst. Atty. Gen., for the State.

MATSON, J. This is an appeal from the district court of Tillman county, wherein the defendant, Eula Cardwell, was convicted of the crime of manslaughter in the first degree for killing one Russell Godfrey, and sentenced to serve a term of four years' imprisonment in the reformatory at Granite, Okl. From such judgment of conviction an appeal has been taken to this court by the filing of a case-made with petition in error attached.

[1] Assignment of error No. 2 is as follows:

"That the court erred in overruling the challenge of the defendant to the jurors Cason, Bracken, Wade, and Heffner."

It appears that during the examination of the jurors on their voir dire the attorney for the defendant questioned the jurors as to

whether or not they entertained conscientious scruples as to the infliction of the death penalty, and the record discloses that the jurors above named answered that they entertained conscientious scruples against the infliction of the death penalty as a punishment for crime. Further, it is also disclosed by the record that the defendant exhausted all his peremptory challenges, and that the above-named jurors served on the trial jury after the trial judge had overruled the challenge of the defendant to such jurors on that ground, to which action counsel for defendant saved proper exception at the time.

The charge against this defendant was murder.

Section 2319, Revised Laws 1910, provides:

"Any person convicted of murder shall suffer death, or imprisonment at hard labor in the state penitentiary for life, at the discretion of the jury. Upon trial of an indictment for murder, the jury, if they find the defendant guilty, must designate in their verdict whether he shall be punished by death or imprisonment for life at hard labor, and the judgment of the court shall be in accordance therewith. But upon a plea of guilty the court shall determine the same."

Section 5855, *Id.*, relating to the formation of petit juries in criminal causes, provides:

"A challenge for cause may be taken either by the state or the defendant."

Section 5856, *Id.*, provides:

"It is an objection to a particular juror and is either: First, general, that the juror is disqualified from serving in any case on trial; or, second, particular, that he is disqualified from serving in the case on trial."

Section 5858, *Id.*, divides particular causes of challenge into two kinds:

"First. For such a bias as, when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this chapter as implied bias.

"Second. For the existence of a state of mind on the part of the juror in reference to the case, or to either party, which satisfies the court, in the exercise of a sound discretion, that he cannot try the issue impartially, without prejudice to the substantial rights of the party challenging, and which is known in this chapter as actual bias."

[2] Section 5859, *Id.*, provides eight different grounds upon which a challenge for implied bias may be taken, the eighth ground of which is as follows:

"If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty, in which case he shall neither be permitted nor compelled to serve as a juror."

[3] From the foregoing sections of the statutory law of this state, it is clear that a

petit juror who is called to serve in a murder case is subject to challenge on the ground of implied bias for the entertainment of such conscientious opinions as would preclude his finding the defendant guilty. But the conscientious scruples or opinions sufficient to disqualify a juror in a murder case under our statutes must be such as would preclude him from agreeing to a verdict of guilty with the death penalty attached. *Hopkins v. State*, 9 Okl. Cr. 104, 190 Pac. 1101, Ann. Cas. 1915B, 736.

The particular ground of challenge set out in subdivision 8, *supra*, was evidently intended for the benefit of the state. In many of the states this particular ground of challenge for cause is confined to the prosecution. In this state, however, the Legislature has apparently made no distinction between the state and the defendant—permitting either party to interpose a challenge upon this ground.

However, it is extremely difficult to see how defendant could be prejudiced by the service on the jury of one who, although he may believe defendant guilty of murder, would not return a verdict to that effect with the death penalty attached, where, as in this state, the jury in its discretion may either assess the punishment at death or at imprisonment for life. Taking the view of the statutes involved most favorable to defendant, viz. that they permit defendant to take a challenge for cause on this ground, nevertheless the burden is upon defendant to make it affirmatively appear that the challenged juror was clearly disqualified within the meaning of the statute.

In the instant case all that appears from the record is that the jurors mentioned have conscientious scruples against the infliction of the death penalty as a punishment for crime. The entire *voir dire* examination of these jurors is not before us. Whether or not the scruples or opinions are merely against the law itself, or are such as would interfere with the performance of his duty under his oath and preclude the juror from returning a verdict of guilty with the death penalty attached, does not appear. This court is not inclined to hold an error in the selection of the trial jury reversible which apparently did not result to the substantial prejudice of the defendant upon the trial; and where it does not clearly appear from the record that the conscientious scruples or opinions of the jurors complained of were such as would preclude them from returning a verdict of guilty of murder with the death penalty attached, it cannot be said that the trial court so abused its discretion in the selection of the jury as to commit reversible error in overruling defendant's challenges to these jurors for cause.

However, it may be added, for the future

guidance of the trial courts in cases where the death penalty is provided as a punishment for crime, that the better practice would be to exclude all jurors who have conscientious scruples or opinions against the infliction of the death penalty, whether the challenge comes from the state or the defendant; or even if, without challenge, such is made to appear before the jury is sworn to try the cause, the court should of its own motion excuse the juror.

[4] Certain instructions of the trial court are complained of, but the court has examined the transcript of the evidence, and we are convinced that the instructions fairly state the law of the case as applied to the facts, and are, when considered as a whole, free from any reversible error, and as favorable to the defendant as the evidence would warrant.

[5] The other alleged error complained of was not properly raised in the court below.

For the reasons stated, the judgment is affirmed and the cause remanded to the lower court, with instructions to carry into effect its judgment.

DOYLE, P. J., and BESSEY, J., concur.

TINNEY v. STATE. (No. A-3273.)

(Criminal Court of Appeals of Oklahoma. June 4, 1921.)

(Syllabus by the Court.)

1. Jury \S 110(1)—Known ground of juror's disqualification is waived by withholding until after verdict.

A known ground of disqualification to a juror before or during the progress of the trial is waived by withholding it, or refusing or declining to raise the objection until after verdict.

2. Homicide \S 300(3), 309(1), 340(4)—Objection to instruction on guilt or innocence of murder not available where conviction was for manslaughter.

Instructions examined, and held free from prejudicial error.

Appeal from District Court, Tillman County; Frank Matthews, Judge.

Luke Tinney was convicted of manslaughter in the first degree, and he appeals. Affirmed.

J. A. Carr and Mounts & Davis, all of Frederick, for plaintiff in error.

S. P. Freeling, Atty. Gen., and Sam Hooker, Asst. Atty. Gen., for the State.

MATSON, J. Defendant, Luke Tinney, was convicted in the district court of Till-

man county of the crime of manslaughter in the first degree for killing one Thomas Jackson in said county on the 27th day of February, 1917, and was sentenced to serve a term of seven years' imprisonment in the reformatory at Granite, Okl.

[1] It is first contended that the trial court erred in not excluding from service upon the jury one M. F. Cason, for the reason that the said juror entertained conscientious scruples against the infliction of the death penalty, which fact was made known to the court after the juror had been impaneled and sworn to try the cause. There was no attempt to take advantage of this alleged error in the procedure of the trial until after the verdict was rendered. This was too late. In the case of *Queenan v. Territory*, 11 Okl. 261, 71 Pac. 218, 61 L. R. A. 324, the Supreme Court of the territory of Oklahoma held:

"A known ground of disqualification to a juror, before or during the progress of the trial, is waived by withholding it, or refusing or declining to raise the objection until after verdict."

See, also, 24 Cyc. p. 316, subd. E, §§ 1 and 2.

[2] Instruction No. 6, given by the trial court and excepted to by the defendant, is alleged to be erroneous. An examination of this instruction discloses that it relates entirely to the crime of murder. While the instruction is not open to the objection urged against it, it has been repeatedly held by this court:

"An assignment of error based upon an instruction of the court bearing on the question of the guilt or innocence of a person on trial of murder is of no avail when the jury return a verdict finding such person guilty of manslaughter and not of murder." *Duncan v. State*, 11 Okl. Cr. 217, 144 Pac. 629; *Byars v. State*, 7 Okl. Cr. 650, 126 Pac. 252; *Morgan v. Territory*, 16 Okl. 530, 85 Pac. 718.

Instruction No. 11 was also excepted to, and is as follows:

"You are further instructed that, while one unlawfully attacked has the right to use such force as under the circumstances reasonably appears to him to be necessary to repel the attack and avoid injury to himself, he will not be justified in using greater force than reasonably appears necessary and sufficient so to do; and if he does use greater force than so reasonably appears necessary and sufficient to avoid the danger apparently intended to be inflicted upon him, and thereby kills the person who made the attack, or if, after the attempt to injure him shall have failed and the danger no longer imminent, he kills the person making the attempt, he will be guilty of manslaughter in the first degree."

As no brief in this case in behalf of plaintiff in error has been filed, the cause was submitted on the brief filed in the case of

Cardwell v. State (No. A-3272), 201 Pac. 817, this day decided. In the Cardwell Case the facts were dissimilar to this, although self-defense was pleaded in each case. Instruction No. 11 is applicable to the facts detailed by the witnesses for the state construed in connection with the defense interposed, and the jury could reasonably conclude from the entire evidence either (1) that the defendant used greater force than reasonably appeared to him necessary as sufficient to avoid the danger from the deceased, in which case the killing would not be justifiable; or (2) that the injury inflicted by him upon the deceased which caused death occurred after the deceased's attempt to injure defendant had failed and the defendant was no longer in imminent danger from the deceased, in which event the killing would be manslaughter in the first degree under the third subdivision of section 2320, Revised Laws 1910. We cannot see wherein the defendant was in any wise prejudiced by the giving of this instruction.

Instruction No. 13 is also complained of on the ground that it is confusing and misleading. No authorities are cited to support the contention urged. While the instruction covers certain subject-matter contained in other instructions given, we fail to see wherein it could have misled or confused the jury when considered together with all the instructions given in the cause. We regard the court's instructions as a whole to be an able exposition of the law applicable to the facts of the cause.

While the facts in this case are conflicting, there is ample evidence in the record to justify the jury's conclusion that the defendant was guilty of manslaughter in the first degree.

No prejudicial error being urged, and none appearing to the court, it is the opinion of this court that the defendant had a fair and impartial trial, and that the judgment of conviction should be affirmed; and it is so ordered.

DOYLE, P. J., and BESSEY, J., concur.

DUMAS v. STATE. (No. A-3663.)

(Criminal Court of Appeals of Oklahoma. June 18, 1921. Rehearing Denied Sept. 12, 1921.)

(Syllabus by the Court.)

1. Indictment and Information \S 125(46)—Information charging burning of several buildings as one offense is not duplicitous.

An information charging as a single act the burning of a number of designated buildings charges but one offense, and is not bad for duplicity.

2. Criminal law \S 1141(2), 1163(1)—Appellant must establish error and resulting prejudice.

On appeal the burden is upon defendant to establish both error and prejudice resulting therefrom.

3. Criminal law \S 1166½(5)—Overruling challenge to venire summoned by sheriff, a witness, not prejudicial, where sheriff did not testify.

Where the appellant interposed in the trial court a challenge to a special venire of talesmen on the ground that they were summoned by the sheriff, and that said sheriff's name was indorsed on the information as a witness against defendant, and there is no showing in the record that the sheriff was a material witness against defendant, and, on the contrary, it appears that the sheriff was not produced and did not testify as a witness against defendant, it cannot be said that the trial court, in the absence of such a showing, committed error prejudicial to defendant in overruling the challenge.

4. Criminal law \S 508(3)—State may use one of two persons jointly informed against as witnesses against others.

Where two or more persons are jointly informed against, the state may use one of such defendants, either before or after conviction, as a witness against the others, without first dismissing the prosecution against the defendant so used as a witness.

5. Criminal law \S 508(3), 1144(12)—Where codefendant testified but did not claim privilege, he will be presumed to have testified voluntarily.

Sections 5879 and 5880, Rev. Laws 1910, relate to the dismissal of a prosecution against one defendant in order that he may be compelled to be a witness against the other, but such sections must be construed in connection with section 27, art. 2, Const., requiring any person having knowledge or possession of facts that tend to establish the guilt of any other person or corporation charged with an offense against the laws of the state to give testimony or produce evidence when legally called upon to do so, although the same may tend to incriminate him, but relieving such person from subsequent prosecution or penalty or forfeiture on account of so testifying or producing evidence. It is the privilege of a codefendant to testify voluntarily against the other defendant on a separate trial, and where such codefendant claims no privilege against self-incrimination, the presumption will be entertained in this court that he testifies voluntarily.

6. Criminal law \S 371(1, 12)—Evidence of other crime admissible to show motive and intent.

It is a general rule in criminal prosecutions that evidence of any offense other than that for which the prosecution is had is inadmissible. To this rule there are exceptions, and one of them is that evidence which tends to show motive or intent may be given against a defendant, although its introduction may involve defendant in the commission of other offenses.

7. Criminal law §1114(1)—Assignments not supported by record will not be considered.

Assignments of error not supported by the record will not be considered on appeal.

8. Criminal law §511(1)—Evidence held sufficient to corroborate accomplice.

Evidence examined, and held to be sufficient to corroborate an accomplice.

Appeal from District Court, Choctaw County; A. A. McDonald, Judge.

Houston Dumas was convicted of arson in the second degree, and he appeals. Affirmed.

Plaintiff in error, Houston Dumas, herein after referred to as defendant, was charged jointly with one J. D. Moore, by information filed in the district court of Choctaw county, with the crime of arson, and upon a separate trial was convicted of second degree arson and sentenced to serve a term of five years' imprisonment in the penitentiary. Briefly stated, the material evidence is, in substance, as follows:

Defendant lived in the town of Soper, Choctaw county, and in the spring or summer of 1917 he became the agent of the Madill Grain & Elevator Company, in that town, for the purpose of buying grain and feed of different kinds and shipping same to said company to the city of Madill, in Marshall county. Arrangement was made between defendant and an agent of the grain and elevator company to transact the local business at Soper through the First National Bank of that city, and it appears from the evidence that the plan of operation was to draw drafts on said company through said bank for the grain, cotton seed, and other products that were purchased by defendant for the company at the town of Soper. A warehouse was provided for the use of defendant in storing the grain and other feedstuffs until cars could be obtained to transport the same; the said warehouse being a frame building located on lot No. 4 in block 21 in the town of Soper, and owned by one Dick Crowder.

The testimony shows that defendant, through connivance with other persons, drew, shortly before the alleged commission of this offense, approximately \$200 from the Madill Grain & Elevator Company for materials that had never been purchased by him for said company. Also there is some evidence to the effect that parties were permitted to take corn from the warehouse in Soper after the same had been purchased by the grain and elevator company and paid for without the knowledge and consent of said company, and without any authority from it.

According to the records kept by the Madill Grain & Elevator Company for money paid for corn and cotton seed presumed to have been purchased by defendant, there should have been about 686 bushels of corn in the

warehouse and about 25 tons of cotton seed at the time of this alleged offense, while the evidence discloses that there was approximately in the neighborhood of only 150 to 175 bushels of corn and about from 5 to 8 tons of cotton seed in the warehouse at that time. The day before the fire, defendant, in a telephone conversation with the manager of the grain and elevator company at Madill, told said manager that he would ship the corn and cotton seed on hand immediately; and there is some evidence to the effect that men had been employed a day or two before this fire to separate the corn from the cotton seed in the warehouse. However, before the fire none of this grain or foodstuff was shipped to the grain and elevator company.

The fire took place about 1 o'clock a. m. on the morning of February 15, 1918, and the witness J. D. Moore, who was jointly informed against with defendant but who had demanded a severance of trial, testified in behalf of the state that he and defendant, with whom he was living at the time, took a can of coal oil over to the warehouse and set fire to the same. A high wind was blowing in the direction of other buildings in the town, which resulted in the communication of the fire to several buildings nearby and a destruction of property to the extent of approximately \$150,000.

The defense interposed was an alibi, and in support thereof defendant introduced as his sole witness his wife, who testified that defendant came home that night from town about 11 o'clock and went to bed with her, and that he was asleep in bed at the time she heard the fire alarm; that their house was located about a block and a half distant from the warehouse. Defendant did not take the witness stand in his own behalf, in no way denying the positive testimony of Moore to the effect that they had set fire to the building, and in no way denying the testimony of other witnesses to the effect that defendant and they had drawn fictitious drafts against the grain and elevator company for foodstuff which had not been sold to defendant.

Jordan & Burke, of Hugo, for plaintiff in error.

S. P. Freeling, Atty. Gen., and E. L. Fulton and W. O. Hall, Asst. Attys. Gen., for the State.

MATSON, J. (after stating the facts as above). It is first contended that the trial court erred in overruling the demurrer to the amended information. In the brief and also orally counsel advanced the argument that the information is duplicitous.

[1] The charging part of the information is as follows:

"That Houston Dumas and J. D. Moore did, in Choctaw county, state of Oklahoma, on or

about the 15th day of February, 1918, and anterior to the presentment hereof, commit the crime of arson, in the manner and form as follows, to wit: Then and there, in Choctaw county, state of Oklahoma, in the town of Soper, in said county and state, the said defendant, Houston Dumas, on or about February 15, 1918, was using a house of wooden structure, then the property of and owned by one Dick Crowder, situated on lot No. 4 in block No. 21 in said town of Soper, for storing, and then and there had stored therein, corn and also cotton seed, for and then and there the property of the Madill Grain & Elevator Company; that lot No. 6 is near and lies south of said lot No. 4, said lot being situated in block No. 21; that a wooden house was situated on said lot No. 6 at said time, a portion of which house had been and was then and there occupied by one J. S. Fry and members of his family as a lodging and sleeping place in the nighttime; that lot No. 7 in said block No. 21 is situated, adjoining, and south of said lot No. 6; that on said date there was a two-story wooden house on said lot No. 7, the upper story of which house had been and was then and there occupied by one Bun Henderson and members of his family, in the nighttime, as a lodging and sleeping place; lot No. 8 in said block No. 21 is adjoining, and lies south of said lot No. 7; that on said date there was a house on said lot No. 8 in which one McWorter was then and there doing a merchandise business; that lot No. 9 in said block No. 21 is adjoining and lies south of said lot No. 8; that on said date a house was situated on said lot No. 9 in which A. A. Ferguson & Co. was then and there doing a merchandise business; that lot No. 10 is adjoining and lies south of said lot No. 9; that on said date there was a house on said lot No. 10 in which the Soper Trading Company was then and there doing a merchandise business; that lots Nos. 11 and 12 in said block No. 21 lie south of said lot No. 10, and said lot No. 11 adjoins said lot No. 10; that on said date there was a house on said lots Nos. 11 and 12 in which Failes Bros. were then and there doing a merchandise business; that on said date of February 15, 1918, or about said date, each and all of said houses herein described were situated so close together and so near each other that the burning of any one or either of said houses, so described herein, would manifestly endanger each and every other house herein described; that on or about the said date of February 15, 1918, in the nighttime, when a strong wind was blowing from the northeast, and said houses being so situated as above described, and each and all of said houses then and there being used in the manner and for the purposes herein set forth, and then and there occupied as a lodging and sleeping place, as described, and by the persons named as above set forth, the said defendants, Houston Dumas and J. D. Moore, acting together, did unlawfully, willfully, maliciously, and feloniously then and there set fire to and burn said house on said lot No. 4, from which burning house fire was then and there communicated from said burning house on said lot No. 4, to each and all of said houses as above described, and each and all of said houses above described to which fire was so communicated, from said burning house on said lot No. 4 were burned and destroyed by said fire, it then and

there being the willful, unlawful, malicious, and felonious intention of said defendants that said fire from said house on said lot No. 4 be so communicated to each and every other building described and said buildings thereby burned and destroyed; that said defendants then and there set fire to and burned said house or building on said lot No. 4 in said block No. 21 in the town of Soper, Okla., with unlawful, felonious, and malicious intent then and there to destroy said house or building and the said contents therein contained, and each and every other house or building herein described, by and through said fire being so communicated from said burning house on said lot No. 4 to each and all of said buildings herein described."

The particular statutes involved are as follows:

Section 2598, Revised Laws 1910, defines arson:

"Arson is the willful and malicious burning of a building, with intent to destroy it."

Section 2600, Id., provides:

"Any building is deemed an 'inhabited building,' within the meaning of this article, any part of which has usually been occupied by any person lodging therein at night."

Section 2601, Id., provides:

"The word 'nighttime,' in this article, includes the period between sunset and sunrise."

Section 2607, Id., provides:

"Where any appurtenance to any building is so situated with reference to such building, or where any building is so situated with reference to another building, that the burning of one will manifestly endanger the other, a burning of the one is deemed the burning of the other, within the foregoing definition of arson, and as against any person actually participating in the original setting fire, as of the moment when the fire from the one shall communicate to and burn the other."

Section 2608, Id., divides arson into two degrees and is as follows:

"Arson is divided in two degrees. Arson in the first degree is: First, maliciously burning in the nighttime an inhabited building in which there is at the time some human being; or, second, maliciously burning in the nighttime a structure adjoining to or within the curtilage of an inhabited building in which there is at the time some human being, and in such a way that such inhabited building is endangered; or, third, maliciously burning in the daytime any inhabited building or structure in which merchandising is carried on; or, fourth, maliciously burning in the nighttime any uninhabited building in which merchandising is carried on, or in which there is at the time any cattle, horses, hogs or sheep.

"Arson committed in any other way is arson in the second degree."

In drawing the foregoing information, the pleader evidently intended to allege facts sufficient to charge the offense as defined by sections 2598 and 2607, supra. An analysis

of these statutes convinces the court that the Legislature intended by the adoption and enactment of section 2807 to make the burning of one building by setting fire to another, so that the fire so set would manifestly endanger the other building, to be one continuous arson should the fire be communicated to and burn the other building. This is the view taken of the identical statute by the Supreme Court of New York in *Woodford v. People*, 62 N. Y. 117, 20 Am. Rep. 464, where-in it was held:

"An indictment charging as a single act the burning of a number of designated dwelling houses charges but one offense, and is therefore not bad for duplicity.

"The criminal act is kindling the fire with felonious intent to burn the houses specified, and is consummated when the burning is effected; and the facts that the houses did not burn at the same time, and that but one was set on fire, the fire communicating therefrom to the others, do not make the burning of each a separate offense."

In 2 *Ruling Case Law*, § 12, p. 508, it is said:

"In the case of arson a single offense may be committed although several houses or articles are burned, provided only one fire was set. Consequently an indictment for arson which charges as a single act the burning of several houses charges but one offense and is not bad for duplicity."

See, also, *State v. Colegate*, 31 Kan. 511, 3 Pac. 846, 47 Am. Rep. 507; *Early v. Commonwealth*, 86 Va. 921, 11 S. E. 795.

The conclusion is reached that the information charges but a single act or transaction of burning, and is not bad for duplicity.

[2, 3] It is next contended that the trial court erred in overruling a motion of plaintiff in error to quash and set aside the panel or array of talesmen. The record discloses that the trial court made an order for the sheriff of Choctaw county to summon a special venire of 20 talesmen, and counsel for defendant moved to quash this panel on the ground that the said sheriff's name was indorsed as a witness on the information to be used by the state against defendant.

None of the proceedings had upon the trial of this challenge are set forth in the record. While there is a recital to the effect that the said talesmen were summoned by the sheriff, and it also appears that two of said talesmen served upon the jury, there is no showing that the sheriff was a material witness against defendant, and, on the contrary, it appears that the sheriff was not produced and did not testify as a witness in the case.

It has been repeatedly held by this court:

"On appeal the burden is upon the appellant to establish both error and prejudice resulting therefrom." *Cardwell v. State* (No. A-3272), 201 Pac. 817, opinion filed June 4, 1921, not yet officially reported.

As plaintiff in error has not brought before this court the record of the hearing had upon the challenge to the special venire of talesmen, and, further, it not appearing that the sheriff was a material witness against defendant, it cannot be said that the trial court, in the absence of such a showing and proof, committed error prejudicial to the substantial rights of defendant in overruling the challenge to the special venire.

[4, 5] It is next contended that the trial court committed reversible error in permitting J. D. Moore, the codefendant, to testify on behalf of the state. The particular ground is that the said codefendant was an incompetent witness because the charge against him had not been dismissed at the time he was called to testify. The codefendant Moore, had asked for and been granted a severance, and Dumas was alone upon trial.

Section 5879, Revised Laws 1910, provides:

"When two or more persons are included in the same indictment or information, the court may, at any time before the defendants have gone into their defense, on the application of the county attorney, direct any defendant to be discharged from the indictment or information, that he may be compelled to be a witness for the state."

Section 5880, Id., also provides:

"When two or more persons are included in the same indictment or information, and the court is of opinion that in regard to a particular defendant there is not sufficient evidence to put him on his defense, it must, before the evidence is closed, in order that he may be compelled to be a witness for his codefendant, submit its opinion to the jury, who, if they so find, may acquit the particular defendant for the purpose aforesaid."

Section 5881, Id., provides:

"In the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of a crime, offense or misdemeanor before any court or committing magistrate in this state, the person charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him nor be mentioned on the trial; if commented upon by counsel, it shall be ground for a new trial."

From a consideration of the foregoing statutes, together with sections 21 and 27, art. 2, Constitution of Oklahoma, the conclusion is reached that section 5879, relating to the discharge of defendant as a witness, applies only where the defendants are both upon trial, and it is the purpose of the prosecution to compel one defendant to be a witness against the other. The said statutes have no relation to the voluntary giving of testimony by a defendant. In this case the codefendant, Moore, asserted no right under the Constitution against compulsion to give evidence which might tend to incriminate him. He testified freely and voluntarily.

In *Brown v. State*, 9 Okl. Cr. 382, 132 Pac. 359, in passing upon the identical question here involved, this court held:

"Where two or more persons are jointly indicted, the state may use one of such defendants either before or after conviction as a witness against the others without first dismissing the prosecution against the defendant so used as a witness."

Section 5881, *supra*, and section 21, art. 2, Constitution, are provisions intended solely for the protection of the defendant, and should he assert his claim against giving incriminating evidence, then section 27, art. 2, Constitution, may be resorted to by him where he gives testimony or produces evidence tending to establish the guilt of his codefendant. The matter of giving evidence against a codefendant voluntarily is his privilege at all times, but he may assert his claim to protection against compulsion to so testify as to evidence that might incriminate him under sections 21 and 27, art. 2, Constitution. In such an instance (compulsion), if it be upon a joint trial, the charge against him may be dismissed as provided in sections 5879 and 5880, *supra*; or if, upon a joint trial or not, he testifies in good faith under compulsion, he may subsequently assert his rights against further prosecution on account of such testimony or evidence under the protection afforded by section 27, art. 2, Constitution.

From this record, however, the court concludes that the codefendant testified voluntarily, that he claimed no privilege against self-incrimination, and that he was a competent witness for the state upon a separate trial. We regard this assignment of error, therefore, without substantial merit.

[6] It is next contended that the trial court erred in permitting evidence of certain transactions between defendant and Madill Grain & Elevator Company, which tended to show that defendant had defrauded said company while acting as its agent by drawing certain fictitious drafts for materials not bought by him for said company, and also by permitting certain materials bought and paid for by said company to be extracted from the warehouse prior to the fire.

In this connection it was the contention of the state that defendant set fire to the warehouse for the purpose of concealing the evidence of these other offenses. This evidence tended strongly to show a motive on the part of defendant to burn the said warehouse at that time, and also his intent in the burning of it. In 2 *Ruling Case Law*, § 21, p. 517, it is said:

"A rule applicable in criminal prosecutions generally renders inadmissible evidence of any offense other than that for which the prosecution is had. To this rule there are exceptions, and one of them is that when it is material to show the intent with which the act charged was

committed, to illustrate its criminality, or to identify the accused as the person who committed the act, such evidence is admissible. This rule is applicable to prosecutions for arson."

In *McLaughlin et al. v. State* (No. A-3574), 197 Pac. 717, opinion rendered May 7, 1921, not yet officially reported, it is held:

"Evidence material to the issues, and tending to shed light on the guilt of defendants, is not rendered incompetent because it may, incidentally, involve defendants in the commission of a distinct offense."

Also, upon the subject of motive or intent, other transactions tending to prove its criminal existence, even though they may involve other offenses, may be given in evidence against defendant. *Smith v. State*, 3 Okl. Cr. 629, 108 Pac. 418; *Carter v. State*, 6 Okl. Cr. 232, 118 Pac. 264.

The record before us discloses that as to the defendant, Dumas, the evidence allowed to be admitted in this case as to other offenses clearly tended to show that the motive for the commission of this arson grew out of the collateral crimes, and the court, in instructing the jury, specifically told the jury as follows:

"You are instructed that the testimony with reference to drafts and with reference to the corn and cotton seed in the building that is alleged to have been burned was admitted for one purpose only, and that purpose to show the motive, if any, existing upon the part of the defendant to burn said building, and cannot be considered for any other purpose."

The conclusion is reached that the evidence introduced tending to connect defendant with the commission of other offenses, limited by instruction No. 9, *supra*, was properly admitted, and the ruling of the trial court in overruling defendant's objection to its admission was, under the circumstances disclosed by this record, not error.

[7] It is also contended that the trial court erred in permitting a witness to testify to a certain conversation had with defendant shortly after the fire, in which defendant admitted that he set out the fire. It is contended that the record discloses that such evidence was not a free and voluntary confession on the part of defendant, but was induced by reason of promises and immunity held out to him. In connection with this assignment we deem it sufficient to say that the record before us does not support the contention urged.

[8] It is also contended that the evidence is insufficient because based on the uncorroborated testimony of the accomplice, Moore. This contention is without merit. There are ample facts and circumstances in the record of the evidence before us, independent of the testimony of the alleged accomplice, tending to connect defendant with the commission of this offense. We deem the corroboration sufficient.

(201 P.)

This cause is fully briefed, and was ably argued by counsel for appellant at the time of its submission. This court has given careful consideration to all grounds advanced and urged as reasons for a reversal of this judgment. An examination of the record, the brief, and authorities in support thereof, and a consideration of the argument made, fails to convince this court that any error occurred, from the inception of this prosecution to its close, prejudicial to the substantial rights of defendant. We think that defendant had a fair and impartial trial according to the forms of law.

For reasons stated, the judgment of the trial court is affirmed.

DOYLE, P. J., and BESSEY, J., concur.

BOWERS v. CHICAGO, M. & ST. P. RY. CO. (No. 4485.)

(Supreme Court of Montana. Oct. 26, 1921.)

1. Railroads \Leftarrow 411(16)—Fences at station grounds not required.

Rev. Codes, § 4308, requiring railroads to maintain fences and cattle guards, is inapplicable to tracks at station grounds and liability for injury to an animal which has strayed into the grounds depends on negligence in handling trains.

2. Railroads \Leftarrow 441(6)—Fences about station grounds not presumed a trap for animals.

In an action for killing an animal which had ample room on either side of the track aft-

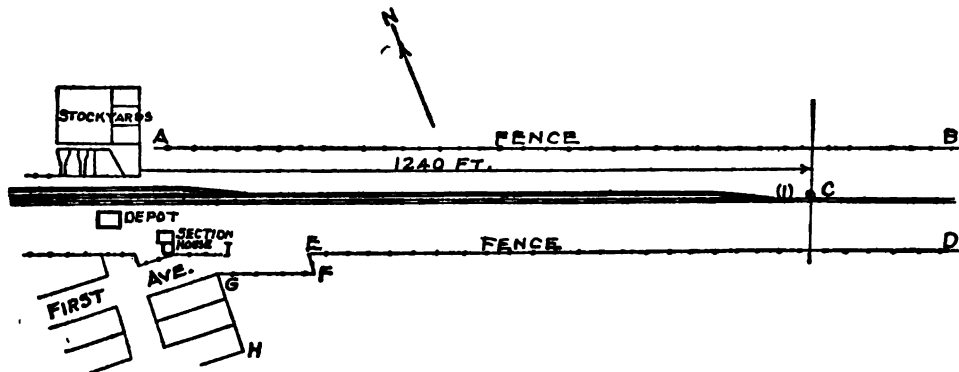
Action by J. W. Bowers against the Chicago, Milwaukee & Saint Paul Railway Company, a corporation. Judgment for plaintiff, and defendant appeals. Reversed.

Murphy & Whitlock, of Missoula, for appellant.

J. Peter P. Healy, of Melstone, for respondent.

BRANTLY, C. J. A mare belonging to plaintiff, which had strayed into the station grounds of defendant at Bascom, Mont., was run down by a freight train and fatally injured, so that it was necessary to kill her. Plaintiff commenced this action to recover damages for the loss he thus sustained. After issues had been made up, the parties submitted the cause for judgment upon an agreed statement of facts. The court concluded that the defendant was liable and rendered judgment for the plaintiff for \$200, the amount which it was agreed the mare was worth, with interest at 8 per cent. per annum from the date of the commencement of the action. Defendant has appealed.

To make clear a statement of the facts so far as they are material to present the question submitted for decision, we reproduce a plat of defendant's station grounds and a portion of the town site of the village of Bascom, which we find incorporated in the record. For convenience we shall note the directions as north, south, east, and west.



er straying into station grounds fenced at places not required by Rev. Codes, § 4308, to be fenced, there is no presumption under section 4309 that such fences constituted a trap so as to render the railroad company liable, though the train was not negligently operated.

Appeal from District Court, Musselshell County; George P. Jones, Judge.

The station buildings are designated as the depot and section house on the south side of the tracks, and the stockyards on the north side. The station grounds to the east of these buildings are inclosed on the north and south by wire fences, indicated by the notched lines parallel to the tracks at a distance of 100 feet on either side of the main track. This is the track nearest the

depot building. These fences are referred to in the statement as legal fences, that is, such as comply with the statute imposing upon railway companies the duty to fence their tracks and property.

As indicated on the plat, the station grounds are fenced toward the west from point I, on First avenue in the town site, and from the stockyards on the north. The only means of access into the station grounds are a narrow passway through the fence on the north at the stockyards at A, not protected by a gate, and the gap in the fence on the south side at First avenue, indicated by the letters G I. So far as the statement discloses anything on the subject, the portion of the town site appearing on the plat is unoccupied. The area to the east of this and beyond the fence south of the tracks is an inclosed pasture belonging to the plaintiff, the west boundary line being the fence G H, extended south. On August 22, 1915, the day before the accident the mare in question was in the pasture. During the following night she, with other animals, strayed out of the pasture and into the station grounds by way of First avenue through the gap at First avenue, and east along the tracks to a point near the switch at C. Several trains of the defendant do not stop at Bascom, among these being the west-bound freight No. 63. About 3 o'clock in the morning of August 23, train No. 63, consisting of 45 cars and a caboose, driven by defendant's engineer, Harper, was approaching the station from the east at a speed of 20 miles per hour. The grade at this point is from 2 to 3 per cent. downward toward the west. When the engine was about 12 car lengths east of the point marked (1), the engineer discovered two horses on the track. He immediately applied the emergency brakes, sounded the engine whistle, opened its cylinder cocks, allowing the steam to escape, in order to frighten the horses from the track, and did everything in his power to stop his train. These horses moved off the track to the south, but were immediately followed by five others, stringing along one after the other across the track, among them the mare in question. She was the last one of the string, and was struck by the engine.

Counsel for defendant contends that the admitted facts are insufficient to show that the defendant is liable for plaintiff's loss. His argument is that in such cases the point at which an animal strays upon a railway track is a controlling element in determining the liability of the company for injury to it; that, though the statute makes a general requirement that railway companies shall fence their tracks and property, an exception must necessarily be made of depot and station grounds, including a way of access to them; and that since it is conceded that the engineer did everything in his power to prevent

his train from running the mare down, and was not negligent in handling it, the defendant is not liable because the mare had strayed into the station grounds, which the company was not required to fence, and was there without defendant's fault.

Counsel for plaintiff, conceding that the engineer was not negligent in handling his train, and that defendant is not liable on that ground, contends that the location of the fences from First avenue east from the narrow gap at that point constituted that part of the station grounds a cul-de-sac, or trap, rendering it impossible for animals straying into it to escape from trains approaching from either direction, and hence that the defendant is liable for this reason. In other words, it was incumbent upon it either to have maintained wing fences and a cattle guard immediately east of the gap at First avenue to prevent animals from straying toward the east, or, in the alternative, to have omitted to maintain any fences in this direction at all.

Section 4308, Revised Codes, declares:

"Railroad corporations must make and maintain a good and legal fence on both sides of their track and property, and maintain, at all crossings, cattle guards over which cattle or other domestic animals cannot pass. In case they do not make and maintain such fence and guards, if their engines or cars shall kill or maim any cattle or other domestic animals upon their line of road, they must pay to the owner of such cattle or other domestic animals, in all cases, a fair market price for the same, unless it occurred through the neglect or fault of the owner of the animal so killed or maimed. Provided, that nothing herein shall be construed so as to prevent any person, or persons, from recovering damages from any railroad corporation for its negligent killing or injury to any cattle, or other domestic animals, at spurs, sidings, Y's, crossings and turntables."

[1] While the statute is general in its terms and includes all the property of railway companies, it not only impliedly recognizes an exception of public highway crossings, but the necessities of the case, as well as other provisions of law, forbid the maintenance of fences transecting highways. In requiring the installment of cattle guards at crossings, it implies that they must be effective to keep animals off the track, and this requires the maintenance of wing fences on both sides of the highway. The nature of the business of railways and the relation it bears to the public, implies a further exception of tracks at depots and in the station grounds where passengers and freight are received and discharged, and public convenience requires free and unobstructed access to the station buildings and tracks. There must be included, also, space sufficient to afford reasonable convenience in the switching of cars, the making up of trains

and supplying engines with fuel and water. Further, employees are required to pass almost continuously back and forth along the tracks in the station grounds in the performance of their duties. That these must be left open and free from obstruction is founded upon the danger which would necessarily result to employees were wing fences or cattle guards or other similar obstructions maintained in the station grounds. Their freedom from danger while the employees are performing their duties is more important than the safety which such obstructions would afford to straying animals. These several exceptions are recognized by the courts and text-writers generally, and grow out of the very necessities of the case. 3 Elliott on Railroads, § 1194; Knop v. Chicago, Mil., St. Paul Ry. Co., 57 Mont. 288, 187 Pac. 1020, and authorities cited.

The proviso in the latter part of the section seems to imply still another exception, but as it is not pertinent to the case in hand, we do not stop to determine its application.

It will be noticed that railway companies are neither expressly nor impliedly excused from exercising ordinary care to avoid killing animals which stray into their depot and station grounds. Their liability in such cases depends upon whether they appear to have been guilty of negligence in handling their trains, just as their liability arises at public crossings and other places at which fences are not required to be maintained. In such cases, the fact of killing or injury being proved, the presumption established by section 4309 prevails, and the burden is upon them to rebut it. No presumption may be indulged against a company, however, because of the location and character of the fences it maintains about its station grounds, if it chooses to fence them, or at any other place where it is not required to do so, if the fences meet all legal requirements as to their sufficiency. As pointed out by Mr. Elliott in his work on Railroads, if an animal has entered upon the property of a railway company at a point where no fence is required and is injured at a point where none is required, or even at a place where one is required, there is generally no liability, in the absence of willfulness or negligence. 3 Elliott on Railroads, § 1201.

[2] No fence was required, either at the place where the mare in question gained entrance or at the point where she was injured. The contention made by plaintiff is that the fences along the tracks to the east created a trap from which the mare could not escape. In fact, there was a space on either side of the track at the point where she was injured, and there was ample room for her to keep out of the way of defendant's train. In the absence of evidence tending

to show that the fences constituted a trap, there is no presumption that they did.

It being conceded that the engineer, Harper, was not negligent in the handling of his train, the facts are not sufficient to justify the conclusion that the defendant was at fault. The judgment must therefore be reversed. It is so ordered.

Reversed.

REYNOLDS, COOPER, HOLLOWAY, and GALEN, JJ., concur.

STATE v. RICKS et al. (No. 3345a.)

(Supreme Court of Idaho. July 1, 1921. On Petition for Rehearing Nov. 1, 1921.)

1. Criminal law § 1106(3)—Lapse of time in filing appeal transcript is not jurisdictional.

Under C. S. §§ 9079 and 9013, lapse of time in filing a transcript on appeal in a criminal case is not jurisdictional, and it rests in the discretion of the court to dismiss the appeal or enlarge the time for filing the transcript.

2. Criminal law § 1106(1), 1109(3)—Where reporter's transcript cannot be procured, appeal will be heard on record, court may order transcript whether defendant's counsel approve or not.

Where it is impossible to procure a reporter's transcript, and the clerk of the district court has furnished a clerk's transcript, lacking that of the reporter, a motion to dismiss will be denied, and the appeal heard on such record as is before the court.

3. Criminal law § 1090(5, 17)—Indictment and information § 52(1)—Information need not be verified; questions on motions to quash and in arrest of judgment not reviewed unless presented by bill of exceptions.

Questions raised by motions to quash the information and in arrest of judgment will not be reviewed by this court unless presented by a bill of exceptions.

4. Criminal law § 1004—Appeal only exercised by statutory method.

The right of appeal can be exercised only by the method and in the manner provided by statute.

5. Criminal law § 1189—Power to grant new trial depends on reversal of judgment.

The power of this court to grant a new trial depends upon a reversal of the judgment.

6. Criminal law § 1144(17)—Judgment of trial court presumed valid.

The judgment of the trial court is presumed valid in the absence of a showing to the contrary.

7. Criminal law § 1141(2)—Error must be shown in record.

This court cannot reverse the judgment of the trial court unless error calling for a reversal is shown in the record.

8. Criminal law \Rightarrow 1104(1)—Inability to procure court reporter's transcript is not ground for reversal.

The fact that the death of the court reporter and subsequent loss of his notes make it impossible to procure his transcript of the proceedings on the trial is not ground for reversing the judgment.

Lee, J., dissenting in part as to main opinion, and Rice, C. J., and Lee, J., dissenting on rehearing.

Appeal from District Court, Madison County; James G. Gwinn, Judge.

Henry Ricks and Edward Levine were convicted of rape, and they appeal. Affirmed, and petition for rehearing denied.

Miller & Ricks, of Rexburg, for appellants. Roy L. Black, Atty. Gen., and Jas. L. Boone, Asst. Atty. Gen., for the State.

MCCARTHY, J. [1] Appellants were convicted in the district court of the crime of rape, and appealed. They ordered a transcript from the clerk in accordance with C. S. 9077, and procured an order from the district judge for a reporter's transcript of the evidence, proceedings, and exceptions, in accordance with C. S. 9013. In the meantime the court reporter died, showing was made that his successor could not prepare the transcript, and it is now stipulated by the Attorney General and appellants' counsel that no reporter's transcript can ever be procured. Respondent moves to dismiss the appeal on the ground that there is no transcript. Upon order of this court the clerk of the district court has furnished a clerk's transcript, lacking that of the reporter. Appellants repudiate it, contending that they should not be forced to submit the case to this court on appeal without the reporter's transcript. By way of opposition to respondent's motion, appellants move this court to reverse the judgment and remand the case for a new trial on the ground that a reporter's transcript cannot be obtained. On the argument of respondent's motion to dismiss the appeal, counsel for appellants also submitted argument in support of their present motion; the court reserving opinion as to whether it presented a proper question for consideration at this stage of the proceedings or at all.

The time within which the record on appeal in a criminal case shall be filed in the Supreme Court is fixed by statute, C. S. § 9077. Criminal appeals are thus differentiated from civil appeals, in that in civil appeals section 7186 provides that the transcript shall be filed within such time as is now or shall be designated by rule of the Supreme Court. In criminal appeals under section 9077, the transcript must be filed within 40 days from the time the appeal is

taken unless further time is given by the district court or by a member of the Supreme Court. By section 9077 it is provided that the record on appeal from a final judgment of conviction shall consist of copies of the notice of appeal, the record as the same is or shall be provided by section 9040, and the reporter's transcript in case there be one. That is the record which must be filed within 40 days or some extension thereof. But section 9013, which provides for a transcript in lieu of a bill of exceptions, states that a failure of the reporter to obtain an extension of time shall not in any wise impair the rights of the parties to the action, and section 9079 provides that the court may dismiss an appeal if the return is not made as provided in the last article, unless, for good cause, it enlarges the time for that purpose. In view of the language of sections 9013 and 9079, lapse of time in filing transcript in a criminal case is not a jurisdictional matter, and it rests in the discretion of the court to dismiss the appeal or enlarge the time for filing transcript. We conclude that, under the circumstances of this case, this discretion should be exercised in favor of denying the motion to dismiss the appeal.

[2] There is another reason for such conclusion. It is stipulated by the parties that it is impossible to procure the reporter's transcript. Appellants contend that on this ground the judgment should be reversed and a new trial granted by this court in the exercise of its appellate jurisdiction. This court has held that it has no power to grant a new trial on this ground in the exercise of its original jurisdiction. *State v. Ricks*, 32 Idaho, 282, 180 Pac. 257, 13 A. L. R. 90. The question whether it can and should do so in the exercise of its appellate jurisdiction is now squarely raised and should be decided on a hearing of the appeal rather than on a motion to dismiss it.

Respondent contends that the view which we have taken of the motion to dismiss the appeal in this case is in conflict with the decision in *State v. Squires*, 15 Idaho, 327, 97 Pac. 411, and with several other decisions of this court in which appeals have been dismissed or transcripts stricken for failure to substantially comply with the statutes and rules of this court. In all these cases it appeared that the appellant had not procured and filed his transcript in accordance with the statutory provisions and rules of the court although it was in his power so to do. They are thus distinguished from a case like the present where the failure to file the transcript was due to the fact that it was beyond the power of the appellant. Under such circumstances this court is not forced to dismiss the appeal and should not do so.

Respondent has moved to strike the clerk's transcript on the grounds: First, that it was

not filed within six months of the perfection of the appeal; second, that no transcript was served upon respondent or filed within 90 days after the appeal; third, that the court has no authority to order the transcript brought here or consider it and that appellants have disavowed it. The first two grounds are disposed of by the reasons given above in discussing the motion to dismiss the appeal. As to the last ground, Constitution, art. 5, § 9, gives this court the power to issue all writs necessary or proper to the complete exercise of its appellate jurisdiction. Under this provision the court had the power to order the transcript sent here whether defendants' counsel approved or disavowed it.

[3] The first point raised upon the appeal is that neither the probate court sitting as committing magistrate, nor the district court, acquired jurisdiction because the complaint before the former was made on information and belief and the information in the latter was not verified. As a matter of fact the complaint shown in the transcript was not made on information and belief, but was a positive sworn statement. Our statute does not require an information to be verified. C. S. 8810. But on this appeal these questions are not properly before this court. All these points were raised in the lower court by motions to quash the information and in arrest of judgment. The only way this court can pass upon them is by reviewing the orders of the lower court. This can be done only if these questions are brought here by proper bills of exception. C. S. §§ 9008, 9010; State v. Maguire, 81 Idaho, 24, 169 Pac. 175. Such bills of exception could have been furnished by appellants, the matter not being affected by the loss of the reporter's transcript.

[4, 5] Appellant contends that he has a constitutional right to appeal, that for the full enjoyment of this right he is entitled to the reporter's transcript of the proceedings of the trial below, and that to affirm the judgment, in the absence of that transcript, would be to deprive him of his liberty without due process of law, in violation of the constitutional guaranty.

There are some cases in which it is held that the Supreme Court has power, in the exercise of its original jurisdiction, to grant a new trial, where the record of the trial below is not available, without fault of appellant. *Bailey v. United States*, 3 Okl. Cr. 175, 104 Pac. 917, 25 L. R. A. (N. S.) 860; *State v. Reed*, 67 Mo. 36; *Borrowdale v. Bosworth*, 98 Mass. 34. The contrary is held in *State v. Ricks*, supra, thus settling that question in this state.

In other cases it is held that the court has such power in the exercise of appellate jurisdiction. The reasons for this conclusion are best expressed in certain decisions of the

Supreme Courts of Wyoming and Oklahoma. The Wyoming Constitution provides that the Supreme Court shall have power to issue writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction.

"Incidental to the power to compel a correct record to be sent up or a bill of exceptions to be settled, is the power, as it seems to us, of ordering a new trial of the cause, where it is made to appear that the only record in the cause has been destroyed without possibility of substitution through no fault of the appellant, or where, without fault on the part of the appellant or his counsel, but solely because of the neglect or delay of some court official, or some accident or act of Providence for which no one is responsible, it has become impossible for a bill of exceptions to be settled, without which the errors complained of cannot be considered." *Richardson v. State*, 15 Wyo. 485, 485, 89 Pac. 1027, 1034 (12 Ann. Cas. 1048.)

In an Oklahoma case the appellant was unable to furnish a bill of exceptions owing to the death of the judge who tried the case. The court said:

"This defendant has the constitutional right to have this court consider the facts of this case, and the legal questions involved in the light of these facts, and of all that transpired at the trial, and he cannot be deprived of this right by the death of the judge who tried the case." *Tegler v. State*, 3 Okl. Cr. 595, 107 Pac. 949, 139 Am. St. Rep. 976.

See, also, *Elliott v. State*, 5 Okl. Cr. 63, 113 Pac. 213.

These decisions hold that a Supreme Court, which is granted general appellate jurisdiction by the Constitution, has the power to reverse the judgment and grant a new trial in such cases and that it should be done.

Opposed to the line of authorities mentioned above is another line which holds that inability to procure a transcript of the proceedings is not ground for reversing a judgment and granting a new trial. The reasons for this conclusion are well summed up in the decisions of the Supreme Courts of Iowa, Illinois, Minnesota, and California.

"Moreover, we are not prepared to hold that failure to perfect a record or an appeal because of noncompliance with reasonable legislative regulations can be excused by a showing that such noncompliance was occasioned by accident, casualty, or misfortune, or that refusal to give effect to such excuse is the denial of a constitutional right. * * * In such cases the appeal fails, not because a constitutional right is denied, but because of failure to comply with the conditions constitutionally imposed upon its exercise. If the failure is caused by unavoidable casualty, the party thus handicapped suffers a misfortune, but no wrong for which either Constitution or statute provides a remedy." *Dumbarton Realty Co. v. Erickson*, 143 Iowa, 677, 685, 120 N. W. 1025, 1028 (136 Am. St. Rep. 778, 21 Ann. Cas. 258).

"We do not understand that the appellate courts of this state or this court, is vested with power to grant new trials merely for the purpose of relieving a party of hardship resulting from some defect in the record, even though he is chargeable with no omission of duty or negligence whatever. On appeals or writs of error these courts sit merely for the purpose of reviewing the record upon errors properly assigned, and reverse and remand cases to be retried only when it is shown that error was committed in the former trial. The rule contended for does not address itself to our sense of justice. All presumptions are in favor of the fairness, impartiality, and regularity of the proceedings of the trial court. The party in whose favor the judgment has been rendered is on appeal or writ of error entitled to the benefit of those presumptions, and yet this rule deprives him of his judgment, and sends him back to the trial court to re-establish his claim, because, as is said, his adversary has been, without his fault, deprived of the means of pointing out errors which are said to have been committed on the former trial." *Alley v. McCabe*, 147 Ill. 410, 35 N. E. 615.

"It would be a dangerous rule to hold that a loss of some of the records in a particular case was a good and sufficient reason for granting a new trial. The statutes do not authorize it, and the court should not open the gate to a new field for prolonging litigation." *Peterson v. Lundquist*, 106 Minn. 339, 119 N. W. 50.

"It is incumbent on the appellant to show error, and we know of no rule that permits us to presume that defendant did not have a fair trial because a portion of the record upon her appeal has been destroyed without fault of either party." *People v. Botkin*, 9 Cal. App. 244, 98 Pac. 881.

There can be no distinction between civil and criminal cases in this regard.

Idaho Constitution, art. 5, § 9, provides:

"The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the district courts, or the judges thereof. The Supreme Court shall also have original jurisdiction to issue writs of mandamus, certiorari, prohibition, and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction."

Id., art. 5, § 13, provides:

"* * * The Legislature shall provide a proper system of appeals, and regulate by law, when necessary, the methods of proceeding in the exercise of their powers of all the courts below the Supreme Court, so far as the same may be done without conflict with this Constitution."

In *Re Neil*, 12 Idaho, 749, 87 Pac. 881, this court said:

"Both the Constitution and statute guarantee to him [the defendant] the right of appeal from any judgment of conviction rendered and entered against him."

And in *Weiser Irr. Dist. v. Middle Valley*, etc., Co., 28 Idaho, 548, at page 552, 155 Pac. 484, at page 485:

"We believe it will at once be admitted that the right to appeal at law is and always has been purely statutory, and that the Legislature may prescribe in what cases, under what circumstances and from what courts appeals may be taken."

State v. Ricks, supra, quotes the sentence from *In re Neil* quoted just above, and also states:

"The appellate jurisdiction of this court is limited to reviewing upon appeal the decisions of the district courts or the judges thereof."

The expressions quoted from *In re Neil* and *State v. Ricks*, supra, seem to be in conflict with the expression quoted from *Weiser Irr. Dist. v. Middle Valley*, etc., Co., supra. The conflict, however, is apparent rather than real. Considering Constitution, art. 5, § 9, and article 5, § 13, and their proper relation to each other, it is clear that the right of appeal can be exercised only through the channels and in the method provided by the Legislature.

Touching the power of this court on appeal, C. S. § 9086, provides:

"The court may reverse, affirm, or modify the judgment or order appealed from, and may set aside, affirm or modify any or all of the proceedings subsequent to, or dependent upon, such judgment or order, and may, if proper, order a new trial."

In *State v. Ricks*, supra, it is held that the power to grant a new trial, conferred by that section, is dependent upon a reversal of the judgment upon a review thereof on appeal; also, that the right of appeal, of which one convicted of crime in a district court may avail himself, is a right to call on the exercise of such powers as this court possesses to review, upon appeal, the decisions of the district courts or judges thereof.

The method of appealing and supplying the record is committed to the Legislature. In *Boise-Payette Lumber Co. v. McCarthy*, 31 Idaho, 305, 170 Pac. 920, this court said:

"A proper system of appeals [under article 5, § 13, of the state Constitution] includes not only the character of the record to be used upon appeal, but also the questions which may be raised by the record.

"The Constitution has committed to the Legislature, and not to the courts, the task of prescribing what the record on appeal shall contain and the method by which it shall be prepared and authenticated."

The provision of Idaho Constitution, art. 5, § 13, giving this court original jurisdiction to issue any writ necessary to the exercise of its appellate jurisdiction, gives it power to compel compliance with the statutory method of appeal, wherever possible. We do not agree with the view of the Wyoming court that, as a necessary incident to this power, goes the implied power to reverse the

judgment when the method of supplying the record provided by statute is ineffective.

[6] The judgment is presumed to be valid in the absence of a showing to the contrary.

"All presumptions are in favor of the regularity of the proceedings of courts of record, and in the absence of any showing to establish the fact as to whether or not the court has complied with the requirements of law in course of the trial, the presumption will at once arise that the law has been complied with." *State v. Suttles*, 13 Idaho, 88, 88 Pac. 238.

[7] The appellate power of this court is to review any decision of the district court (Constitution, art. 5, § 9), and to reverse, affirm, or modify the same (C. S. § 9086). This necessarily implies error committed by the court below. Such error must be made to appear to this court. Otherwise, the presumption is in favor of the validity of the judgment and the fairness of the trial. In the absence of a showing of error, there is nothing calling for the exercise of our power to reverse the judgment on appeal. Certainly the loss of the transcript was not due to any error in the proceedings below. It is argued that appellants have a constitutional right to be heard on the facts. They have a constitutional right to be heard in this court through the system of appeal provided by the Legislature. The method of obtaining and presenting the record of the trial below is purely statutory. The fact that this method fails in the present case because of the death of the reporter does not result in depriving appellants of any constitutional right. The machinery provided by the Legislature becomes ineffective in such case, but this does not affect the constitutional question. Nor does it follow that the appellants are deprived of their liberty without due process of law. They are entitled to a hearing in this court, but only by the method and through the machinery provided by statute. If that method turns out to be ineffective in this case because of the death of the reporter, this does not deprive them of due process nor constitute ground for reversing the judgment.

[8] In many cases the machinery provided by law may prove inadequate to meet all emergencies. If new evidence is discovered after the statutory time for granting a new trial on that ground has elapsed, the judicial machinery provided is insufficient for that particular emergency. It is conceivable that hardship might result, but no court would on that ground usurp the power to reverse the judgment and grant a new trial. The defendant would be remitted to his remedy before the pardon board. So in this case that remedy obtains. The pardon board can require the defendants to make a showing that they were not rightly convicted; whereas, this court is asked to act

blindly, without any showing, and in face of the presumption of regularity.

Much is said in appellants' brief about the practical results which may follow a decision of this case one way or the other. It is argued that a great injustice will be perpetrated if the appellants were not given a fair trial below. If their rights were violated on the trial, it would have been possible for them to have presented at least some of the more important questions by a bill of exceptions, if, instead of asking us to grant them a new trial because of the loss of the transcript, they and their counsel had attempted to prepare a bill of exceptions when they first learned of its loss. On the other hand, if the contrary view be held, and court records are destroyed by fire or other disaster, all judgments must be reversed in cases where the destruction occurred before the time to appeal had elapsed. This would result in many obvious miscarriages of justice.

We conclude that no ground is shown for reversing the judgment of the lower court. Accordingly, it is affirmed.

RICE, C. J., and DUNN, J., concur.

BUDGE, J. I am of the opinion that the appeal in this case should have been dismissed upon the state's motion. However, the majority of the court entertained a different view. The result would have been the same. I therefore concur in the conclusions reached.

LEE, J., dissents.

LEE, J. (dissenting in part). I dissent from that part of the majority opinion which holds that this court is without jurisdiction to grant any relief to a defendant convicted of crime, on appeal from such judgment of conviction, where, without fault on his part, he is prevented from obtaining a transcript of the oral proceedings had at the trial below. It is conceded that appellants were prevented from obtaining a transcript by reason of the death of the court reporter, and that there is now no way in which such transcript can be obtained. They contend that they had a right to rely upon the reporter's transcript, this being the only instrumentality provided by law for taking and preserving a record of the oral proceedings at the trial, and that this instrumentality having failed by reason of the death of the reporter—that is, the intervention of an act of God, which made it impossible for them to obtain a record of the oral proceedings had at the trial, upon which this conviction is based—that the judgment should be vacated and a new trial awarded, so that the questions presented by such record may be reviewed on appeal to this court.

The majority opinion holds that this ap-

peal should not be dismissed because of the failure of defendants to present the same upon a bill of exceptions, where such failure was caused by the death of the reporter, and then holds that for the want of such record this court is without power to afford them any relief from the judgment of conviction below. This is "but to keep the word of promise to the ear and break it to the hope." If the right of appeal rests upon such an uncertain foundation, then this right, guaranteed by the Constitution, is but a broken reed.

C. S. §§ 6556-6561, provide for the appointment of a stenographic reporter in each judicial district, who is required to take the oath prescribed for judicial officers, to give a bond for the faithful performance of his duties, to report all oral proceedings in said court, unless the same be waived, and file such stenographic report with the clerk of said court, and, in criminal cases, to furnish a typewritten copy upon request.

In *State v. Ricks*, 82 Idaho, 232, 180 Pac. 257, 13 A. L. R. 99, this court said:

"It has been shown to this court, by sufficient proof, that no transcript of the deceased reporter's notes has been or can be made, and it has also been shown that appellants have at all times since the trial made diligent efforts to obtain a transcript, but have failed through no fault of theirs. * * * That a party or his attorney is justified in relying upon the stenographic reporter for a transcript of the oral proceedings of a trial is, in our opinion, the correct view to be taken."

In *Fischer v. Davis*, 24 Idaho, 216, 133 Pac. 910, this court, speaking through Chief Justice Ailshie, said:

"It is a well-settled rule of law that litigants or parties dealing with public officers are not chargeable with the delays, mistakes, negligence or inaction of such officers, and that they cannot be deprived of any legal right by the negligence, delay or refusal to act on the part of such officers, provided that they do the things required to be done by them personally."

In *Re Neil*, 12 Idaho, 749, 87 Pac. 881, it is said:

"Both the Constitution and statute guarantee to him [defendant] the right of appeal from any judgment of conviction rendered and entered against him. Const. art. 5, § 9. * * * This right of appeal is in no respect dependent upon the guilt or innocence of the defendant. One guilty beyond all question of doubt is guaranteed the same right of appeal as if he were absolutely innocent."

C. S. § 6511 (R. C. § 3925), provides that—

"When jurisdiction is, by this Code, or by any other statute, conferred on a court or judicial officer all the means necessary to carry it into effect are also given; and in the exercise of the jurisdiction if the course of proceedings be not specially pointed out by this Code, or the statute, any suitable process or mode of

proceeding may be adopted which may appear most conformable to the spirit of this Code."

The better reason and the very great weight of authority sustain appellants' contention that where a party has been deprived of his exceptions without fault on his part, he is entitled to a new trial. The authorities make no distinction between civil and criminal cases, and upon principle there would seem to be none; nevertheless, the right to life and liberty must always be regarded as a more sacred right than a property right.

The cases relied upon by the majority opinion are *Dumbarton Realty Co. v. Erickson*, 143 Iowa, 677, 120 N. W. 1025, 136 Am. St. Rep. 778, 21 Ann. Cas. 258; *Alley v. McCabe*, 147 Ill. 410, 35 N. E. 615; and *Peterson v. Lundquist*, 106 Minn. 339, 119 N. W. 50. These are all civil actions, based upon facts entirely unlike the case at bar, and are not convincing authority. In the Iowa case, the court says:

"It remains an open question whether a court of equity may not, in the exercise of its general equity powers, order a new trial when the record of the evidence has been wholly lost without fault of the party applying, and it is not within the power of such party, or of the court upon his application, to restore or substitute the lost record."

In the Illinois case the court found that the appellant had not shown due diligence to obtain a bill of exceptions, and the trial judge having died more than a year after the testimony was taken, the court refused to settle the bill or reverse the case. In the Minnesota case the court said:

"We need not stop to consider just what authority the trial court would possess in a case of this kind respecting the settlement of a case or bill of exceptions from the best sources at hand, for no effort was made to so proceed in this case."

The authorities in support of the contrary doctrine are so numerous and from so many jurisdictions that it would be impractical to cite them all, and I will refer only to the leading cases, and those where the constitutional and statutory provisions pertaining to appeals are analogous to our own.

In *Hume v. Bowle*, 148 U. S. 245, 13 Sup. Ct. 582, 37 L. Ed. 438, that court, speaking through Chief Justice Fuller, said:

"Where a party, without laches on his part, loses the benefit of his exceptions through the death or illness of a judge, a new trial will be granted."

In *Borrowscale v. Bosworth*, 98 Mass. 34, it is said:

"We can have no doubt that where a party has regularly taken exceptions in a cause and has lost the benefit of them without fault of his own, a new trial may be granted."

In *Crittenden v. Schermerhorn*, 85 Mich. 370, Chief Justice Cooley says:

"Where a party has lost the benefit of his exceptions from causes beyond his control, it is proper to give him a new trial."

In a note to *Bailey v. United States*, 3 Okl. Cr. 175, 104 Pac. 917, in 25 L. R. A. (N. S.) at page 860, the annotator states that the weight of authority supports this rule, reviewing the authorities at great length; and at page 867 he cites the authorities which hold that appellant is entitled to a new trial for a failure to obtain a bill of exceptions by reason of the death or default of the official reporter. *Curran v. Wilcox*, 10 Neb. 449, 6 N. W. 762; *Holland v. C., B. & Q. R. Co.*, 52 Neb. 100, 71 N. W. 969; *Mathews v. Mulford*, 53 Neb. 252, 73 N. W. 661; *Barton v. Burbank*, 119 La. 224, 43 South. 1014; *State ex rel. Downing v. Gaslin*, 32 Neb. 291, 49 N. W. 358.

In a note to *Richardson v. State*, 15 Wyo. 465, 89 Pac. 1027, in 12 Ann. Cas. 1048, the annotator, at page 1056, states the rule as here given and says that it is supported by the weight of authority, and gives the citations arranged in the order of the jurisdictions from which they are taken. He also reviews the cases adopting the minority rule, and points out that such decisions are all based upon some exceptional provision found in the Constitution or statutes of these jurisdictions.

In *Richardson v. State*, supra, Chief Justice Potter also gives an extensive citation of authorities, many of which are also cited in *State v. Ricks*, supra.

The following citations refer only to state cases and are given because if any distinction should be made in the application of this rule, it should be applied with greater force to criminal cases: *State v. Bess*, 31 La. Ann. 191; *State v. Weiskittle*, 61 Md. 48; *People v. Judge*, 40 Mich. 630; *People v. Judge*, 41 Mich. 726, 49 N. W. 925; *Gaiter v. State*, 45 Miss. 441; *State v. Reed*, 67 Mo. 36; *State v. McCarver*, 113 Mo. 602, 20 S. W. 1058; *State v. Powers*, 10 N. C. 376; *Bryans v. State*, 29 Tex. App. 247, 15 S. W. 288; *Martin v. State* (Tex. App.) 16 S. W. 749; *Prieto v. State*, 35 Tex. Cr. App. 69, 31 S. W. 665; *Ham v. State* (Tex. Cr. App.) 42 S. W. 295.

While it is a correct rule of law that presumptions are in favor of the regularity of the proceedings of a court of record, and ordinarily the burden is upon appellant to show error before a reversal can be had, this rule has no application to an appeal where the appellant is prevented from obtaining a record without fault on his part, and solely by reason of an act of God or some other unavoidable circumstance, whereby the instrumentality provided by law for taking and preserving this record has failed. Where the

right of appeal is guaranteed by the Constitution, such right does not depend for its existence on there being error in the record. *Zweibel v. Caldwell*, 72 Neb. 47, 99 N. W. 843, 102 N. W. 84.

Article 5, § 9, of the Constitution, provides that "the Supreme Court shall have jurisdiction to review, upon appeal, any decision of the district court, or the judges thereof," and C. S. § 9068, provides that "an appeal may be taken by the defendant (1) from a final judgment of conviction." In *Re Nell*, supra, it is held that this right is not dependent upon the guilt or innocence of the defendant.

Defendants have been convicted of a grave offense. The means provided by law, which in ordinary cases are sufficient to enable them to exercise their constitutional right of appeal, have failed through the intervention of Providence, and it is neither in accord with justice, reason, or authority to say that under these conditions this constitutional right should be denied them. To uphold this right merely results in the evidence being again taken, and supplies a record which cannot be otherwise obtained.

For the reasons herein stated and upon the authorities herein referred to, the judgment should be reversed and a new trial granted.

On Petition for Rehearing.

McOARTHY, J. In a petition for rehearing, counsel for appellants insist that the principle in criminal cases is different from that in civil cases. No reason for a distinction is pointed out by them, nor in any of the decisions cited. None is made by the Constitution or statutes. The court has no more power in one class than in the other. In both, its power and duty are to reverse the decision of the district court only for prejudicial error. The presumption of regularity applies with equal force in both. It is true that a successful litigant in a civil case has a species of property right in his judgment, and that the state has no property right in the judgment in a criminal case. It by no means follows that the state has no right. On the contrary, it has a right to insist that such a judgment be enforced, unless shown to be erroneous and unjust. This right far transcends mere property rights, being based upon the fundamental principles which underlie the exercise of the police power for the protection of society from crime.

In *Richardson v. State*, 15 Wyo. 465, 89 Pac. 1027, 12 Ann. Cas. 1048, perhaps the leading case relied upon by appellants, the Attorney General and appellant's counsel stipulated that certain errors had been committed by the district court. In the instant cases appellants have made no showing of error whatever. They have not even pointed out the errors which they claim were committed. They have not even made a showing that it was impossible, without the report-

er's transcript, for them to present the points upon which they relied. In the absence of any showing that they were wronged by the judgment, and that they could not present their points to this court without the transcript, there is no reason for reversing the judgment. *Galbraith v. Barnard*, 21 Or. 67, 26 Pac. 1110; *Shute v. Big Meadows Inv. Co. (Nev.)* 198 Pac. 227; *Bingman v. Clark*, 178 Iowa, 1129, 159 N. W. 172. Counsel state that the right to appeal does not depend upon a showing of error. The right to appeal does not necessarily carry with it the right to a reversal. The right to a reversal does depend upon a showing of error, and appellants have made none. Justice does not require that a litigant should be permitted to take advantage of the mere circumstance that the reporter's transcript is lost. Yet that is just what these appellants are trying to do, so far as the showing to this court goes.

In their petition for rehearing, appellants ask this court to permit the record to be substituted by calling before the district judge, who tried the case, all of the witnesses who testified, and retaking the testimony. Under our Constitution, the method of appeal, including the preparation of the record, is statutory. The statutes of this state do not provide for such a method of preparing the record as that suggested. It would not be a substitution of the former record, but the making of a new one. Then, too, the steps for obtaining the record must be initiated in the lower court. Incidentally, if appellants could remember what occurred on the former trial well enough to retake the testimony, it would seem that they could have presented to this court a record of the points upon which they relied, if they had tried to do so, instead of relying entirely upon the contention that the loss of the transcript of itself gave them an absolute right to a reversal of the judgment.

The petition for rehearing of the above-named appellants, and each of them, is denied.

DUNN, J., concurs.

BUDGE, J. I adhere to my views heretofore expressed and therefore concur.

RICE, C. J., and LEE, J., dissent.

STATE v. WILLIAMS et al. (No. 3344a.)

(Supreme Court of Idaho. July 1, 1921. On Petition for Rehearing Nov. 1, 1921.)

Appeal from District Court, Madison County; James G. Gwinn, Judge.

Lavon Williams and Dewey Arnold were convicted of assault with intent to commit

rape, and they appeal. Affirmed, and petition for rehearing denied.

Miller & Ricks, of Rexburg, for appellants.

Roy L. Black, Atty. Gen., and Jas. L. Boone, Asst. Atty. Gen., for the State.

MCCARTHY, J. In this case the facts and questions of law are substantially the same as those presented to this court in the case of *State v. Henry Ricks and Edward Levine*, 201 Pac. 827.

Upon the authority of that case, the judgment of conviction herein is affirmed.

RICE, C. J., and DUNN, J., concur.

BUDGE, J., concurs in the conclusions reached, for reasons given in the case of *State v. Ricks and Levine*, supra.

Lee, J., dissents.

On Petition for Rehearing.

MCCARTHY, J. The questions raised by the petition for rehearing in this case are the same as those raised by the petition for rehearing in the case of *State v. Henry Ricks and Edward Levine*, 34 Idaho, —, 201 Pac. 827. Upon the authority of that decision, the petition for rehearing of the above-named appellants, and each of them, is denied.

DUNN, J., concurs.

BUDGE, J. I adhere to my views heretofore expressed and therefore concur.

RICE, C. J., and LEE, J., dissent.

SOULE v. JOHNSON et al.

SAME v. BAKER.

(Nos. 3426, 3377.)

(Supreme Court of Idaho. Oct. 28, 1921.)

1. Mines and minerals §26—One under contract to labor on claims held not entitled to acquire interest therein by agreement with third party relocating the same on his default.

One under contract to perform the annual labor on mining claims cannot acquire an interest in such claims by entering into an agreement with a third party, by which he fails to perform such annual labor and such third party relocates such claims and deeds an interest therein to such person under contract to perform such annual labor.

2. Mines and minerals §26—One knowing of another's obligation to labor on claims cannot acquire interest by relocation after agreeing with such other not to perform.

Under the facts stated in paragraph 1, such third party, knowing the obligation of the other

party to perform the annual labor, cannot acquire an interest in such claims by relocating them.

3. Mines and minerals \Leftrightarrow 38(15) — Evidence held to establish conspiracy to defraud a locator of his claims.

Evidence in this case held sufficient to establish the charge of conspiracy of certain defendants to defraud plaintiff.

4. Vendor and purchaser \Leftrightarrow 226(2)—To acquire valid title against equitable owner, purchaser must have paid for interest before being put on inquiry.

To acquire a valid title to an interest in real property against the equitable owner, a purchaser must have purchased and paid for his interest before coming into possession of facts sufficient to put him upon inquiry.

Appeal from District Court, Lemhi County; Robt. M. Terrell, Judge.

Action by Kester T. Soule against Adrian F. Johnson and others to recover title to and possession of mining claims alleged to have been fraudulently relocated by the defendants, and from the judgment for the defendant William R. Baker the plaintiff appeals, and from the judgment for the plaintiff the defendants Adrian F. Johnson and others appeal. Judgment for the defendant Baker reversed, and that in favor of plaintiff affirmed.

J. M. Stevens, H. E. Ray, and W. H. O'Brien, all of Pocatello, and E. W. Whitcomb, of Blackfoot, for Johnson and others.

Quarles & Padgham, of Salmon, and A. C. Cherry, of Weiser, for Soule.

DUNN, J. This action was brought by the plaintiff to recover title to and possession of three mining claims situated in the Pratt Creek mining district, Lemhi county, known as the Clearwater, Clearwater No. 1, and Clearwater No. 2 lode claims, alleged to have been fraudulently relocated by the defendant Adrian F. Johnson, for his benefit and that of his codefendants, in January, 1916, under the names of Bluebird Quartz, Bluebird No. 1, and Bluebird No. 2 lode mining claims, and to enjoin said defendants from interfering with plaintiff's possession and control of said mining claims.

The complaint alleges that the plaintiff, up to the end of the year 1915, was the owner of said mining claims, holding two-thirds thereof in his own right and the remaining one-third as security for certain sums of money which plaintiff's grantor had advanced to defendant Isaac S. Johnson; that on the 12th day of June, 1915, at the solicitation and request of said Isaac S. Johnson, he gave to the defendant John C. Sheridan a written option to purchase said mining claims for \$10,000, the first payment of \$2,000 to be made on February 15, 1916; that by the

terms of said option Sheridan agreed to perform annual labor on said mining claims to the amount of at least \$300 on or before November 1, 1915, and each and every year thereafter during the continuance of said agreement in manner to meet the requirements of the laws of the United States and of the state of Idaho in respect to annual labor, so that plaintiff's title to said property would continue unimpaired; that the said Isaac S. Johnson then knew the terms and conditions of said option and had a part and share in determining what terms and conditions were to be and what were inserted in said written option; that from the time of giving said option to and into the month of January, 1916, the said Sheridan and the said Isaac S. Johnson, by their words and actions, led the plaintiff to believe that the necessary annual labor had been performed on said mining claims during the year 1915, and until the month of January, 1916, the plaintiff supposed said Sheridan was in possession of said claims and carrying out the terms of said option; that plaintiff had confidence in said Sheridan, and trusted him to do the necessary labor on said claims for the year 1915; that Adrian F. Johnson is a son of Isaac S. Johnson, and has had his home with his father and mother since his birth; that he has since the year 1907 had full and complete knowledge of the holdings, rights, and interests of his father in and to the undivided one-third part of said mining claims and of the holding by this plaintiff and his grantor, H. W. Soule, of one-third of said claims as security for the payment of moneys advanced by the said H. W. Soule to said Isaac S. Johnson, and had full knowledge of the option given by the plaintiff to said defendant Sheridan; that the defendants Isaac S. Johnson, John C. Sheridan, and Adrian F. Johnson, well knowing the premises and well knowing the true state of the plaintiff's title and right in and to said mining ground and his interest in the one-third part thereof held for said Isaac S. Johnson, corruptly and fraudulently conspired, combined, and confederated and agreed together that the said John C. Sheridan should not perform the annual labor on said mining claims for the year 1915, and that the said mining ground should be located during the month of January, 1916, in the name of said Adrian F. Johnson for the sole benefit of themselves and said defendant Baker, and in pursuance of their fraudulent conspiracy, confederacy, and agreement afterwards, to wit, on the 23d, 27th, and 30th days of January, 1916, entered into possession of said mining claims and ground and, intending and contriving to deprive this plaintiff of all his interests therein, did locate the same in the name of said Adrian F. Johnson, under the names of the Bluebird Quartz, Bluebird No. 1, and

Bluebird No. 2 lode claims; that in furtherance of the said unlawful combination, confederation, and conspiracy said defendant Adrian F. Johnson, on the 26th day of April, 1916, for the nominal consideration of \$5, conveyed to said John C. Sheridan an undivided three-eighths part of said mining claims and ground, and on the said 26th day of April, 1916, for the nominal consideration of \$5, also conveyed to the defendant William R. Baker an undivided one-fourth part or interest in said mining claims and ground; that prior to the date of the said deed to the defendant William R. Baker he had full knowledge of the rights and interests of the plaintiff in and to the mining claims and ground aforesaid, and full knowledge of the aforesaid option to said defendant Sheridan, and full knowledge of the agreement between the defendant Isaac S. Johnson and said Horace W. Soule relative to the interest of said Johnson in the one-third part of said mining claims standing in the name of said Soule, and that it was held by said Soule as security for money advanced by said Soule to said Johnson, and because of such knowledge alleges that said defendant William R. Baker was not a bona fide purchaser of said one-fourth interest without notice of plaintiff's rights and interest therein, and is not a purchaser of the said property in good faith and for a valuable consideration.

The plaintiff further alleges on information and belief that a three-eighths interest in said Bluebird Quartz, Bluebird No. 1, and Bluebird No. 2 lode claims was located by the said Adrian F. Johnson for the use and benefit of Isaac S. Johnson, and that he is now holding the same for the use and benefit for the said Isaac S. Johnson, and that the same is now claimed and is being managed by the said Isaac S. Johnson as his own property. The claims in controversy are of the admitted value of \$10,000.

Defendants filed separate answers, admitting plaintiff's ownership and possession of the Clearwater claims up to the end of the year 1915, admitting also knowledge of the option given by plaintiff to defendant Sheridan in June, 1915; in fact, practically everything alleged in the complaint is admitted, either expressly or by failure to deny, by all of the defendants, except the charge of conspiracy, which is denied by the three defendants so charged, and the charge that plaintiff was deceived and misled by Sheridan and Isaac S. Johnson as to the performance of the annual labor for the year 1915, which is denied by said defendants, and the charge that three-eighths interest in the Bluebird claims was located for and held by Adrian F. Johnson for the benefit of Isaac S. Johnson and is being managed by the said Isaac S. Johnson, which is denied by Adrian F. Johnson and Isaac S. Johnson. Baker admits all the allegations regarding himself except

that he is not a purchaser in good faith for a valuable consideration.

The court made findings upon all the issues and entered a decree that the plaintiff, Kester T. Soule, was at the commencement of this action and now is the owner of and entitled to the immediate possession of an undivided three-fourths interest in and to the Clearwater, Clearwater No. 1, and Clearwater No. 2 lode mining claims, situated in Pratt Creek mining district, Lemhi county, Idaho; that the relocation by the defendant Adrian F. Johnson of the mining ground embraced within the boundary lines of the said mining claims under the name of the Bluebird Quartz and Bluebird No. 1 and the Bluebird No. 2 lode mining claims was through and by means of a fraudulent conspiracy formed and entered into by the said defendants Adrian F. Johnson, John C. Sheridan, and Isaac S. Johnson, with intent to fraudulently and unlawfully deprive the said plaintiff of his interest in and to said mining ground; that whatever title the defendants Adrian F. Johnson, John C. Sheridan, and Isaac S. Johnson have in or to said mining ground, through the relocation so made by said Adrian F. Johnson, has at all times been and is now held in trust by said defendants for the use and benefit of the said plaintiff, and the said defendants and each of them are required and directed, within 10 days after the final decision in this action, to make, execute, acknowledge, and deliver to the said plaintiff a good and sufficient deed conveying all his right, title, and interest in and to the same to plaintiff, and in case of their neglect or refusal to make, execute, acknowledge, and deliver such deed within said time, the clerk of the district court of said county is directed to make, execute, acknowledge, and deliver to said plaintiff such mining deed under the authority of said decree; that the defendant William R. Baker was at the commencement of this action and is now the owner of an undivided one-fourth interest in and to the said mining ground within the boundary lines of the aforesaid Clearwater, Clearwater No. 1, Clearwater No. 2, Bluebird Quartz, Bluebird No. 1, and Bluebird No. 2 lode mining claims, subject to the paramount title of the United States; that the said defendant Isaac S. Johnson owns an undivided one-third interest in and to the said Clearwater, Clearwater No. 1, and Clearwater No. 2 lode mining claims, the legal title to which is in the name of and belongs to the said plaintiff, which said undivided one-third interest is held by the said plaintiff by agreement as security for the payment by said Isaac S. Johnson of certain moneys advanced to and paid out for said defendant Isaac S. Johnson at his request by the predecessor in interest of said plaintiff; and it is adjudged and decreed that said plaintiff may hold said undivided one-third interest

until an accounting may be had in another action between plaintiff and said defendant Isaac S. Johnson as to the amount due from said defendant to said plaintiff and until the payment of such sum to said plaintiff by said defendant Isaac S. Johnson; that neither of said defendants John C. Sheridan nor Adrian F. Johnson has any right, title, or interest whatsoever in or to said mining claims or premises or any part thereof, and the plaintiff's title is quieted as against any and all claims whatsoever of said last-named defendants, or either of them.

The defendants moved for a new trial on the ground of the insufficiency of the evidence and errors of law on the part of the judge in making his findings of fact, conclusions of law, and decree, and under each ground numerous specifications are made. The motion for a new trial was denied, and defendants have appealed from the order denying said motion. The plaintiff has appealed from that part of the decree awarding a one-fourth interest in the claims in controversy to William K. Baker.

[1, 2, 4] Many errors are specified by appellants, but in their brief only the question of conspiracy is discussed; appellants apparently conceding that, if the evidence is held sufficient to support the findings of the court that there was a conspiracy as alleged in the complaint, the judgment of the trial court must be upheld.

This action proceeds upon the assumption that the annual labor on the Clearwater claims for the year 1915 was not performed. This fact made the lands embraced in said claims vacant and unoccupied public lands of the United States on the 1st day of January, 1916, and therefore subject to location by any one entitled to locate mining claims on such lands.

So far as the conspiracy alleged in the complaint, if it were established by competent evidence, would affect the title of Isaac S. Johnson to one-third interest in the Clearwater claims, or in the Bluebird claims, if title to these latter should be awarded to the respondent, such conspiracy may be disregarded, for the reason that the respondent is not seeking to deprive said defendant of such interest. As to Isaac S. Johnson, then, the decree giving him one-third interest in the ground in controversy, subject to the lien of respondent for certain moneys claimed to be due him, must be affirmed.

By failing to deny the allegations of the complaint as to the conspiracy of Isaac S. Johnson, John C. Sheridan, and Adrian F. Johnson, Baker admits that such conspiracy was formed by said parties in the manner and for the purpose alleged in the complaint, but he attempts to allege that he had no knowledge of the location of said mining claims until after such location was accomplished. He expressly admits, however, that

prior to the date of his deed he had full knowledge of the rights and interests of the plaintiff in said mining claims and ground, and of the option held by Sheridan, and of the agreement by which Soule held a one-third interest in said claims for Isaac S. Johnson. Putting a fair and reasonable construction upon these admissions of Baker, it must be held that if he had not actual knowledge of the fraud attempted against Soule by Sheridan and the Johnsons, he was in possession of sufficient knowledge as to the conflicting claims of Soule on the one hand and Sheridan and the Johnsons on the other to put him upon inquiry. He could not close his eyes to the facts that he admits knowing before he received his deed and became a purchaser in good faith, even though he paid therefor the valuable consideration that he claims. The one-fourth interest for which he claims to have paid \$1,800 must therefore be held to be the property of appellant Soule. 26 R. C. L. p. 1296; *Wormley v. Wormley*, 8 Wheat. (U. S.) 421, 5 L. Ed. 651.

This leaves only the interest held by Adrian F. Johnson and John C. Sheridan, and the record contains sufficient evidence to warrant the conclusion of the trial court that the fraudulent agreement or understanding set up in the complaint as having been entered into by Adrian F. Johnson, John C. Sheridan, and Isaac S. Johnson actually existed.

Adrian F. Johnson was in no contractual relation with respondent, but he admits that he knew of the relation of Sheridan to respondent, by virtue of the lease and option held by Sheridan, which bound him to perform the annual labor on the Clearwater claims for the year 1915. There is evidence tending to show that he heard Sheridan assure the respondent that the annual labor on these claims had been performed for that year, when in fact Johnson knew that it had not been performed. There is also evidence that Isaac S. Johnson, who was more familiar with the claims than respondent, shortly before the end of the year 1915 falsely represented to respondent that the work had been done. It may be, as contended by appellants, that there was no legal obligation upon Adrian F. Johnson to advise respondent that the work had not been performed, and if he had been content to relocate the claims and hold the title for himself probably such title as against respondent would have been unassailable. That question, however, is not before us, and it is not necessary to decide it. He was not content to hold such title for himself, for the evidence shows that immediately after his relocation of these claims his father, Isaac S. Johnson, wrote to Sheridan, who was then in Butte, Mont., and advised him of the relocation of the claims. Almost immediately after receiving such in-

formation Sheridan came back and assisted Adrian F. Johnson in performing the location work on the Bluebird claims. Sheridan admits by his answer that he received a deed conveying to him a three-eighths interest in said claims for the nominal consideration of \$5, but even if his testimony is true that he received such interest for his assistance in performing the location work, the consideration would still be trifling as compared with the admitted value of the interest received by him, which was nearly \$4,000. All of these facts and circumstances, with the others admitted by the several answers and found by the trial court, are sufficient, in our opinion, to vitiate the title of Adrian F. Johnson and John C. Sheridan to the ground in question. But even if Johnson's title could be sustained, Sheridan's title could not be upheld against respondent. He was under contract to perform the annual labor, and he could not be permitted, under any circumstances, by his own default, to cause respondent to lose his interest in the Clearwater claims, and by such base and dishonorable conduct as is shown in the record acquire any part of such interest for himself.

[3] The evidence is ample to justify the conclusion of the court that the conspiracy alleged in the complaint was entered into by all of the defendants except Baker. The judgment is therefore affirmed, with costs to plaintiff, on the appeal of defendants Isaac S. Johnson, John C. Sheridan, and Adrian F. Johnson from the order denying motion for a new trial, and is reversed, with costs to plaintiff, on his appeal from that portion of the judgment awarding defendant Baker a one-fourth interest in the claims in controversy. The trial court is directed to modify its judgment accordingly.

RICE, C. J., and BUDGE, McCARTHY, and LEE, JJ., concur.

ALLISON v. BROTHERHOOD OF RAILROAD TRAINMEN (ALLISON, Intervener). (No. 3419.)

(Supreme Court of Idaho. Oct. 31, 1921.)

1. Insurance §718, 784(1)—Constitution and general rules become part of contract; beneficiary cannot be changed except by compliance with contract terms.

Where a certificate of membership is issued by a fraternal beneficial order, the constitution and general rules of the order become a part of the agreement, and a member cannot change the beneficiary except by a substantial compliance with the terms of such agreement.

2. Insurance §784(2)—A change of beneficiary on grand lodge books cannot be made where application reaches officers after insured's death.

Where the provisions of a fraternal benefit certificate provide that all transfers of the beneficiary shall be made upon the books of the grand lodge, under the direction of the general secretary and treasurer, and all transfers made in any other manner shall be null and void, the insured cannot change such beneficiary by making a request under oath in writing and mailing the same to the grand lodge, where such request does not reach the office of the general secretary and treasurer until after the death of the insured.

3. Equity §57—Equity will not enforce change of beneficiary, not consummated before insured's death.

The maxim that equity will regard as done that which ought to have been done has no application to the change of a beneficiary in a certificate, where it would in effect be making for the parties a contract materially different from that which they had made for themselves.

4. Insurance §784(7)—Where insured dies before completing change of beneficiary, rights of original beneficiary immediately vest, and insurer cannot waive rights to beneficiary's prejudice.

Where the insured in a beneficiary certificate attempts to change the beneficiary, but dies before such change is effected, the rights of the original beneficiary immediately vest upon the death of the insured, and the insurer cannot after the death of the insured waive any of the terms of the agreement to the prejudice of the beneficiary.

Appeal from District Court, Minidoka County; Wm. A. Babcock, Judge.

Action by David B. Allison to recover on a beneficiary certificate issued by defendant, Brotherhood of Railroad Trainmen, in which Hannah Allison intervened. From a judgment for plaintiff, the intervener appeals. Reversed and remanded, with instructions for new trial.

P. C. O'Malley, of Pocatello, and Homer C. Mills, of Twin Falls, for appellant.

Dampler & Coddington, of Rupert, for respondent.

LEE, J. This action was commenced by respondent David B. Allison to recover upon a beneficiary certificate issued by the Grand Lodge of the Brotherhood of Railroad Trainmen upon the life of his son, Thomas B. Allison. The more important facts are stipulated in the record, and from the record it appears that the respondent was the first beneficiary named in this certificate, which was issued to the assured in November, 1905, and that subsequently, appellant and insured having intermarried, he transferred the certificate to her, in accordance with the constitution and general rules of the brotherhood.

(201 P.)

The assured died on October 18, 1917, as the result of an injury received on September 25th preceding, and left surviving him his said wife and their two children, Mary, aged eight, and Patrick, aged six years. An estrangement had existed between deceased and his wife since July preceding, when upon their return journey from the state of Washington they separated at Avery, Idaho, the husband remaining there and the wife continuing her journey to Pocatello, where her parents resided, she taking with her a trunk which her husband had checked on their transportation, which contained this certificate in question, along with other of their personal effects. This husband and wife appear never to have met again after their parting at Avery. The wife later returned to Seattle, where she was employed at the time of her husband's death, and he appears to have continued in the employment of the railroad until about the 25th of September, when he received the injury which resulted in his death. The wife in the meantime had commenced divorce proceedings in the superior court of the state of Washington. Immediately after said injury, assured was taken to the general hospital in Pocatello, where he remained for some time, and appeared to improve to such an extent that his recovery seemed probable. On October 9th he was taken to his father's home near Rupert, where he remained until he died on October 18th, not having met or directly heard from his wife, and their domestic difficulties never having been reconciled. The wife had been informed that her husband was ill, but not as to the cause of the illness, until after his death and burial, when she returned to Pocatello and secured possession of the certificate in question, which had remained in the trunk at her father's home in Pocatello, where it had been left by her in July preceding.

From communications in writing addressed to his wife or intended for her, made by the assured shortly prior to receiving the injury, and also from statements made to Sheriff Blake, who was called soon after the occurrence, it appears that he intended and desired to leave this insurance to his wife, expressing for her great affection, and admitting that he had not always treated her properly during their married life.

Later, however, and while still at the hospital, and apparently believing that he would fully recover, he stated to George W. Hunt, the secretary of the local lodge of the brotherhood, that there had been trouble between himself and his wife, and expressed a wish to change the beneficiary from her to his father, and requested the secretary's assistance in so doing. He was advised by the secretary what proceedings were necessary to be taken, and that he (the secretary) would assist in making the change. No further

steps were taken toward changing the beneficiary until he returned to his father's home, when H. B. Redford, an attorney of Rupert, at the request of respondent prepared an affidavit and letter and took the same to the assured, who was then confined to his bed at his father's home about two miles from Rupert, and when the assured signed and swore to the affidavit before the attorney as a notary.

Omitting the caption, the affidavit is as follows:

"Thomas Benjamin Allison, being first duly sworn, deposes and says: That he is insured in the Brotherhood of Railroad Trainmen in the sum of \$1,600.00; that the beneficiary under said policy is his wife Hannah Allison; that said policy is to the best of affiant's knowledge and belief now in the possession of his said wife and that her whereabouts are to this affiant now unknown; that affiant is unable to get possession of said insurance policy and that said beneficiary refuses to return the same to affiant; that David B. Allison, whose residence is Rupert, Idaho, is the father of affiant; that it is the intention and desire and request of said affiant that the general secretary and treasurer of the said Brotherhood of Railroad Trainmen change the beneficiary in said policy from affiant's wife Hannah Allison to affiant's father David B. Allison, in accordance with the rules and regulations of said brotherhood. Affiant further requests that a new certificate be issued in accordance herewith and upon such issuance he hereby releases said brotherhood from any further liability under the old certificate. Affiant further says that his present address is Rupert, Idaho.

"Thomas Benjamin Allison.

"Subscribed and sworn to before me this 18th day of October 1917.

"H. B. Redford, Notary Public."

The mother of the assured mailed this affidavit to the secretary of the brotherhood at Cleveland, Ohio, some time after its execution; but it did not reach the secretary's office until October 20th, or two days after the death of the assured, and after the secretary had been notified of the death by the respondent David B. Allison, named as beneficiary in said affidavit, who claimed to be the rightful beneficiary by virtue of the making and mailing of this affidavit, and who demanded the insurance upon this certificate from the brotherhood, having made satisfactory proof of death. The wife also made demand upon said brotherhood for the amount of this certificate, basing her claim upon being named as the beneficiary in said certificate, and also submitted satisfactory death proofs and surrendered the certificate to the head office of the order.

Respondent commenced this action in March, 1918, and the brotherhood admitted its liability, but claimed that it was unable to determine who was entitled to this money, and paid the net amount of \$1,520.90 due on this certificate into court, and upon doing so

was released from further liability thereon. The court then entered an order that appellant should appear after the service of a copy of such order upon her, and of the complaint and summons, and that unless she did so appear and set up her claim to the fund, it should be paid to respondent, and she appeared and filed in said action a complaint and answer in intervention, whereby she claimed to be entitled to the proceeds of said certificate by virtue of being the beneficiary therein.

The agreed statement of facts brings into the record a photographic copy of the certificate, the affidavit above set forth, which attempted to change the beneficiary, and certain letters, telegrams, and other record evidence pertaining to the issues involved, including the constitution and general rules of the brotherhood of Railroad Trainmen, in so far as they are material or relevant to the issues presented by the pleadings.

Respondent bases his claim for recovery upon section 60 of the constitution and general rules, entitled "Beneficiary Certificates," and particularly that part reading as follows:

"* * * In case a beneficiary certificate has been lost or destroyed, or the member to whom it has been issued cannot obtain possession thereof, a new beneficiary certificate may be issued by the general secretary and treasurer on presentation of an affidavit from the member fully setting forth the loss or destruction of the certificate issued to him, or his inability to obtain possession of the same, and releasing and discharging the brotherhood from any and all liability thereunder."

Appellant contends that the foregoing provisions must be construed in connection with the preceding paragraph of the same section, which reads:

"Every such certificate must be accepted in writing on the face thereof, over the signature of the member insured thereby, to be attested by the secretary of the subordinate lodge, under the lodge seal."

—and section 62, entitled "Transfer of Beneficiary Certificates," which is as follows:

"All transfers of beneficiary certificates shall be made upon the books of the grand lodge, under the direction of the general secretary and treasurer, and all transfers made in any other manner shall be null and void. Any member desiring to transfer his beneficiary certificate shall fill out the printed transfer on the certificate and sign his name thereto, and send the same to the general secretary and treasurer, through the secretary of a lodge of the brotherhood. It shall be the duty of the general secretary and treasurer, immediately upon its receipt, to certify to such transfer in the form therefor provided in the certificate, and until so certified by the general secretary and treasurer the transfer will not be complete."

A trial of the cause was had before the court with a jury, and a verdict was returned

in favor of respondent David B. Allison, from which verdict and judgment thereon appellant, widow of deceased, prosecutes this appeal, and assigns some 30 or more errors as grounds for reversal of the judgment, the more important of which are: Errors based upon the court's refusal to nonsuit plaintiff; that the evidence is insufficient to support the verdict and judgment; errors in giving instructions relating to the effect of the affidavit made by the deceased in his attempt to change the beneficiary in such certificate from his wife to his father; instructions relating to the construction to be given to certain parts of the constitution and general rules of the brotherhood; instructions relating to the competency or lack of competency of the assured to change his beneficiary at the time of the making of said affidavit; and in the court's refusal to give several instructions requested by appellant. The record is not sufficiently definite and certain as to what requests were given and what refused, nor are any of the instructions identified or referred to otherwise than by folios.

In addition to the agreed statement of facts, the reporter's transcript contains some 250 pages of evidence taken at the trial; but in our view of the law applicable to this case, it will not be necessary to review the testimony of the several witnesses, because all of the facts essential to a determination of the questions here presented may be found in the agreed statement of facts. Nor will it be necessary to consider each assignment in detail, for the right to recover depends upon the construction to be given to the foregoing provisions of the constitution and general rules of the brotherhood, relating to the manner in which the assured may change his beneficiary under the terms and conditions of his contract.

[1-3] A change or attempted change of a beneficiary in a fraternal life insurance certificate, where the insured has died before all of the conditions prescribed by the agreement have been fully complied with, has perhaps more often given rise to legal controversies than any other class of questions pertaining to these contracts. In this case, counsel have with great diligence collected and cited so many authorities in support of their respective contentions that it is not possible within the limits of this opinion to review all of them. Respondent contends that the foregoing affidavit, executed by the assured shortly before his death, evidences such a fixed purpose to change the beneficiary in the certificate from his wife to his father that, following the fundamental principle that equity will regard that as done which ought to have been done, it must be held in this case that the assured did in fact effect a change in his beneficiary, notwithstanding his affidavit requesting a change did not reach the general offices of the brotherhood at Cleveland, Ohio,

until after his death. The learned trial judge adopted this view and applied this rule, and instructed the jury to this effect. The principle contended for, that equity will treat that as done which ought to have been done, is sound in reason and supported by such weight of authority that its correctness cannot be regarded as a debatable question. The difficulty does not arise regarding the correctness of the general principle, but with regard to its application in the manner contended for by the respondent to the admitted facts of this case, for it is equally as fundamental that this principle cannot be extended or applied to facts or conditions where it would in effect be making for the parties a contract essentially different from that which they themselves have made.

It seems clear that the provisions of section 60 of the brotherhood's constitution first above quoted were primarily intended to provide a method for procuring a new certificate where the one previously issued had been lost or destroyed, or where the member to whom it had been issued could not obtain possession of the same, without such person being required to undergo a new medical examination or other requirement relating to his being a proper risk. As to whether or not it was intended by this provision that, in addition to obtaining a new certificate, the insured might at the same time have a new beneficiary named therein, upon the request being presented to the general secretary and treasurer during the lifetime of the insured, it is not necessary for us to determine, for the reason that the request in this case did not reach the secretary until two days after the death of the insured. Under the provisions of this section, and also under the proviso contained in section 62 relative to a change of beneficiary, the secretary was at the time of receiving this affidavit, he having previously received notice of the death of the insured, without authority to issue a new certificate.

We do not wish to be understood as holding that a change of beneficiary could not be made without a literal compliance with all of the requirements of this certificate and the constitution and general rules of the brotherhood, which form a part of the contract. But we do think that part of section 60 above quoted, relating to the method of securing a new certificate, must be construed in connection with the other provisions of that section, and also section 62, and we hold that a change of beneficiary cannot be made by the insured placing in the mails a request in the form of an affidavit that the original certificate is lost, destroyed, or beyond his control, and directing the brotherhood to issue a certificate with a new beneficiary in lieu of the old one, particularly when he qualifies such request with the proviso that "upon such issuance he hereby releases said brother-

hood from further liability under the old certificate," and it appears that he died before the request reached the insurer.

Fraternal orders of this character have found that it is essential for their protection and the protection of their members to attach reasonable rules and regulations to the method of changing the beneficiary in these certificates. It is a matter of common knowledge that much of the business of these orders must be transacted through local officials, whose selection and method of doing business is only to a limited extent under the control of the head officers. These associations may waive the prescribed manner of effecting a change of beneficiary, and after such waiver persons interposing conflicting claims to the benefit fund may not complain because of a noncompliance with the rules and regulations of the order in making the change. While it may be true that the brotherhood in this case is not making any claim on behalf of either of the parties, it comes into court and admits that it owes this money to the rightful beneficiary, and asks the court to determine who is the rightful beneficiary under this certificate. It cannot waive any right of the beneficiary, after the death of the insured, to the prejudice of such beneficiary, as such right becomes vested upon the death of the insured. If the certificate members in these orders could change these certificates at will, and particularly with regard to beneficiaries, without any restrictions or concurrent action on the part of the lodge officers, it would result in the order being frequently, as it is in this case, subjected to the conflicting demands of various persons, each claiming to be the lawful beneficiary.

The courts construe liberally the provisions of this class of contracts relating to a change of the beneficiary, and give effect to the intent of the insured to change such beneficiary whenever it can be done without disregarding the plain terms of the agreement. But it is quite generally held that in order to change a beneficiary in a mutual benefit certificate, there must be a substantial compliance with the constitution, rules and regulations of the order. *Ind. Order Foresters v. Kellher*, 36 Or. 501, 59 Pac. 324, 1109, 60 Pac. 563, 78 Am. St. Rep. 785; *Pilcher v. Puckett*, 77 Kan. 284, 94 Pac. 132, 17 L. R. A. (N. S.) 1063; *Knights of Maccabees v. Sackett*, 34 Mont. 357, 86 Pac. 423, 115 Am. St. Rep. 532; *Finnell v. Franklin*, 55 Colo. 156, 134 Pac. 122; *Supreme Lodge, etc., v. Price et al.*, 27 Cal. App. 607, 150 Pac. 803; *Sovereign Camp v. Israel*, 117 Ark. 121, 173 S. W. 855; *Wilkes v. Hicks*, 124 Ark. 192, 186 S. W. 830; and *M. W. A. v. Headle*, 88 Vt. 87, 90 Atl. 893, L. R. A. 1915A, 580 and note.

In *Shuman v. Ancient Order, etc.*, 110 Iowa, 642, 82 N. W. 331, very similar in its facts to case at bar, the insured had been in possession of the certificate for many

years, and on the day before his death indorsed on the back of the certificate a revocation of payment to his wife, the beneficiary named therein, and directed payment to be made to his nephew. The certificate with the indorsement thereon was mailed to the grand lodge the same day that the insured died, but no new certificate was issued. Its constitution, which was held to be a part of the contract, gave the insured a right to change the beneficiary, but explicitly pointed out the manner in which the change should be made, and it was held that this was the method he had agreed to, and that he had no absolute legal right to effect a change of beneficiary in any other manner.

In *Stemler v. Stemler*, 31 S. D. 595, 141 N. W. 780, it is held that where a fraternal beneficiary certificate provides that no change of beneficiary shall be effective until the old certificate is delivered to the head clerk and a new certificate is issued, during the lifetime of the member, and that until this is done the old certificate remains in force, such condition must be substantially complied with before there is a change of beneficiary, and where a member executed the surrender clause, designating the desired change of beneficiary, but did not deliver the old certificate to the head clerk, who issued a new certificate immediately after the member's death, there was no change of beneficiary, and the rights of a beneficiary in the original certificate and the rights of a beneficiary in a new certificate depend, as between themselves, on the contract between the member and the association at the time of the member's death. At the time of the insured's death the right of the beneficiary in the original certificate becomes vested, and the association cannot by any waiver affect this vested right.

So in *Freund v. Freund*, 218 Ill. 189, 75 N. E. 925, 109 Am. St. Rep. 283, it is held that where a policy of life insurance provides that a change of beneficiary shall be made by an indorsement in writing, and shall not take effect until indorsed on the policy by the home office, no act of the insured can effect such a change in the absence of such indorsement; and this is true although the person whose life is insured adopts and signs printed forms prepared by the association, making known his intention to change the name of the beneficiary, and receives a receipt from the local officer of the association, stating that the papers have been received for transmission to the home office, still if the association does not in the lifetime of the insured indorse the requested consent, as required by the terms of the policy, no change of beneficiary is accomplished.

In case at bar, the court instructed the jury that under the undisputed facts the insured, Thomas B. Allison, had done all that was required of him under the rules and

regulations of the brotherhood to change the beneficiary, and in that we think there was reversible error. This instruction in effect directs the jury to find for the respondent unless they find that at the time the insured made the affidavit he was of unsound mind, or had been subjected to undue influence on the part of the respondent or his wife. As we have already observed, none of the provisions relating to a change of beneficiary, as required by said section 62, had been complied with, and while the witness George W. Hunt, secretary of the local lodge of the brotherhood at Pocatello, testified that he had known of beneficiaries being changed by affidavits similar to that made by the deceased in this case, it is not shown that this practice was so common as to amount to immemorial custom, and it cannot be held to modify the provisions of sections 60 and 62 above referred to.

Counsel for respondent places great reliance upon the recent case of *Supreme Council v. Behrend*, 247 U. S. 394, 38 Sup. Ct. 522, 62 L. Ed. 1182, 1 A. L. R. 968, wherein it is held that in the absence of law or rule of the association to the contrary, the naming of a person as beneficiary in a benefit certificate issued by a fraternal association does not confer a vested right, but an expectancy merely, which may be defeated at any time by act of the insured member; and further that in order to change a beneficiary, it is not always essential to validate such change that the original certificate be surrendered, providing the association issues a new certificate in lieu of the old during the lifetime of the assured, and with this holding we are in accord. Counsel also relies on the case of *Supreme Conclave, etc., v. Cappella* (C. C.) 41 Fed. 1, wherein it is said:

"In making such change of beneficiary, however, the insured is bound to do it in the manner pointed out by the policy and by-laws of the association, and any material deviation from this course will invalidate the transfer. Thus, if the certificate provides that no assignment shall be valid unless approved by the secretary, an assignment without such approval will be invalid."

The court further says that the general rule that the insured is bound to make such change of beneficiary in the manner pointed out by the policy and by-laws of the association is subject to three exceptions: (1) If the society waives a strict compliance with its own rules, and in pursuance of a request of the insured has issued a new certificate, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pursued; (2) if it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made; (3) if the assured has pursued

the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but before the new certificate is issued he dies, a court of equity will treat such certificate as having been issued. We do not think the facts of this case bring it within any of these exceptions.

[4] Where, as in this case, the insured had under consideration a change of beneficiary for some weeks prior to his death, and had been instructed by the secretary of the local lodge how to make such change, and the contract contains such specific requirements as are found in the rules and regulations of this association, we do not think the execution and mailing of the affidavit herein referred to, which did not reach the general secretary and treasurer until after the death of the insured, is sufficient to change the beneficiary under the admitted facts of this case.

For the reasons herein expressed, the judgment of the court below is reversed and the case remanded for a new trial, in accordance with the views herein set forth. Appellant is awarded costs.

RICE, C. J., and BUDGE, MCCARTHY, and DUNN, JJ., concur.

TAGE v. SHENON. (No. 3385.)

(Supreme Court of Idaho. Oct. 19, 1921.)

Appeal from District Court, Lemhi County; Carl A. Davis, Judge.

Action by A. F. Tage against Minnie M. Shenon for agent's compensation. Judgment for plaintiff, and defendant appeals from a portion of the judgment. Reversed.

E. W. Whitcomb, of Blackfoot, and A. C. Cherry, of Weiser, for appellant.

J. M. Stevens, of Pocatello, for respondent.

RICE, C. J. This appeal is from only so much of the judgment as requires appellant to pay to respondent the sum of \$500 as reasonable compensation for services rendered as agent.

Appellant specifies as error that there was no evidence to support the finding of the court upon which that portion of the judgment was based. This assignment is well taken. The transcript contains no evidence on this matter. It is unnecessary to consider the other assignments of error.

The portion of the judgment appealed from is reversed, with costs to appellant.

BUDGE, MCCARTHY, DUNN, and LEE, JJ., concur.

CHITTENDEN & EASTMAN CO. v. LEADER FURNITURE CO. (No. 1974.)

(Supreme Court of Arizona. Nov. 16, 1921.)

1. Account stated \S 1—Prior accounts merged in "stated account."

The term "stated account" signifies an agreed balance between the parties to a settlement; it becomes a new agreement and takes the place of the obligations resting upon either party by reason of their prior account.

[Ed. Note.—For other definitions, see Words and Phrases, Stated Accounts.]

2. Account stated \S 18(1)—Manner of pleading account stated.

In pleading an account stated, it is sufficient to allege that the account was stated, that the statement showed a given balance due plaintiff by defendant, and that no part of it has been paid, and it is improper to allege facts relating to the prior transactions of the parties, or to the manner in which the new agreement came about.

3. Account stated \S 18(1)—Agreement to pay need not be alleged in suing on account stated.

A complaint on an account stated need not allege that defendant agreed to pay the amount shown by the account; the law implying a promise to pay.

Appeal from Superior Court, Cochise County; Albert M. Sames, Judge.

Action by the Chittenden & Eastman Company against the Leader Furniture Company. Judgment for defendant on demurrer, and plaintiff appeals. Reversed and remanded, with directions.

David Benshimol, of Douglas, for appellant.

Manatt & Stephenson, of Douglas, for appellee.

McALISTER, J. The Chittenden & Eastman Company, a corporation organized and existing under the laws of the state of Missouri, filed suit in the superior court of Cochise county against the Leader Furniture Company, a corporation organized under the laws of the state of Arizona, alleging its cause of action in the language following:

"(2) That on or about March 7, 1921 an account was stated by and between plaintiff and defendant by which there was ascertained to be due and owing plaintiff from defendant, a balance of \$2,000.

"(3) That no part thereof has been paid, and the said sum of \$2,000 is now due and owing."

To this the defendant interposed a general demurrer, which was sustained by the court, but the plaintiff elected to stand upon its complaint, whereupon judgment was entered dismissing the action at its cost. From the

order sustaining the demurrer and the judgment, plaintiff appeals, no other error being assigned.

[1] In support of the ruling sustaining the demurrer appellee contends that the allegation that "an account was stated by and between plaintiff and defendant" is merely a conclusion of law and raises no issue, because "the facts from which the law makes an account stated between the parties are not always uniform," and by way of example it suggests that such an account may arise in two ways: By implication from certain facts or as a result of an express agreement between the parties. The term "stated account" signifies an agreed balance between the parties to a settlement; that is, that they have agreed after an investigation of their accounts that a certain balance is due from one to the other. But whether this agreement was express or implied is immaterial so long as it is actual; the agreement itself, and not the manner of reaching it, being the important consideration. "An account stated becomes a new agreement and takes the place of the obligations resting upon either party by reason of their prior account," and an action thereon is based on this new agreement into which the prior accounts have been merged. *Harrison v. Henderson*, 67 Kan. 202, 72 Pac. 878; *Holmes v. Page*, 19 Or. 232, 23 Pac. 961; *Carey v. Philadelphia & California Petroleum Co.*, 83 Cal. 694. It "is not founded upon the original items, but upon the balance ascertained by the mutual consent of parties." *Carey v. Philadelphia & California Petroleum Co.*, supra; *Benites v. Hampton et al.*, 3 Utah, 369, 3 Pac. 206. The party in whose favor the balance in a stated account appears is virtually in the position of the holder of a promissory note, while the other party is obligated practically as the maker thereof. *Loventhal et al. v. Morris*, 103 Ala. 332, 15 South. 672; *Volkening v. DeGraff et al.*, 81 N. Y. 268; *McCarthy v. Mt. Tecarte Land & Water Co.*, 111 Cal. 328, 43 Pac. 956.

[2] Hence the allegation of facts relating to the prior transactions of the parties or referring to the manner in which the new agreement came about has no place in the complaint any more than the facts leading to the giving of a promissory note would be proper in a suit thereon. It would of course be otherwise if the action were based on the account while still open and unsettled, but the stating of it renders all transactions relating to the items of the original account a closed book, except where fraud or mistake in the settlement is alleged. It is not apparent, therefore, wherein any facts other than that the account was stated, that such statement showed a balance of \$2,000 due the plaintiff by the defendant, and that no part of it had been paid, are competent, relevant, or material, and, while appellee urges that the facts constituting the cause of action

should be alleged, that appellee might know what it must meet in order to make its defense properly, yet it does not point out, or even suggest, what facts, other than those alleged, could possibly have any bearing on the question of whether a balance in their accounts was actually ascertained and agreed to by and between the parties. As said by the Supreme Court of New York in *Moses v. Lindblom et al.*, 39 App. Div. 586, 57 N. Y. Supp. 703:

"The pleading is sufficient if it sets forth the fact that the account was stated between the parties, that a certain sum was found due from one to the other, and that such sum is not yet paid."

See, also, the following: *Patillo et al. v. Allen-West Com. Co.*, 108 Fed. 723, 47 C. C. A. 637; *Heinrich et al. v. Englund*, 84 Minn. 395, 26 N. W. 122; *Watkins v. Ford*, 69 Mich. 357, 37 N. W. 300.

[3] Our attention is called to one fact, however, which it is contended renders the complaint vulnerable, and that is that it does not allege that appellee agreed to pay the amount shown by the stated account. This is true, but, where it is shown that the parties have adjusted and settled their accounts by striking a balance, the amount thereof is admitted and acknowledged as due, and the law implies a promise to pay it. *Voight v. Brooks et al.*, 19 Mont. 374, 48 Pac. 549; *Watkins v. Ford*, 69 Mich. 357, 37 N. W. 300; *Chace v. Trafford*, 116 Mass. 529, 17 Am. Rep. 171.

"It is not necessary that there should be an express promise to pay, as appellants contend. On the contrary, there is an implied promise in law on the part of him against whom the balance is found to pay, and action is maintainable thereon. *Jacques v. Hulit*, 16 N. J. Law. 38; *Vanbebbler v. Plunkett (Or.)* 38 Pac. 707. In *Heinrich v. Englund*, 84 Minn. 395, 26 N. W. 122, it was said of a complaint similar to that under consideration: 'The allegations of the complaint that an account was stated between plaintiffs and defendant, and that upon such statement a certain balance was found due from the latter to the former, fairly mean that the parties had an accounting, and that the balance named was agreed on and admitted as the true balance between them. To allege a promise to pay this balance was unnecessary, and would really have added nothing to the complaint. It was sufficient to state the facts showing the duty to pay, without alleging the promise by law from these facts.' The following authorities are directly in point to the effect that under code procedure it is not necessary to allege a promise to pay, it being sufficient to allege the facts from which the duty to pay arises: *Pom. Code Rem.* § 538 et seq.; *Baylies' Code Pl.*, § 27; *Phil. Code Pl.* § 474; *Mackey v. Auer*, 8 Hun, 180; *James v. Fel-lowes*, 20 La. Ann. 116; *Claire v. Claire*, 10 Neb. 54, 4 N. W. 411; *Bouslog v. Garrett*, 39 Ind. 338. The general demurrer was properly overruled." *Voight v. Brooks*, supra.

Appellee relies on a statement in *Herr v. Kennedy*, 22 Ariz. —, 195 Pac. 530, as authority for its contention that only a conclusion of law is alleged, but in that case the allegation was that the "plaintiff on the 10th day of December, 1918, and prior thereto, was indebted to the defendant in the sum of \$595.58 upon an account stated." This is an allegation of indebtedness without a sufficient statement as to how it arose, but to allege that an account was actually stated on or about a certain date, that a balance of so much was thereby ascertained to be due from one to the other, and that no part thereof has been paid, is merely a succinct statement of the ultimate facts the plaintiff must prove. And, as appears from the remarks of the Supreme Court of Minnesota in *Heinrich et al. v. Englund*, supra:

"The allegations of the complaint that an account was stated between plaintiffs and defendant, and that upon such statement a certain balance was found due from the latter to the former, fairly mean that the parties had an accounting, and that the balance named was agreed on and admitted as the true balance between them."

Hence the issues were "whether an account showing a balance had been rendered to the defendant and assented to by him" (*Loventhal v. Morris*, supra) and whether it had been paid.

The judgment is reversed, and the case remanded, with instructions to overrule the demurrer.

ROSS, C. J., and FLANIGAN, J., concur.

RICHARDSON v. STATE. (No. 515.)

(Supreme Court of Arizona. Nov. 16, 1921.)

1. Indictment and Information \S 137(6)—Motion to quash for misnomer without merit.

Motion to quash information on the ground that accused's true name was S. G. R., and not S. H. R., as set out in the information, was without merit; it appearing that, as soon as accused's true name was learned, subsequent proceedings were had in that name, as provided in Pen. Code 1913, \S 987.

2. Indictment and Information \S 137(5)—Information not set aside because of accused's arrest without warrant.

A person informed against for crime may not have the information set aside because he was arrested without a warrant or imprisoned without commitment; this not being one of the statutory grounds for vacating and setting aside an information provided in Pen. Code 1913, \S 972.

3. Criminal law \S 223—Preliminary trial not necessary in misdemeanor cases.

A preliminary trial is not necessary in misdemeanor cases.

4. Indictment and Information \S 41(3), 52(1)—Information need not be verified in misdemeanor cases nor be based on verified complaint.

There is no law requiring, in misdemeanor cases, the verification of the information, or that the same shall be based upon a verified complaint.

5. Criminal law \S 628(2)—Indorsement of names of witnesses not required.

It is not made necessary by the Penal Code to indorse the names of the witnesses upon the information.

6. Intoxicating liquors \S 222—Information for manufacturing need not negative manufacture of denatured alcohol.

An information for manufacturing intoxicating liquor need not allege that the intoxicating liquor manufactured was not denatured alcohol, for the exception in Const. art. 23, \S 1, of denatured alcohol is separable; it being a poison rather than an intoxicant.

7. Intoxicating liquors \S 236(19)—Evidence held to sustain conviction of manufacturing intoxicants.

In prosecution for manufacturing intoxicating liquor, evidence held to support conviction.

8. Criminal law \S 369(6)—Evidence of previous sale of liquor admissible in prosecution for manufacture.

In prosecution for manufacturing intoxicating liquor evidence that accused had, shortly previous to his arrest, offered to sell intoxicating liquor was admissible as having a tendency to prove the charge.

9. Criminal law \S 715, 1171(1)—Holding to jury a bottle of liquor alleged to have been manufactured by accused held improper, but harmless.

While, in a case where there is dispute as to whether the liquid accused is charged with manufacturing is intoxicating or not, it is error for the prosecuting attorney to give to the jury the container of the liquid alleged to have been manufactured, for the jury's inspection or any other purpose, such procedure making the jury witnesses to, as well as triers of, the very question involved, yet, where the record does not show any dispute as to the intoxicating character of the liquor alleged to have been manufactured, any error in giving to the jury such container is harmless.

10. Criminal law \S 713, 1154—Prosecuting attorney's addressing individual jurors by name held improper, but not reversible.

For the prosecuting attorney in the course of his address to speak to the individual jurors by name rather oversteps the limits of legal and fair conduct; but the duty of the trial court to see that the bounds of propriety are not transgressed in such matters will be interfered with by an appellate court only when gross abuse of such discretion appears.

11. Criminal law \S 1129(3)—Assignment of error held indefinite.

An assignment that "the instructions of the court were confusing and misleading" is too

indefinite, and does not conform to rules of Supreme Court, No. 12, subd. 4.

Appeal from Superior Court, Yuma County; Fred L. Ingraham, Judge.

S. G. Richardson was convicted of manufacturing intoxicating liquor, and appeals. Affirmed.

Glenn Copple and K. F. Miller Hinds, both of Yuma, for appellant.

W. J. Galbraith, Atty. Gen., for the State.

ROSS, C. J. The defendant appeals from a judgment of conviction of the charge of manufacturing intoxicating liquor. In the information it was alleged that the defendant (omitting unnecessary allegations) "did then and there willfully and unlawfully manufacture one (1) quart of intoxicating liquor, the kind of which is to the county attorney unknown," etc.

The defendant attacked the information by motion to quash it on the grounds:

(1) That his true name was S. G. Richardson, and not S. H. Richardson, as set out in the information.

(2) That he had been arrested and imprisoned several weeks without a warrant having been issued or any order of commitment.

(3) That he had not been given a preliminary hearing.

(4) That the information was not based upon a verified complaint.

(5) That the names of witnesses were not indorsed on the information.

This motion was denied. Defendant thereupon demurred to the information upon the grounds:

(1) That the acts constituting the offense in ordinary and concise language were not stated.

(2) That the information did not state any acts which would constitute a public offense.

The demurrer was overruled.

The rulings of the court upon the motion to vacate and set aside the information and on the demurrer are assigned as errors.

[1] The motion to quash is without merit. It seems that as soon as defendant's true name was learned "the subsequent proceedings" were had in that name, as provided in section 937 of the Penal Code.

[2] The second ground of motion is not one of the statutory grounds, as provided in section 972, Penal Code, to vacate and set aside an information. If defendant was illegally restrained of his liberty as he asserts, he doubtless would have been discharged in a proper proceeding, had he instituted such, but we do not understand the law to be that a person informed against for crime may have the information set aside because he was arrested without a warrant or imprisoned without commitment.

[3] That a preliminary trial is not necessary in misdemeanor cases is well settled

by the decisions of this court. *Cummings v. State*, 20 Ariz. 176, 178 Pac. 776.

[4] We have no law requiring the verification of the information, or that the same shall be based upon a verified complaint in misdemeanor cases.

[5] It is not made necessary by the Penal Code to endorse the names of the witnesses upon the information whatever may be required by the laws of other states.

[6] The point raised by the demurrer is that the information does not negative that the intoxicating liquor alleged to have been manufactured was not denatured alcohol; the contention being that it should so allege.

The Constitution makes it a misdemeanor for a person to manufacture any ardent spirits, ale, beer, wine or intoxicating liquor of any kind, except denatured alcohol. Section 1, art. 23, Amendment to Const. Laws 1915, Appendix, page 1.

"It is necessary to negative an exception or proviso contained in a statute defining an offense where it forms a portion of the description of the offense, so that the ingredients thereof cannot be accurately and definitely stated if the exception is omitted. Where, however, the exception or proviso is separable from the description and is not an ingredient thereof, it need not be noticed in the accusation, being a matter of defense." 22 Cyc. 344, 14 R. C. L. 188. Sec. 34.

The thing forbidden by the Constitution is the manufacture of all kinds of beverages; those specially named, as well as all others that intoxicate. The exception, denatured alcohol, is not a beverage, but a poison. It is from its very nature disassociated from the list and kind of drinks proscribed. It is different in name, quality, and uses. We conclude the exception is clearly separable from the clause of the Constitution defining the offense of manufacturing intoxicating liquor, and is not descriptive of nor an ingredient of such offense, and therefore it was not necessary to negative such exception in the information. *State v. Crawford*, 21 Ariz. 501, 190 Pac. 422.

[7] The refusal of the court to grant defendant's motion for directed verdict is assigned as error. Defendant asserts that there was no evidence, either direct or circumstantial, that he ever manufactured any intoxicating liquor, or that the liquor found in his possession was manufactured in Yuma county. On this point the evidence shows that—

In or near the center of a 160-acre tract of land, owned by one Tyrus N. Havener, was "a large pile of wood, posts, and other material which had been piled up higher than a man's head, and in a circular form, inclosing an area large enough for occupation; and that inside this inclosure defendant was living; and that at the time of his arrest besides his bed and personal effects there was found at this place a still for distilling liquor, and barrels and bot-

tles of intoxicating liquors which apparently had been manufactured at that place."

At the time of defendant's arrest the officer said to him, "Shorty we got you with the goods," to which he answered, "I guess you have." It was also shown that defendant, shortly previous to his arrest, had attempted to sell intoxicating liquor. The liquor found at this place and in possession of defendant was unquestionably shown to be intoxicating. This evidence seems to us ample to take the question of the innocence or guilt of the defendant to the jury.

[8] The court did not err in permitting evidence that defendant had, shortly previous to his arrest, offered to sell intoxicating liquor. We think this evidence had a tendency to prove the charge in the information and under the rule announced in *Cluff v. State*, 16 Ariz. 179, 142 Pac. 644, and *Lee v. State*, 16 Ariz. 291, 145 Pac. 244, Ann. Cas. 1917B, 131, was properly admitted.

[9] The next error is based upon the alleged misconduct of the deputy county attorney, first in passing to the jury, during his closing argument, a bottle and saying:

"Now, gentlemen, as twelve common, everyday men, what do you suppose that is? Is it lemonade or water? If you think it is, just * * * pass it around among yourselves and try to think what you think it is"

—and, second, in addressing some of the jurors by name. If there had been any controversy or dispute as to whether the liquid defendant was charged with manufacturing was intoxicating or not, we think it would have been error to give to the jury, during the closing argument, or at all, the container for inspection, or any other purpose. It would have been making of the jury witnesses to, as well as triers of, the very question involved. This should not be done. *State v. Lindgrove*, 1 Kan. App. 51, 41 Pac. 688; *State v. Coggins*, 10 Kan. App. 455, 62 Pac. 247. The record does not show what the jury did with the liquor handed to them. If they did more than smell it, we assume the defendant would have seen that the record so showed. There being no dispute as to its intoxicating character, the error in giving to the jury the container, in which the liquid was, was harmless.

[10] It may be doubted whether the prosecuting attorney can with entire propriety assume such a close familiarity with individual jurors in the course of his address as to speak to them by name. We are inclined to think that it is rather overstepping the limits of legal and fair conduct. Defendant cites one case in which the court calls it "indiscretion." *Jordon v. People*, 19 Colo. 417, 36 Pac. 218. In that case it was said:

"The nature and scope of argument that will be permitted in a cause is largely within the

discretion of the presiding judge. It is the duty of the court to see that the bounds of propriety are not transgressed, but an appellate court will only interfere when a gross abuse of discretion is made to appear." *Manzoli v. People* (Colo.) 169 Pac. 144.

[11] Lastly it is assigned that "the instructions of the court were confusing and misleading." This assignment is so indefinite as not to advise us of anything. It is not in conformity with the rules of the court. Rule XII, subd. 4, Rules of Supreme Court. However, we have examined the instructions, and find in them a fair statement of the law as applied to the facts of the case.

There being no reversible error, the judgment of the lower court is affirmed.

MCALISTER and FLANIGAN, JJ., concur.

HADDAD et al. v. STATE. (No. 513.)

(Supreme Court of Arizona. Nov. 16, 1921.)

1. Carriers \S 21(4)—Information for unlawful competition with stage route held good.

Information against owner and driver of rent service automobile, charging violation of Corporation Commission's general order by carrying passengers over a stage route at less than 140 per cent. of the scheduled stage fare, held not indefinite or uncertain as to the crime attempted to be charged, nor to contravene Pen. Code 1913, $\S\S$ 934, 936, 943.

2. Criminal law \S 162—Statute held not to punish twice for same offense.

Although Const. art. 15, $\S\S$ 16, 19, provide for punishment by penalty or fine for disobeying an order of the Corporation Commission, Laws 1919, c. 130, \S 8, authorizing punishment for such disobedience under a criminal prosecution, does not violate the guaranty of Const. art. 2, \S 10, that no one shall be punished twice for the same offense.

3. Public service commissions \S 19(1)—Order of Corporation Commission not void because including individuals as well as corporations.

Though Const. art. 15, was enacted to regulate "public service corporations" within the state, and not individuals eo nomine, an order, under Laws 1919, c. 130, of the Corporation Commission, affecting both corporations and individuals, held not void as including classes of persons not mentioned in such article.

4. Constitutional law \S 62—Delegation of powers to Corporation Commission held constitutional.

Even without the authorization given by Const. art. 15, \S 6, it would have been competent for the Legislature to delegate power over automobile transportation to a special agency like the Corporation Commission; hence Laws 1919, c. 130, enlarging, in this respect, the powers and extending the duties of the Corporation Commission, is warranted.

5. Carriers ⇐2—Constitutional law ⇐297—Automobile transportation law held constitutional.

Laws 1919, c. 130, regulating automobile transportation, *held* to pertain to matters well within legislative cognizance, to aim at objects proper to be attained by the exercise of the police power, and not to constitute an unreasonable or palpable invasion of rights secured by Const. U. S. Amend. 14, or Const. art. 2, § 4, providing that "No person shall be deprived of life, liberty or property without due process of law."

6. Monopolies ⇐10—Statutes ⇐79(1)—Automobile transportation act held not special or partial legislation.

Laws 1919, c. 130, regulating automobile transportation, *held* not special or partial legislation under Const. art. 2, § 13, art. 4, pt. 2, § 19; for the fact that, in granting the certificate of convenience and necessity for a stage route provided for in the act, the Corporation Commission may be obliged to select between two or more applicants, does not invalidate the law as monopolistic, class, discriminatory, or partial legislation.

7. Carriers ⇐13(2)—Order of Corporation Commission held not discriminatory.

General Order 70A of the Corporation Commission, under Laws 1919, c. 130, the automobile transportation regulation law, providing that the fare for rent service on stage lines shall not be less than 140 per cent, of the regular scheduled fare, does not conflict with Const. art. 15, § 12, as requiring a discrimination for the same service.

8. Carriers ⇐21(2)—Evidence that owner of automobiles told drivers to collect regularly prescribed fare admissible.

In prosecution of driver and owner of automobile, under Laws 1919, c. 130, for failure to collect the scheduled fare, where there was no evidence that the owner knew anything about the particular transaction or ever authorized the driver's act, other than might be presumed from his employment of the driver, exclusion of testimony of the owner that he told his drivers to charge the regularly prescribed fare for services rendered by his cars was error; the avowal not being insufficient in failing to exclude guilty knowledge by the owner of his servant's acts.

9. Carriers ⇐21(2)—That driver of automobile accepted unlawful fare not sufficient to show owner's acquiescence.

In prosecution of driver and owner of automobile, under Laws 1919, c. 130, for failure to collect the scheduled fare, where there was no evidence that the owner knew anything about the particular transaction or ever authorized the driver's act, other than might be presumed from his employment of the driver, *held*, that the mere fact that the driver accepted the unlawful fare, during the course of his employment, and within the scope thereof, was not in itself sufficient to show direction, knowledge, or acquiescence by the owner.

Appeal from Superior Court, Greenlee County; Frank B. Laine, Judge.

John M. Haddad and Jose Bienes were convicted of violating an order of the Arizona Corporation Commission, and they appeal. Affirmed as to defendant Bienes and reversed as to defendant Haddad, with instructions.

L. Kearney, of Clifton, for appellants.

W. J. Galbraith, Atty. Gen., O. E. Schupp, Sp. Asst. Atty. Gen., and George R. Hill, Asst. Atty. Gen., for the State.

FLANIGAN, J. This is an appeal from a judgment convicting appellants (jointly informed against) of violating an order of the Arizona Corporation Commission made pursuant to chapter 130, Acts of the Fourth Legislature, Session Laws 1919. This act is entitled:

"An act providing for the supervision, regulation and conduct of the transportation of persons, freight and property for compensation over the public highways of the state of Arizona by automobiles, jitney busses, auto trucks, stages and auto stages."

And it provides a somewhat comprehensive scheme to regulate intrastate transportation of freight and passengers, by the vehicles mentioned, as common carriers for hire, under the regulatory and supervisory powers in such act conferred upon the Commission. The broad extent of the powers thus granted is well exemplified by section 5 thereof:

"The Corporation Commission of the state of Arizona is hereby authorized and empowered to supervise and regulate every transportation company, person, firm or association, in this state engaged in transportation mentioned in this act; to fix the rates, fares, charges, classifications, rules and regulations of each such transportation company, firm or association operating under the terms of this act; to regulate the service and safety of operation, to require the filing of annual and other reports and other data; to supervise and regulate all corporations, persons, firms or associations in all matters affecting the relationship between such corporation, persons, firms, or associations and the traveling and shipping public. The Corporation Commission, in the exercise of jurisdiction conferred upon it by the Constitution of this state and by this act, shall have power and authority to make orders and prescribe rules and regulations affecting all transportation mentioned in this act, notwithstanding the provisions of any ordinance or permit of any incorporated city or town, and in case of conflict between any such order, rule or regulations, and any such ordinance or permit, the order, rule or regulation of the Corporation Commission shall in each instance prevail."

Section 3 enacts that none of the vehicles mentioned shall be operated as common carriers for hire between fixed termini unless the operator shall have first made applica-

tion for and procured from the Commission what in the act is designated a "certificate of convenience and necessity." Of the hearing upon this application three days' notice is required to be given. The application is required to set forth (amongst other matters) the proposed time schedule, and a schedule of tariffs showing the passenger fares, or freight rates, to be charged between the several points, or localities, to be served.

Paragraph 5 of section 3 makes these provisions for the hearing on the application:

"(d) At the time specified for said hearing or at such later time as the same may be fixed by the Corporation Commission, a hearing upon said application shall be held by the Corporation Commission. After such hearing the Corporation Commission may issue a certificate of convenience and necessity as prayed for or refuse to issue the same, or may issue the same with modifications, and upon such terms and conditions as in its judgment the public convenience and necessity may require. No certificate of convenience and necessity shall issue until the Corporation Commission shall find that the public convenience and necessity requires the issuance of the same.

"(e) Each certificate of convenience and necessity issued under the provisions of this act shall contain the following matters:

- "1. The name of the grantee.
 - "2. The public highway, streets or highways over which, and the fixed termini between which, the grantee is permitted to operate.
 - "3. The kind of transportation, whether passenger or freight, in which the grantee is permitted to engage, together with a statement of the number and of the maximum seating or tonnage capacity of the vehicle which the grantee is permitted to operate.
 - "4. The term for which the permit is granted, which term shall not exceed ten years.
 - "5. Such additional provisions and limitations as the Corporation Commission shall deem necessary or proper to be inserted in the permit.
- "No certificate of convenience and necessity issued under the provisions of this act may be assigned or transferred without an order of the Corporation Commission authorizing such transfer."

Section 4 directly prohibits any transportation of freight or persons, for hire, by any of the vehicles mentioned, or by any "rent for hire car * * * over any road, street or public highway or between fixed termini, over which or between which" there is already a line in operation under a certificate of convenience and necessity, "until such * * * person * * * shall have secured permission from the Corporation Commission to so operate, and then only in strict accordance with such rules as the Commission may prescribe for such operation."

Section 8 is as follows:

"Every officer, agent or employee of any corporation, and every other person who violates or fails to comply with or who procures, aids or abets in the violation of any provision of this act, or who fails to obey, observe or comply with any order, decision, rule or regulation or

requirement or any part or provision thereof of the Corporation Commission, or who procures, aids or abets any corporation or person in his failure to obey any order, decision, rule or regulation or any part of [or] provision thereof, is guilty of a misdemeanor and is punishable by a fine, not exceeding one thousand (\$1,000.-00) dollars, or imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment."

The information under which the appellants were convicted alleged that on or about December 21, 1920, they were operating an automobile as a "rent for hire" car, for the transportation of persons for compensation over the public highways of Greenlee county, Ariz., and that there was then and there between Clifton and Morenci, in said county, an automobile stage operated by Mountain Auto Company, under a certificate of convenience and necessity duly and regularly issued by the Commission, according to fixed tariffs and schedule of service, as prescribed by said Commission; that on the aforesaid day there was in full force and effect a certain order of the Commission known as General Order No. 70A, made on March 12, 1920, pursuant to the provisions of said chapter 180, which said order provided as follows:

"That the rate, or fare for rent service when performed between points from and to which a scheduled service is in effect shall not be less than 140 per centum of the rate of fare prescribed for such scheduled service; provided, further, that where three or more scheduled daily trips are made by stage lines, operators of 'for hire' cars may render service at stage line rates after the time the last stage is scheduled to leave."

It is then charged that on said day the defendants, before the last stage of said Mountain Auto Company was scheduled to leave Clifton, did carry certain persons as passengers in their said for hire car from Clifton to Morenci; that said Mountain Auto Company was then and there running on said day for the transportation of persons, in accordance with their schedule; that the said defendants, contrary to the order of the Commission, did, for the transportation of the said passengers, take and accept from them as fare and compensation each the sum of \$1, which fare was less than 140 per centum of the rate of fare prescribed for such scheduled service by the Commission.

The information was demurred to on various grounds, mostly constitutional, and much the same objections were made to the introduction in evidence of General Order No. 70A. The rulings of the court sustaining the information and permitting the evidence are the basis of most of the errors assigned.

[1] The information is attacked as being indefinite and uncertain as to the crime attempted to be charged. We do not think it is required, in order to state the offense charged, or the particular circumstances of

it necessary to constitute a complete offense (sections 936, 943, Penal Code), to include the particular circumstances of "the rates of fare, the schedules, time of departure and arrival of stages, fixed tariffs and schedules of service, or the termini of the route" of Mountain Auto Company, further than is stated in the information. Nor do we think that the information is subject to the objection that it does not state "the acts constituting the offense in ordinary and concise language and in such a manner as to enable a person of common understanding to know what is intended," in contravention of section 934, Penal Code.

From the testimony given at the trial it appears that the appellant Haddad was himself the holder of a permit from the Commission to operate "two service cars" in Clifton, Morenci, Metcalf, and vicinity, at schedule rates of \$4 per hour, and "140 per cent. of stage line rates" when "operated over routes of regular stage lines." We do not deem that fact material to the inquiry, for the reason that appellants were not charged with violating the terms of such permit.

What we have to decide on this phase of the case is, in short, the jurisdiction of the Commission, by General Order No. 70A, to compel all rent service car owners operating for hire between the termini of the stage line to exact fares for passenger transportation of the prescribed rate of 140 per cent. of the stage line fare; such regular stage line fare being \$1. The order complained of is general and applies to all operators of "rent for hire" cars not running on fixed schedule, whether under permit or not. As a necessary consequence, the appellants are entitled to raise any question which goes to the validity of the exercise of the powers of the Commission, or the existence of the power itself, to grant certificates of convenience and necessity.

[2] Appellants contend that, the right being reserved by the Constitution to the Commission to punish for the infraction of an order of the Commission, chapter 130, in so far as it authorizes punishment under a criminal prosecution, violates the constitutional guaranty that no one shall be punished twice for the same offense.

Sections 16 and 19 of article 15, Constitution, are as follows:

"Section 16. If any public service corporation shall violate any of the rules, regulations, orders, or decisions of the Corporation Commission, such corporation shall forfeit and pay to the state not less than one hundred dollars nor more than five thousand dollars for each such violation, to be recovered before any court of competent jurisdiction."

"Section 19. The Corporation Commission shall have the power and authority to enforce its rules, regulations and orders by the imposition of such fines as it may deem just, within the limitations prescribed in section 16 of this article."

Before considering the objections thus made, we may observe that we do not think the sections of the Constitution quoted amount to an implied prohibition of the legislative action in section 8, c. 130. The punitive provisions of section 8 have no tendency to defeat or frustrate the constitutional intent, but are rather in aid of its accomplishment. Being of that character they must be upheld. *Stevens v. Benson*, 50 Or. 269, 91 Pac. 577; *State v. Hooker*, 22 Okl. 712, 98 Pac. 964; *Reeves v. Anderson*, 13 Wash. 17, 42 Pac. 625-627.

No right vested or recognized by the Constitution is conditioned in its exercise by section 8, nor does that section extend the constitutional penalty to a class of cases not constitutionally mentioned. *Cooley's Constitutional Limitations* (7th Ed.) p. 99.

"In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in and may be exercised by the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose and to the limitations which are contained in the Constitution of the United States. The legislative department is not made a special agency for the exercise of specifically defined legislative powers, but is intrusted with the general authority to make laws at discretion." *Id.* p. 126.

The quoted sections of the Constitution merely provide for the recovery of a penalty in a civil proceeding for a civil wrong, while chapter 130 enacts that a disobedience of any order made pursuant to the terms of that law shall be a crime, and punishable as such. This does not violate the constitutional guarantee of section 10, art. 2, Constitution, that no person shall "be twice put in jeopardy for the same offense." *Stout v. State ex rel. Caldwell*, 36 Okl. 744, 130 Pac. 553, 45 L. R. A. (N. S.) 884, Ann. Cas. 1916E, 858; 16 C. J. 235.

[3] The contention we next consider is that, as article 15 of the Constitution was enacted to regulate "public service corporations" within the state, and not individuals or nomines, General Order No. 70A is therefore void, because it includes classes of persons not mentioned in that article. Identically the same contention was made in *Van Dyke v. Geary* (D. C.) 218 Fed. 111, asserting the invalidity of our Public Service Corporation Act, so far as it included natural persons within the scope of the law; the constitutional language extending only to "public service corporations." The ruling in the case cited, as in the same case on appeal to the Supreme Court of the United States (see *Van Dyke v. Geary*, 244 U. S. 39, 37 Sup. Ct. 483, 61 L. Ed. 973), upheld the validity of the enactment as against the objection.

While the precise point is not urged, we think it important to observe that we have not failed to consider the fundamental propo-

sition of law necessarily involved in sustaining the information, that the Legislature did not exceed constitutional limitations by prescribing that the infraction of an order of the Commission, made within the scope of the powers conferred, might be prosecuted as a crime. *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563.

That the occupation of common carriers on the public streets and highways is a proper subject-matter for legislative regulation is well settled.

"When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." *Munn v. Illinois*, 94 U. S. 126, 24 L. Ed. 77.

See, also, *Elliott on Roads and Streets* (3d Ed.) § 526.

The employment of "hackmen and draymen whose places of business are in the public highway" was a proper subject for police regulation at common law. *Munn v. Illinois*, supra. And recent authority classes these and the like occupations with privileges exercisable only at the will of the sovereign.

"The right of a citizen to travel upon the highway and transport his property thereon, in the ordinary course of life and business, differs radically and obviously from that of one who makes the highway his place of business and uses it for private gain, in the running of a stage coach or omnibus. The former is the usual and ordinary right of a citizen, a common right, a right common to all, while the latter is special, unusual, and extraordinary. As to the former, the extent of legislative power is that of regulation; but, as to the latter, its power is broader. The right may be wholly denied, or it may be permitted to some and denied to others, because of its extraordinary nature. This distinction, elementary and fundamental in character, is recognized by all the authorities:

"A distinction must be made between the general use, which all of the public are permitted to make of the street for ordinary purposes, and the special and peculiar use, which is made by classes of persons in the pursuit of their occupation or business, such as hackmen, drivers of express wagons, omnibusses, etc. *Tiedman on Municipal Corporations*, § 299. The rule must be considered settled that no person can acquire the right to make a special or exceptional use of a public highway, not common to all citizens of the state, except by grant from the sovereign power." *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242; *McQuillin, Municipal Corporations*, 1620." *Ex parte Dickey*, 76 W. Va. 576, 85 S. E. 781, at p. 782, L. R. A. 1916F, 840.

See, also, *West v. City of Asbury Park*, 89 N. J. Law, 402, 99 Atl. 190; *Ex Parte Bogle* (Tex. Cr. App.) 179 S. W. 1193; *Gill v. City of Dallas* (Tex. Civ. App.) 209 S. W. 209.

[4] Even without constitutional authorization, it would have been competent for the

Legislature to delegate power over the subject-matter to a special agency like the Corporation Commission. 12 C. J. 847; *State v. Atlantic C. L. R. Co.*, 56 Fla. 617, 47 South. 969, 32 L. R. A. (N. S.) 639.

Section 6, art. 15, of our Constitution, however, forecloses all question on this head:

"The lawmaking power may enlarge the powers and extend the duties of the Corporation Commission, and may prescribe rules and regulations to govern proceedings instituted by and before it; but, until such rules and regulations are provided by law, the Commission may make rules and regulations to govern such proceedings."

Under these provisions there can be no doubt that chapter 130, enlarging, as it does, the powers and extending the duties of the Corporation Commission, is so far fully warranted.

The control which, under the police power of the state, may be exercised over automobiles carrying persons or freight for hire over the public ways, has received consideration in many of the decided cases. As being a legitimate exercise of the police power of the state, whether exercised directly by the Legislature or by municipalities, or other governmental agencies under delegated powers, regulations of various kinds over automotive transportation on the public highways have been upheld. For illustrative cases, see *P. U. Comm. v. Garviloch*, 54 Utah, 406, 181 Pac. 272; *Memphis v. State ex rel. Ryals* (Tenn.) 179 S. W. 631, L. R. A. 1916B, 1151; *Memphis St. R. Co. v. Rapid Transit Co.*, 133 Tenn. 99, 179 S. W. 635, L. R. A. 1916B, 1143, Ann. Cas. 1917C, 578; *Farmers' & Merchants' Co-op. Tel. Co. v. Boswell Tel. Co.*, 187 Ind. 371, 119 N. E. 513; *West v. City of Asbury Park*, 89 N. J. Law, 402, 99 Atl. 190; *Ex Parte Bogle* (Tex. Cr. App.) 179 S. W. 1193; *Winchester & S. R. Co. v. Commonwealth*, 106 Va. 264, 55 S. E. 692; *Ex Parte Parr*, 82 Tex. Cr. R. 525, 200 S. W. 404.

[5] Chapter 130 pertains to matters well within the legislative cognizance, and aims at objects which are proper to be attained by the exercise of the police power, and in no sense constitutes an unreasonable or palpable invasion of rights secured by the Fourteenth Amendment to the Constitution of the United States, or section 4, art. 2, of our Constitution, which provides that "No person shall be deprived of life, liberty or property without due process of law." See, generally, 6 R. C. L. 224; *Elliott on Roads & Streets* (3d Ed.) § 526; *Barbier v. Connolly*, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 925.

[6] We have reserved for specific consideration the questions raised by the attack upon the act and the order of the Commission, on the ground that they are constitutive of special and partial legislation under the provisions of our Constitution herein-after quoted.

Section 13 of article 2 of the Constitution reads:

"No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

It is provided in section 19, pt. 2, art. 4, thereof, that—

"No local or special laws shall be enacted in any of the following cases, that is to say:
* * *

"13. Granting to any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises. * * *

"20. When a general law can be made applicable."

The prohibition against the enactment of a local or special law granting any exclusive privilege, franchise, or immunity is so far an implied recognition of the legislative power to make such grants under general laws. How far is the power thus recognized, controlled, or affected by the provisions of our Declaration of Rights set out in section 13, art. 2, above quoted? Having in mind that the object of all such provisions is to secure equality of opportunity and right to all persons similarly situated (12 C. J. 1112), our investigation of the authorities leads us to the conclusion that we cannot disregard the implied recognition by the Constitution of the power of the lawmaking body, acting upon its own conception of wisdom and policy, to enact general laws which permit of the grant of franchises, privileges, and immunities, exclusive in character, when the public interest in the judgment of the Legislature is thereby subserved, if under the terms of such laws all citizens or classes of citizens are afforded equal opportunity and right to receive such grants by original investment. We think that a law which provides a scheme for the grant of such privileges, which is fair and equal in its terms, should be upheld, and that—

"The constitutional mandate is satisfied if there be no manifest intent to discriminate in favor of a particular class of citizens to the exclusion of others similarly circumstanced." *State v. Richcreek*, 167 Ind. 217, 77 N. E. 1065, 5 L. R. A. (N. S.) 878, 879, 119 Am. St. Rep. 491, 10 Ann. Cas. 899; *Perkins v. Heert*, 158 N. Y. 306, 53 N. E. 18, 43 L. R. A. 858, 70 Am. St. Rep. 483.

"There are unquestionably cases in which the state may grant privileges to specified individuals without violating any constitutional principle, because, from the nature of the case, it is impossible they should be possessed and enjoyed by all; and if it is important that they should exist, the proper state authority must be left to select the grantees." *Cooley's Const. Lim.* (7th Ed.) p. 564.

"The most common and obvious illustration of the valid grant of an exclusive privilege or monopoly is found in exclusive franchises granted in connection with public utilities, in

which the franchise is not only granted for the promotion of the public interest but is also monopolistic in its nature." 12 C. J. 1115, and cases cited; *Farmers' & Merchants' Co-op. Tel. Co. v. Boswell Tel. Co.*, supra.

The fact that in granting the certificate of convenience and necessity the Commission may be under a duty to select between two or more applicants does not invalidate the law as monopolistic, class, discriminatory, or partial legislation.

As was said in *People v. Board of Railroad Commissioners*, 4 App. Div. 259, 284, 38 N. Y. Supp. 528, at page 531, of a grant made by commissioners under the New York law, conferring like powers:

"It may sometimes happen, as in this case, that two companies apply for a certificate to construct a road between the same points, and it may be that such railroad commissioners can properly certify as to each that public convenience and necessity require the construction of its road, or it may be that they cannot conscientiously certify that public convenience and necessity require the construction of more than one road. It is a question that must be determined by some one, and the board of railroad commissioners is the only body or tribunal vested with authority to issue the certificate in question, and from necessity, therefore, it has jurisdiction to determine, in the case of conflicting applicants, whether certificates shall be issued to both or only to one, and, if only to one, which one."

See, also, *Chicago Motor Bus Co. v. Chicago State Co.*, 287 Ill. 320, 122 N. E. 477; *State Public Utilities Comm. v. Bartonville Bus Line*, 290 Ill. 574, 125 N. E. 373.

Even were we to suppose the case to arise of two applicants for a certificate of convenience and necessity presenting, in all substantial requirements, identical qualifications to serve the public, the mere possibility of such an event arising cannot affect the validity of the act or the grant made under it.

"The validity of a statute or ordinance is not to be determined from its effect in a particular case, but upon its general purpose and its efficiency to effect that end. When a statute is obviously intended to provide for the safety of a community, and an ordinance under it is reasonable and in compliance with its purpose, both the statute and the ordinance are lawful, and must be sustained." *City of Rochester v. West*, 164 N. Y. 510, 53 N. E. 673, 53 L. R. A. 548, 79 Am. St. Rep. 659, and cases cited; *City of Rochester v. Gutherlett*, 211 N. Y. 306, 105 N. E. 548, L. R. A. 1915D, 209, Ann. Cas. 1915C, 483.

In considering the validity of chapter 130, we cannot put out of view the ends to be attained and the means adopted to attain them. These are well set forth in the opinion in *Public Utilities Commission v. Garviloch*, 54 Utah, 406, 418, 181 Pac. 272, at page 277, from which we quote:

"Whenever a route is established, the person or corporation to whom a certificate is granted

must operate the vehicle used at the times, in the manner, and for the prices designated in the certificate. The utility must be operated in good and in bad weather, and, if so specified, both day and night. If, therefore, any one who owns an automobile may compete with the one who has obtained a certificate by soliciting passengers who wish to pass over the established route, then he may do that only in fair weather and at such hours or times when the travel is greatest, and may thus make it impossible for the one having the certificate to successfully carry on the business because of lack of patronage and insufficient remuneration for conducting the business. Public convenience may thus not only be greatly affected, but might be entirely destroyed instead of being subserved."

See, also, *Farmers' & Merchants' Co-op. Tel. Co. v. Boswell Tel. Co.*, supra.

[7] It is also urged that General Order No. 70A conflicts with the provisions of section 12, art. 15, Constitution, which section is in the following language:

"All charges made for service rendered, or to be rendered, by public service corporations within this state shall be just and reasonable, and no discrimination in charges, service, or facilities shall be made between persons or places for rendering a like and contemporaneous service, except that the granting of free or reduced rate transportation may be authorized by law, or by the Corporation Commission, to the classes of persons described in the act of Congress approved February 11, 1887, entitled an act to regulate commerce, and the amendments thereto, as those to whom free or reduced rate transportation may be granted"

—for the reason (as we read the brief) that a discrimination is made by the order for the same service when performed by Mountain Auto Company and when performed by appellants.

It is not contended that the fare allowed appellant Haddad of \$1.40 was not a just and reasonable compensation for the service rendered; on the contrary, he insists that he had a legal right to collect the lesser sum of \$1. So far as the alleged discrimination is concerned, it cannot with reason be said that a special service could not be made the basis of a special "rate or fare" by a general regulation applicable to the competitors of all stage lines in the state, as is done by the order; indeed, it seems to us that the very discrimination prohibited by section 12 would be introduced by prescribing that those receiving the benefit of transportation at irregular times, by special conveyances, should pay no more for such services than others traveling on regular stages between the same terminal.

We think that the control committed by chapter 130 to the Corporation Commission over the common carriers mentioned in the act, and the public highways of the state, is in no wise repugnant to the letter or spirit of section 12.

When the validity of any rule, regulation,

or order of the Commission made under chapter 130 is in question, the criteria to be applied are the reasonableness of the regulation, in itself, and whether it really effectuates any purpose for which the powers were conferred; the presumption being that the regulation is reasonable and valid. So tested, there is no showing in this case that General Order No. 70A is not an appropriate and lawful method of effectuating the objects of the act, or that it is unreasonable or unjust, and we must therefore pronounce it to be a valid regulation.

[8] The evidence introduced went to prove that appellant Bienes, who accepted the fares from the passengers, was in control of the car as the driver thereof, and was as such the employee of the appellant Haddad, owner. There was no evidence that Haddad knew anything about this particular transaction, or that he ever authorized the act of Bienes, other than might be implied or presumed from his employment of Bienes. Upon this state of the testimony, Haddad was asked by his counsel to state what fares he told his driver to charge on trips between Clifton and Morenci. To this question objection was sustained by the court. It was then avowed by Haddad's counsel that if permitted to testify Haddad would state that he told his drivers to charge the regularly prescribed fare for the services rendered by his cars. It is contended by the state, in support of the ruling of the court excluding the testimony, that the avowal was not sufficient because it failed to exclude guilty knowledge by Haddad of the act of his servant.

[9] We think the evidence was improperly excluded under the rule announced in *Grant Bros. C. Co. v. United States*, 18 Ariz. 388, 395, 114 Pac. 955, that—

"The master * * * is not liable criminally for the unlawful acts of his agent or servant, though such unlawful act be committed in the master's business, unless such unlawful act was directed by him or knowingly assented to or acquiesced in."

And, in view of a possible new trial of appellant Haddad, we hold that the mere fact that Bienes accepted the unlawful fare during the course of his employment, and within the scope thereof, is not in itself sufficient to show such direction, knowledge, or acquiescence by Haddad. In so holding we do not mean to intimate that there may not be cases where such direction, knowledge, or acquiescence may not be legitimately inferred from the surrounding circumstances. We think, however, that this case does not exhibit such a control by Haddad over the acts of the servant Bienes as driver as would, under the testimony, establish the commission of an offense by Haddad.

In stating our conclusions upon this case, it must, of course, be understood that it is not our province to uphold or defeat legis-

lation on any conception we may entertain of its wisdom or policy. That function is allocated under our system to another and co-ordinate branch of government, i. e., the law-making power. If valid enactments are to be changed, it must be by act of the Legislature or the people, and not by this court.

Upon the whole case our conclusions are that chapter 130 aforesaid is not subject to the constitutional objections urged; that General Order No. 70A is a valid exercise of powers granted to the Commission; that the information states an offense against the appellants; and that for the reasons stated in this opinion the judgment must be affirmed as to appellant Bienes, and reversed as to appellant Haddad, with instructions to the court below to grant him a new trial as prayed for by him.

ROSS, C. J., and McALISTER, J., concur.

FRIED et al. v. GUIBERSON. (No. 1051.)

(Supreme Court of Wyoming. Nov. 29, 1921.)

1. Appeal and error ⇐765—Time of filing briefs may be extended on application before expiration.

By consent of parties, or for good cause shown, before expiration of the time allowed, the Supreme Court or a justice thereof in vacation may extend time for filing briefs.

2. Appeal and error ⇐772—Court has power to extend time for briefs after expiration thereof.

The Supreme Court has power, after the expiration of the time for filing and serving briefs, to extend the time.

3. Appeal and error ⇐772—Plaintiffs in error held entitled to extension of time for filing briefs on application after time expired.

Plaintiffs in error held entitled on a showing made, to an extension of time for filing briefs on motion made after the expiration of the time.

4. Appeal and error ⇐772—Filing of briefs after expiration of time held ineffectual.

The filing of briefs by plaintiffs in error after the time for such filing had expired, and pending motions for extension of time for dismissal, was ineffectual, but the court, believing such filing was not intended as a violation of the rules, but to show diligence in support of the motion for extension, might, on granting such motion, permit the refiling of such briefs.

Error to District Court, Converse County; Ralph Kimball, Judge.

Action between Julius Fried and another and S. A. Guiberson, Jr. To the judgment, Julius Fried and another bring error. Heard on motion to extend time of plaintiffs in error for filing and serving brief. Motion granted.

W. C. Shelton, of Los Angeles, Cal., and Maurer & Walker, of Douglas, for plaintiffs in error.

Robert D. Hawley, of Douglas, for defendant in error.

POTTER, C. J. This cause has been heard upon the motion of plaintiffs in error for an extension of the time for the filing and serving of their brief; said motion having been filed after the time fixed by our rules for filing and serving such brief had expired.

The petition in error was filed in this court on May 13, 1921, and the 60 days from that date allowed by the rules for filing and serving the brief of plaintiffs in error expired on July 12, 1921, there having been no order of the court or a justice thereof before that date extending said time. The motion for extension of time was filed on July 29, 1921, and it states the following as grounds therefor: (1) That after the filing of the petition in error, and during the course of the preparation of the brief by W. C. Shelton, the attorney for the plaintiffs in error charged with the duty of the preparation of said brief, he was stricken with a serious illness, confining him to his bed for many days, under the care of a doctor and a nurse, leaving him threatened with nervous prostration, and continuously, during all the period of said 60 days, under the care of a physician, and unable to prepare the brief and file the same within the time allowed. (2) That on June 19, 1921, the senior partner of said attorney suffered a stroke of apoplexy, and died on June 22, which was a great shock to said counsel, and further incapacitated him for work for several weeks. (3) That said attorney, during the week in which the death of his senior partner occurred, consulted the rules of this court, and understood them to allow 60 days from the filing of the bill of exceptions and record in this court for the filing and serving of the brief of a plaintiff in error; said misunderstanding of the rules being caused by his illness and mental condition at the time. (4) That an application was in fact made for an extension of time on July 12, 1921, by a telegram to one of the justices of this court.

[1] While the affidavit of said counsel in support of the fourth ground states that the application for extension by said telegram was made on June 12, prior to the expiration of the time for said brief, it should be said, although it is not a matter of record in the cause, that said telegram was sent as a night letter from Los Angeles, Cal., where counsel aforesaid resides, and was not received by the justice to whom it was addressed until July 13, the day after the expiration of the time for said brief, and too late for an order by said justice extending the time; our rule in that respect providing that by consent of parties, or for good cause shown before the

expiration of the time allowed, the court, or a justice thereof, in vacation, may extend the time for filing briefs. *Laramie County v. Goshen County*, 23 Wyo. 207, 147 Pac. 621; *Laramie County v. Platte County*, 23 Wyo. 209, 147 Pac. 622.

The other grounds stated in the motion are supported by affidavits of said attorney for plaintiffs in error, two physicians who attended him during his sickness, and another practicing attorney of Los Angeles who maintained an office in connection with him, and they show that, during the period allowed for said briefs under the rules, the said attorney for plaintiffs in error was incapacitated for work, for the reasons stated in the motion. There are no opposing affidavits. The defendant in error, however, after the filing and before the hearing of said motion for extension of time, filed a motion to dismiss on the ground of the failure of plaintiffs in error to file and serve their brief within the time required by the rule. But, although the latter motion was called to the attention of the court, it was not submitted at the hearing upon the motion of plaintiffs in error, and has not since been submitted, nor has another motion of the defendant in error to strike the bill of exceptions, filed on July 29, 1921, been submitted.

[2] That the court has power, after the expiration of the time for filing and serving briefs, to extend the time, was settled by the decisions in *Phillips v. Brill*, 15 Wyo. 521, 90 Pac. 443, and *Whiting v. Straup*, 15 Wyo. 530, 90 Pac. 445. It was said in *Phillips v. Brill* that the rule does not in terms prohibit such action by the court; that its language is affirmative, and not negative, expressly permitting an extension before the expiration of the time allowed, and stopping there; that to construe the rule as preventing in any case an extension after the expiration of the time allowed might work in some cases a manifest injustice, and that, while the limitation should be quite rigidly enforced, yet, in aid of the very purpose to accomplish which the rule was adopted, that of administering justice, the court should be held upon proper showing to have the power to grant a motion for extension, although filed after the expiration of the period within which the brief might have been regularly filed and served. But it was further said that the power should be sparingly exercised, and only in extreme cases, to prevent an apparent injustice, and that, in justice to the other party, the reasons for its exercise in any case should be strongly and clearly shown.

In the two cases cited, the time of the plaintiff in error was extended on the ground of the serious illness of the sole counsel of the plaintiffs in error, who were out of the city and without knowledge of their counsel's illness and incapacity until after the default had occurred. It appears from the

record in this case that Mr. Shelton is not the sole counsel for the plaintiffs in error, and that the other counsel associated with him are resident attorneys of this state. But it appears also by Mr. Shelton's affidavit that he had been charged with the sole responsibility of the trial of the action in the district court, and the preparation of the brief in the Supreme Court, on behalf of the defendants below, plaintiffs in error here, and that his said associate counsel had taken no active part in the trial of the cause, and were not charged with the responsibility of preparing the brief in this court.

We think it clearly appears from the showing made by and in support of the motion that the plaintiffs in error were intending in good faith to prosecute the proceeding in error in strict compliance with the rules, and that the neglect in the matter of filing and serving the brief was due to the illness of their counsel aforesaid, and his incapacity as a result thereof to prepare the same within the time allowed, and that said illness and the other misfortune mentioned may have led to a misunderstanding of our rule, which, while not reasonably subject to the construction placed upon it by counsel at the time of his examination of it in June, by any one familiar with our practice, might, in good faith, have been misunderstood, considering the condition in which counsel was shown to have been at the time. The rule referred to provides:

"Within 60 days after filing in this court the petition in error, or record on appeal, the plaintiff in error, or the appellant, in both civil and criminal causes, shall file with the clerk four copies of his brief, and shall also within that period serve upon or mail to the opposite party or his attorney of record one other copy of such brief."

The rule refers to two methods of bringing causes to this court for appellate review; one being a proceeding in error, and the other a direct appeal. The proceedings for taking a direct appeal all occur while the cause remains in the district court; the notice of the appeal is filed with the clerk of that court, and also the record for the appeal prepared as provided by statute, and, afterwards, the specifications of error, and jurisdiction of the cause is acquired by this court upon the filing of the record on appeal here; the statute providing that the record shall be transmitted to this court by the clerk of the district court, together with the specifications of error, authenticated by his certificate, attached thereto. A proceeding in error is instituted in this court by first filing a petition in error, and the record is afterwards brought into the cause here through an order issued by the clerk of this court, upon the written application of the plaintiff in error designating the original papers and journal entries desired, and deemed necessary to exhibit the errors complained of.

The parties are entitled in this court in a proceeding in error as plaintiff in error and defendant in error respectively, but on direct appeal as appellant and respondent respectively, without otherwise, on direct appeal, changing the title of the cause. It would be clear, therefore, to an attorney informed concerning the two appellate proceedings aforesaid, that the rule requires that in proceedings in error the brief of the plaintiff in error shall be filed and served within a stated time after the filing of the petition in error, and that, in a case brought here by direct appeal, the appellant's brief shall be filed within said period after the filing of the record on appeal.

[3] Where a rule of the Supreme Court of Oregon, fixing the time for filing brief, was misunderstood by counsel, a case which had been dismissed for failing to file brief in time was reinstated, it appearing that the appellant was prosecuting his appeal in good faith, and that the rule was wrongly interpreted by counsel as to the time, in view of certain language of the court in a former case, referring to the rule. *Cole v. Willow River Land & Irr. Co.*, 60 Or. 594, 118 Pac. 176. But if, in the case here, counsel's misunderstanding of the rule was all that was offered as an excuse, we might not feel inclined to grant the extension. Upon the entire showing, however, we are satisfied that the neglect should be held to be excusable, and that the extension applied for should be granted. *Strattan v. Raine* (Nev.) 192 Pac. 471; *Wallace v. Portland Ry., L. & P. Co.*, 88 Or. 219, 159 Pac. 974; *Weiffenbach v. Puget Sound B. & D. Co.*, 103 Wash. 240, 174 Pac. 10; *Borgmeyer v. Solomon*, 39 Cal. App. 106, 178 Pac. 544; *Yolo Water & Power Co. v. Edmands* (Cal. App.) 187 Pac. 755.

[4] It appears that since the hearing on the motion the plaintiffs in error have filed four copies of their brief, and an affidavit showing the service of another copy upon counsel for defendant in error. It is said at the end of that brief that it was written while there was pending a motion before this court to extend the time within which to file it, and we are satisfied that it was not intended to file the same in violation of the rules, but to show the good faith of plaintiffs in error and their counsel, and possibly to accelerate the time if an extension should be granted. While such copies of the brief were filed and served without right to do so at the time, as against the motion to dismiss and in view of the default, there seems to be no good reason, since an extension of time is to be granted, why they should not be permitted to be refiled, with directions that another copy of the brief be served upon opposing counsel. An order will accordingly be entered granting an extension of time to file and serve the brief of plaintiffs

in error, and fixing the extended time at 30 days from and after the date of this decision, but with permission to refile the copies previously filed as aforesaid.

BLUME, J., and TIDBALL, District Judge, concur.

MYERS v. MILLS. (No. 23143.)

(Supreme Court of Kansas. April 9, 1921.
On Rehearing Nov. 12, 1921.)

(Syllabus by the Court.)

1. Mortgages \S 608½ — Petition to declare deed mortgage held to state cause of action.

The petition stated a cause of action for the redemption of real property from mortgage liens.

2. Mortgages \S 38(1)—Evidence in action to have deed declared mortgage not subject to demurrer.

There was evidence sufficient to establish that a deed and a writing, given at the same time by the grantee to the grantor, constituted a mortgage, and, for that reason, a demurrer to the plaintiff's evidence was properly overruled.

3. Mortgages \S 38(1)—Findings in action to have deed declared a mortgage not open to attack.

Findings of fact of which complaint is made were supported by evidence.

4. Appeal and error \S 692(1)—Where excluded evidence was not abstracted, propriety of exclusion will not be reviewed.

A judgment will not be reversed for the exclusion of evidence on the trial of an action, where that evidence was produced on the hearing of a motion for new trial, but is not abstracted nor otherwise presented to the Supreme Court for consideration.

On Rehearing.

5. Appeal and error \S 1048(6) — Restricting cross-examination on immaterial point held not reversible.

In an action to enforce the right to redeem real property from a mortgage thereon, the ability of the mortgagor to make the payments at any particular time before the action is commenced is immaterial, and a judgment giving the right to redeem will not be reversed for restricting cross-examination of the plaintiff on that question.

Appeal from District Court, Chase County.

Action by J. W. Myers against J. H. Mills. From a judgment for plaintiff, defendant appeals. Modified and affirmed on rehearing.

W. R. Hazen, of Topeka, and F. A. Meckel, of Cottonwood Falls, for appellant.

Hamer & Ganse, of Emporia, for appellee.

MARSHALL, J. The plaintiff recovered a judgment declaring a deed held by the de-

defendant to real property to be a mortgage, and requiring him to convey the property to the plaintiff on the payment of that mortgage and of a first mortgage on the property. The defendant appeals.

Findings of fact and conclusions of law are made, as follows:

"In 1909 plaintiff Myers bought the land in controversy of one J. F. Keith for an agreed consideration of \$12,000. He paid Keith \$1,000 in cash, and assumed a \$8,000 mortgage, which was on said land in favor of Umstead, and gave a mortgage to Keith for \$5,000 balance in payment for the land. Myers, with his family, entered into possession of the land in question, and has remained in possession and lived thereon with his family ever since, claiming to be the owner of it, subject to the incumbrance of \$5,000 on account of the Keith mortgage and the \$8,000 Umstead mortgage, and accumulated interest thereon.

"About five years after the purchase of said land by Myers from Keith, and in December, 1914, Keith approached Myers with a proposition to deed the farm back to him, and proposed to give him (Myers) a contract to reconvey. Keith's purpose and stated reason for entering into such an arrangement was to avoid the payment of taxes on the \$5,000 mortgage held by him.

"On December 15, 1914, in pursuance of said proposition, Myers deeded the land to Keith, and Keith released the \$5,000 mortgage, and returned the notes except one of \$800 or \$700 given as interest on the \$5,000 mortgage, which latter note Myers afterward paid to Keith. Keith, at the time of this transaction, gave Myers an agreement to reconvey, upon the payment of the \$5,000 to Keith and the \$8,000 to Umstead and the taxes.

"The date for the expiration of said contract was fixed at January 1, 1917. The agreement was unilateral, being signed only by Keith. Myers fulfilled the terms of the contract up to the time named therein for its termination. Keith afterward renewed the Umstead mortgage for one year, when it fell due, and paid it at the expiration of the year. Myers has paid all the taxes on the land in question to date, and no offer has been made to repay him for the same. He also paid interest on the Umstead mortgage up to the time of its renewal by Keith.

"Time was not of the essence of the contract, nor did the parties so regard it. Keith had orally agreed with Myers that he might complete the terms of this contract at any time, which would mean a reasonable time.

"After the date set for the expiration of the contract, and on January 28, 1917, Keith wrote Myers, expressing the hope that he could raise the money and pay him off. This was in response to a letter from Myers to Keith regarding the payment of the balance of the money.

"Myers wrote Keith letters at intervals regarding the payment of the indebtedness up to October 9, 1918, but to the letter of that date Keith made no answer. In a letter by Keith to Bruner, written March 14, 1917, regarding the Umstead mortgage and the Myers indebtedness on the farm, Keith wrote to Bruner to secure an extension of the Umstead mortgage, and expressed a doubt as to whether the arrangement

of renewing this mortgage would suit Myers, and states that he would like to have his, Keith's money, but could wait if he could not get it at that time.

"On April 21, 1917, Keith again wrote Bruner, asking him to find out about the taxes, stating that Jake [Myers] was to pay them and the interest, but had 'fell' down on the interest, and had probably not paid the taxes.

"On April 16, 1918, Keith wrote Frank M. Sayre concerning this land, and said: 'I have been indulging Jake [Myers] and waiting on him, thinking he would find a buyer for the place and make a little money for himself, but I have lost hopes of him doing anything. He will promise and not do anything.'

"Keith never notified Myers that he would claim a forfeiture of the contract under the contract of December 15, 1915, nor commenced any action to foreclose the Myers interest in the land.

"Keith claimed at the trial that Myers had been his tenant ever since the execution of the contract. Myers denied this, and testified that the question of tenancy never was broached to him except one time, and that at that time he told Keith he would not occupy the land as a tenant, and refused to execute the lease, and no lease was ever made. Myers was not at any time during the period mentioned herein a tenant of Keith.

"In the late summer of 1918 Mills entered into negotiations with Myers for the purchase of the land in question as the owner of the same, through his brother Harry Mills. The land was looked over, and the defendant, with his brother, came a second time to look the land over, but did not talk to Myers at the time about the purchase. The land was priced on the first occasion by Myers to Mills, and the second visit followed as a result of this conference. Mills had no further negotiations with Myers regarding the matter, but on the 12th day of November, 1918, entered into a contract and received a deed from Keith to this land. Mills knew, at all times during all of these negotiations, that Myers was in possession of the land, and claimed to be the owner thereof, and that he was living thereon with his family. Mills not only had notice of the occupancy of the plaintiff Myers of this land, but also had notice of his claim of ownership, and bought the same with full knowledge of these matters. The deed to Keith was, in effect, a mortgage to secure the payment of the balance due. Myers tenders performance, and is refused.

"Under the circumstances of this case Myers is entitled to a conveyance of this real estate to him from defendant, Mills, on the payment of the \$5,000 and the \$8,000 incumbrances, with interest thereon. Upon such payment to defendant, Mills, or into court, said Mills should convey the land to said Myers, and upon his failure so to do the decree of this court shall operate as a conveyance of the land to plaintiff, Myers, and the plaintiff, Myers, is entitled to recover his costs herein."

[1] 1. One proposition argued by the defendant is that the petition did not state a cause of action. This argument is based on the contention that the writing signed by J. F. Keith was merely an option, unilateral in its nature, and was not a defeasance,

The petition alleged that the plaintiff purchased the land in controversy from J. F. Keith, and, in consideration, assumed and agreed to pay a mortgage on the land for \$6,000, gave to Keith a mortgage thereon for \$5,000, and paid him \$1,000 in cash. The petition also alleged:

"That thereafter, and on the 15th day of December, 1914, a contract was entered into between this plaintiff and the said J. H. Keith, whereby the indebtedness evidenced and secured by said mortgages should be evidenced by an instrument in the form of deed of conveyance and a contract to reconvey; that said agreement was partly oral and partly in writing; that the oral part of said agreement was that if this plaintiff would execute and deliver a paper in the form of a deed for said land to said J. F. Keith, the said J. F. Keith would satisfy of record the said mortgages upon said land, and would release said land to this plaintiff when the indebtedness evidenced and secured by said mortgages was paid to said J. F. Keith; that said paper was so executed and delivered; that said paper, or a copy thereof, is not in the possession of this plaintiff, and for that reason a copy is not attached to or made a part of this petition, but the plaintiff alleges that the same is of record in the office of the register of deeds of Chase county, Kan.; that as evidence of said agreement to release said land upon the payment of said indebtedness, the said J. F. Keith executed and delivered to this plaintiff his certain writing in words and figures, as follows:

"This indenture made this 15th day of December, 1914, by J. F. Keith, of Butler County, Kansas, to J. W. Myers, of Chase County, Kansas. That J. F. Keith agrees that if said J. W. Myers make payments as follows: One certain note due Jan. 1st, 1915, and is extended one year. And the interest on a certain \$6000 Six Thousand Dollar mortgage to E. H. Umsted as due and all tax levied on and as due, all on the East Half of Section (38) Thirty-six in Township (22) Twenty-two in Range (5) Five East of the Sixth P. M., Chase County, Kansas, except one acre off of the northeast corner, payments is as rents on said lands. And if J. W. Myers pays or cause to be paid all the above and assume the Six Thousand Dollar mortgage given to E. H. Umsted and pays or cause to be paid to J. F. Keith or his authorized agent Five Thousand Dollars on or before January 1st, 1917. Said J. F. Keith agrees to relinquish all rights and title to said land that is in him, to said land. If said J. W. Myers fails to pay any of the above covenants when due, then this contract is no good and at an end."

The petition further alleged that the plaintiff was in possession of the property; that he was ready, able, and willing to pay the debts secured by the mortgages; and that the defendant, who purchased the property from Keith, refused to accept the money, and refused to reconvey the property to the plaintiff.

When considered in connection with the facts alleged in the petition, it must be said

that the instrument signed by Keith did not give an option to purchase the land, but was a defeasance in a mortgage given to Keith by the plaintiff, the owner of the land. The petition stated a cause of action.

[2] 2. At the close of the evidence of the plaintiff, the defendant demurred thereto; that demurrer was overruled; the defendant complains of that ruling. The evidence of the plaintiff established sufficient of the facts found by the court to justify the conclusion that the deed given by the plaintiff to Keith and the writing given by Keith to the plaintiff constituted a mortgage to secure the payment of the \$5,000 that was to be paid by the plaintiff to Keith. There was no error in overruling the demurrer to the plaintiff's evidence.

[3] 3. The defendant complains of some of the findings made by the court. One of these concerns Keith's purpose in asking the plaintiff to make a conveyance of the land to Keith. Another concerns the time for the completion of the contract, and another the character of the occupancy of the land by plaintiff. An examination of the evidence and of these findings reveals that each finding was amply supported by evidence. Another finding, about the correctness of which there may be some question and of which complaint is made, concerns the plaintiff's fulfillment of the terms of the defeasance up to the time named in it for its termination. The defendant contends that all of the interest on the \$6,000 mortgage had not been paid by the plaintiff up to that time. Even if this finding were erroneous, it would not be sufficient to justify a reversal of the judgment, for the reason that the conveyance to Keith and the writing signed by him constituted a mortgage, and that, until foreclosure, the plaintiff would have the right to pay the \$5,000 mortgage, notwithstanding the fact that the terms or conditions named in the defeasance apparently barred his right to make that payment. There is nothing in any of these findings to justify a reversal of the judgment.

[4] 4. The defendant complains of the exclusion of evidence. That evidence was presented on the hearing of the motion for a new trial, but it has not been abstracted. This court is unable from the abstract to determine what that evidence was, and cannot say that its exclusion was sufficient to justify a reversal of the judgment.

The judgment is affirmed.

All the Justices concurring.

On Rehearing.

The opinion in this action was filed April 9, 1921. A rehearing was granted on two propositions: One, on the restriction of the defendant in his cross-examination of the plaintiff; and the other, on the indefiniteness

of the judgment. On cross-examination of the plaintiff, he testified as follows:

"Q. How did you expect to pay for the farm?
A. I had the money.

"Q. Had the money at that time? A. Yes, sir; when I wrote to Mr. Keith, I had it.

"Q. How long before that had you been in financial condition to pay Mr. Keith up? A. I had not been until that time; up to that time I wrote him."

He was then asked:

"Q. What arrangement had you made to get the money, and from whom, at that time? How did you expect to raise the money for it?"

[5] An objection to that question was sustained. It is urged that this was error, and that, if the court had allowed the question to be answered, the witness would have been forced to admit that his former testimony was untrue, and that he did not have the money with which to redeem, and had no way of getting it, except through a sale to the defendant.

The purpose of the action must not be forgotten. It was only to compel the defendant to permit the plaintiff to redeem the land from a mortgage. The defendant denied that the instrument was a mortgage, but the court found that it was; and, that being true, the plaintiff had the right to redeem, whether he had the money or not. Under the finding of the court, the plaintiff's ability to redeem at any particular time before the action was commenced was immaterial.

It is contended that the judgment is indefinite, in that it does not fix the time for the expiration of the period of redemption, and does not fix the dates from which interest is to be computed on each of the amounts named in the judgment, and to what dates the interest shall be calculated. It is proper that the amount of the judgment and interest be made definite, and that this litigation be settled in the present action.

The cause is therefore remanded, with direction to enter judgment in favor of the defendant for the amount of the \$6,000 mortgage, which the plaintiff assumed and agreed to pay, and the interest thereon at the rate specified therein, and for the amount of the \$5,000 mortgage debt to Keith, with interest thereon at 6 per cent. per annum from January 1, 1917, all interest to be calculated to the day judgment is finally rendered, and to enter judgment giving the plaintiff 90 days therefrom in which to redeem the land, and, if at the end of 90 days such redemption has not been made, an order of sale shall issue and the land be sold thereunder, and, on con-

firmation of the sale, a deed shall at once issue, and the purchaser shall then be given possession of the property, without further right of redemption in behalf of the plaintiff.

Except as above modified, the judgment is affirmed, and the former opinion is adhered to.

All the Justices concurring.

MEYER v. ALEXANDER et al. (No. 23141.)

(Supreme Court of Kansas. April 9, 1921.
On Rehearing, Nov. 12, 1921.)

(Syllabus by the Court.)

Mortgages \S 599(1)—Second mortgagee mistaken as to time to redeem should not have been permitted to redeem out of time, although acting in good faith and with reasonable promptness.

A second mortgagee relying on what an attorney casually told him and on what the plaintiff's attorney said to the effect that he had 18 months from the date of the sale in which to redeem did not learn to the contrary until about a month before the expiration of such 18 months, when he tendered a sum sufficient to make the purchase entirely whole, and was granted permission to redeem. *Held* that, although he acted in good faith and with reasonable promptness, the court erred in thus permitting redemption out of time.

Appeal from District Court, Kearny County.

Action by H. W. Meyer against J. N. Alexander and others. Judgment for plaintiff, and the named defendant appeals. Reversed and remanded, with directions.

William N. Bendure, of Cimarron, for appellant.

Wm. Easton Hutchison and C. R. Hope, both of Garden City, for appellees.

WEST, J. This is an appeal from an order extending to a junior creditor the time for redemption from 15 months to 18 months.

In May, 1912, Fred Hurst was the owner of the quarter section of land involved and gave a mortgage to Meyer and Meyer for \$900. Thereafter he sold the quarter to his son, B. C. Hurst, and took a mortgage for \$2,000 as part of the purchase price. Afterwards, B. C. Hurst sold to J. N. Alexander, and on the 20th day of July, 1918, Meyer and Meyer began foreclosure proceedings, personal service being had on all the defendants. In September, 1918, judgment was rendered for the plaintiffs, and on the 28th day of January, 1919, the land was sold to H. W. Meyer for \$1,571.09. During the pendency of the action B. C. Hurst claims on

behalf of his father, Fred Hurst, that he was told by certain attorneys, including the attorney for the plaintiff, that he had 18 months in which to redeem, and did not learn to the contrary until about 4 weeks before the expiration of the 18 months, when Fred Hurst made application for an extension of time. Notice was served on all parties interested, and upon hearing the judge at chambers made an order extending the time to July 29, 1920, and redemption was made by paying to the clerk \$1,764.84. J. N. Alexander, the fee owner, appeals from this order.

The testimony indicates that Hurst acted in good faith and was simply mistaken as to the time allowed him by the statute to redeem, and was misled by what the attorneys told him. It is claimed that the order of extension was erroneous and beyond the jurisdiction of the court for the reason that the statutory period cannot be extended or enlarged except by the Legislature, and authorities are cited in support of this contention.

The statute provides that after the expiration of 15 months from the day of sale the creditors can no longer redeem from each other, but the defendant owner may still redeem at any time before the end of the 18 months. Gen. Stat. 1915, § 7388 (Code Civ. Proc. § 484).

The defendant Hurst urges that, as he acted in good faith and was misled and mistaken in a matter of law, the court rightfully exercised its equitable power to grant him the relief sought.

The statute taken literally affords no remedy, and it remains to be determined whether or not its literal significance is to be followed. In two instances this court has substantially held that the letter of the statute must be followed. *Stewart v. Park College*, 68 Kan. 465, 75 Pac. 491, presented this situation: The plaintiff alleged that frequently before the expiration of the 18 months he went to the place of business of the board of trustees of the mortgage holder to redeem, notifying them beforehand that he was coming to make such redemption, but failed to find them; that after the redemption period had expired the sheriff executed and delivered to them a deed to the property, and the plaintiff prayed to be allowed to pay into court the full amount with interest, costs, and taxes due and that a conveyance be granted upon such payment. The court said:

"The right to redeem and the mode of redemption of real estate, after sale by the sheriff upon execution, special or general, or order of sale, are fixed by statute. * * * Plaintiff in this case did not comply with the statutory provisions, and, in fact, made no effort to do so. We have carefully examined

the averments of plaintiff's petition, and find therein no grounds for equitable relief, as claimed." 68 Kan. 467, 75 Pac. 491.

In *Sigler v. Phares*, 105 Kan. 116, 181 Pac. 623, 5 A. L. R. 141, four months after the sale, a judgment was rendered in favor of the second mortgagee. Eleven months after the sale the owner of the fee made redemption. Two months later the second mortgagee tried to redeem, and his effort was held ineffectual. In the opinion the court said:

"Under exceptional circumstances, upon equitable considerations, the right of redemption has sometimes been extended somewhat beyond the bare letter of the statute. We do not regard the situation here presented as of such character as to justify judicial interference with the ordinary operation of the law." 105 Kan. 121, 181 Pac. 630.

In several cases involving quite different circumstances extensions of time have been approved. *Neef v. Harrell*, 82 Kan. 556, 109 Pac. 188; *Quinton v. Adams*, 87 Kan. 112, 123 Pac. 740; *Platt v. Flaherty*, 96 Kan. 42, 149 Pac. 734; *Loomis v. Supply Co.*, 99 Kan. 279, 161 Pac. 627, citing *Wakefield v. Rotherham et al.*, 67 Iowa, 444, 25 N. W. 697; *Norris v. Evans*, 102 Kan. 583, 171 Pac. 606; and *Thresher Co. v. Judd*, 104 Kan. 757, 180 Pac. 763.

But the statute is not merely directory. It specifies the time within which redemption may be made, and, save in cases of clear grounds for equitable interference, its terms must be followed. The situation arising here is not one which within the spirit of the foregoing authorities calls for such interference.

"As courts do not favor forfeitures, but do favor redemptions, they will accord time to parties to effect a redemption where there is some substantial reason for such interference and where its refusal would work hardship or injustice, but not where the grounds alleged are merely frivolous or technical or where greater injury would be done to the mortgagee." 27 Cyc. 1817.

"The right must also be exercised within the time allowed by the statute, or it will be lost; and the court usually has no authority to extend the time, even where the owner has been prevented from redeeming by physical or mental disability, minority, ignorance of the facts, or the like." 16 R. C. L. 141.

The old, old maxim that the law favors the vigilant and not the somnolent still holds good. A homespun version is the other saying that the Lord helps him who helps himself. It all means that he who is vigilant in business is more likely to prosper than he who gets up too late in the morning. One who has a mortgage to look after cannot with impunity depend on hearsay or legal guesses to find out when to redeem from a foreclosure sale. Reasonable care dictates that he act with that liveliness which recognizes

that the purchaser who has invested his money has rights to be respected; for here or elsewhere bona fide investors are ordinarily entitled to the benefit of their bargains.

The judgment is reversed, and the cause remanded, with directions to set aside the redemption complained of.

All the Justices concurring.

On Rehearing.

In his supplemental brief on rehearing the defendant Hurst again insists that the trial court rightfully extended the time for the junior lien holder to redeem from sheriff's sale, and suggests that had the order not been made he would have lost the \$2,000 mortgage, and Alexander would have been absolved from paying that sum. However, after a careful reconsideration of the matter, the court feels impelled to adhere to the judgment of reversal. The statement in the former opinion of the result reached expresses our present views:

"But the statute is not merely directory. It specifies the time within which redemption may be made, and, save in cases of clear grounds for equitable interference, its terms must be followed."

The former opinion is therefore adhered to.
All the Justices concurring.

LEWIS et al. v. DAVIS, Director General of Railroads. (No. 3641.)

(Supreme Court of Utah. Nov. 15, 1921.)

1. Appeal and error ⇨230—No complaint that answer was not stricken where question not objected to.

In an action for the death of a railroad machinist from an explosion of gas, assuming that a question whether carbide generators ever leaked gas was asked for the purpose of proving defendant's negligence, and that the answer in the affirmative was prejudicial, irrelevant, and immaterial, defendant could not complain of the court's refusal to strike out the answer, where no objection was made to the question before it was answered, as it showed on its face that it was irrelevant and immaterial.¹

2. Master and servant ⇨265(5)—Fact of explosion held to show gas generator was generating gas.

In an action for the death of a railroad machinist from an explosion of gas, the fact that the explosion actually occurred held to show that an acetylene generator on the engine

on which he was working was in working order with all its parts in place, and generating gas at the moment of the explosion, where there were no eyewitnesses.²

3. Master and servant ⇨107(7)—Leaving gas generator in working order while machinist was repairing engine held failure to furnish safe place.

Where it was the custom of railroad machinists to use a lighted torch while repairing engines, and acetylene generators sometimes leaked gas, and gas might also escape through the inadvertent disconnection of a hose, and an explosion was inevitable if the lighted torch came in contact with the gas, the employer, in leaving a generator in working order while a machinist was repairing the engine, violated his duty to furnish the machinist a safe place to work.

4. Master and servant ⇨265(14)—In absence of direct evidence, deceased employee presumed to exercise ordinary care.

In an action for the death of a railroad machinist from an explosion of gas, there being no direct evidence bearing on the question, it is presumed that he exercised reasonable care, and the burden is on the defendant to overcome the presumption.

5. Master and servant ⇨217(13)—Risk of unsafe place not assumed unless danger is obvious.

If an employer was guilty of negligence in not providing an employé a safe place in which to do the work it required him to do, the employé did not assume the risk, unless the danger was so manifest, open, and obvious that a reasonably prudent man in the exercise of ordinary care should have refused to do the work.

6. Master and servant ⇨247(1)—Employer held liable for death from explosion, though employé permitted gas to escape by disconnecting hose.

Where a railroad machinist, using a lighted torch while repairing an engine, had no reason to believe that an acetylene gas generator on the engine was in operation, the employer was liable for his death from an explosion, though he, inadvertently or otherwise, disconnected a hose, permitting gas to escape, where he did not purposely disconnect it.

7. Appeal and error ⇨1033(5)—Instruction hypothesizing taking of precautions in defendant's shop and other shops held not to harm defendant.

Though an employer sued for the death of an employé should not be bound by the practice or custom of other shops, an instruction, authorizing a verdict for plaintiff if the jury found that certain precautions against the explosion of gas were usual and customary in defendant's shop and in shops doing similar work, merely imposed an additional burden on plaintiff, and did not prejudice defendant.

¹ Spiking v. Consolidated Ry. & Power Co., 83 Utah, 813, 98 Pac. 838; Lockhead v. Jensen, 42 Utah, 90, 129 Pac. 347.

² Distinguishing Fritz v. Electric Light Co., 18 Utah, 493, 56 Pac. 80; Tremelling v. Southern Pac. Co., 51 Utah, 189, 170 Pac. 80.

8. Trial \Rightarrow 194(19)—Instruction as to precaution by employer against explosion of gas held not to invade jury's province.

In an action for death of a railroad machinist, an instruction that if the jury believed that it was usual and customary to take certain precautions against explosions of gas, and further believed that such precautions were necessary in the exercise of ordinary care, and that a reasonably prudent person under like conditions would, in the exercise of reasonable care, have exercised such precautions, then it was defendant's duty to use reasonable care to take the precautions specified, and such precautions as a reasonably prudent person would take, etc., did not invade the province of the jury, as it was left to the jury to determine whether the precautions referred to were necessary in the exercise of ordinary care.*

Appeal from District Court, Salt Lake County; J. Louis Brown, Judge.

Action by Edward Lewis and others against James C. Davis, Director General of Railroads, United States Railroad Administration, operating the Oregon Short Line Railroad. From a judgment for plaintiffs, defendant appeals. Affirmed.

Geo. H. Smith, J. V. Lyle and R. B. Porter, all of Salt Lake City, for appellants.

Marionaux & Beck and Willard Hanson, all of Salt Lake City, for respondents.

THURMAN, J. This is an action by the heirs of Robert Lewis, deceased, to recover damages for his death alleged to have been caused by the negligent operation of the defendant's railroad. It is alleged in the complaint that the Oregon Short Line Railroad extends from Salt Lake City, Utah, through the state of Idaho into the state of Montana, upon which railroad engines and cars are operated for the purpose of carrying passengers and freight; that the Oregon Short Line Railroad Company on April 28, 1919, in connection with its business as a common carrier, had and maintained a certain roundhouse in Salt Lake City, into which defendant moved its engines in interstate commerce from time to time for the purpose of making repairs thereon; that on said last-named date the railroad company owned and had in its possession a certain engine equipped with an acetylene gas generator for generating gas; that on said date, it being necessary that certain repairs should be made on said engine, said defendant caused the same to be moved upon the pit in said roundhouse, as was customary when it became necessary for defendant's mechanics to make such repairs; that said mechanics had no duties to perform around or upon said engine, except to repair the same when directed to do so,

after the same had been placed upon the pit by other employes of the defendant company. The complaint further alleges that on said 26th day of April, 1919, after said engine had been placed upon the pit in said roundhouse, the said Robert Lewis, who was then and there employed by the defendant as a mechanic, was ordered by defendant's foreman in charge of said roundhouse, and intrusted with authority to direct mechanics in and about their work, to go in and upon said engine to make certain repairs thereon; that pursuant to said command the said Robert Lewis went in and upon said engine and about the same, carrying with him a lighted torch, as was customary and usual. The complaint then in substance alleges that defendant had carelessly and negligently placed in said acetylene gas generator a quantity of carbide and water, whereby acetylene gas was being generated, and carelessly and negligently neglected to remove the float and lid from said generator, and carelessly and negligently allowed the said generator to leak gas, and when the said Robert Lewis approached the said engine and came near enough to the same a certain quantity of said gas came in contact with his said torch, resulting in a great explosion, whereby the said Robert Lewis was so badly injured that he then and there died. The remaining allegations of the complaint relate to the earning capacity of the deceased, his relationship to the plaintiffs as husband and father, and to the damages sought to be recovered. The defendant, answering the complaint, denied every allegation charging liability, and for affirmative defenses alleged assumption of risk and contributory negligence. The case was tried to a jury, verdict was rendered for plaintiffs, and judgment entered accordingly.

Defendant appeals and relies on three alleged errors to reverse the judgment: (1) Admission of evidence over defendant's objection; (2) refusal of the court to direct a verdict for defendant; and (3) erroneous instructions to the jury.

There is no substantial dispute concerning the facts. The evidence shows that the locomotive engine in question was equipped with an acetylene gas generator as alleged in the complaint. For a detailed description of said equipment we here insert an excerpt from the testimony of John L. Porter, an employe of defendant, sworn as a witness for plaintiffs. After stating that he was a machinist acquainted with acetylene gas generators, and that Robert Lewis had been assigned to repair an injector and bell ringer on the engine, the witness said:

"The left injector is on the left side of the cab of a locomotive, and is used for putting water into a locomotive boiler. The bell ringer is on top of the locomotive. The receptacle

* Distinguishing *Smith v. Cummings*, 39 Utah, 306, 117 Pac. 38, Ann. Cas. 1913E, 129; *Ryan v. Union Pac. R. Co.*, 46 Utah, 530, 151 Pac. 71.

that is used to generate gas is located about the center of the running board on the left side of the locomotive. The running board extends from the front to the back all the way on either side of the locomotive. The running board is about 4 feet from the rails, and the acetylene tank is bolted onto the running board. The outside casing of the acetylene tank is about 24 inches and is about 12 inches in diameter. To generate gas you have to have carbide. The carbide is placed in the bottom under the water, and is about 6 or 8 inches from the bottom. There is an outside casing; then in that casing there is a receptacle with a grate on it which fits in down to the bottom. On top of the grate is the carbide. And above the carbide is the water, and below is a spigot for the used water to be drawn off. To get the acetylene generator ready to produce gas after the tank is cleaned out, the receptacle containing the carbide is placed on the grate, and then the water can is put in. The water then drips onto the carbide, and gas is produced. The flow of water is regulated by pressure from the top. The pressure that regulates the flow of water is called a float or gas clock. The tank is covered over with what is called a lid or cover. The cover can be detached from the float. The float is something similar to an inverted jar. It is hollow and is made of tin. On the top of the float is a piece of brass that is used as a hose connection. This brass has a hole in it for gas to pass through, and is threaded. The float is about 18 inches long and about 10 inches in diameter. The float fits in between an inside and an outside wall. The float moves up and down as the gas generates. There is a cotter key that holds the float in place, and before any gas can be generated the cotter key must be removed, and when the cotter key is removed it is ready to generate gas. The float regulates the flow of water onto the carbide. The gas is generated by the water dripping on the carbide. The gas goes out through the tube in the top of the float. Engine 4709 had this kind of an arrangement for generating gas in April, 1919. This kind of gas is explosive if a flame comes in contact with it."

There was no eyewitness to the accident which resulted in the death of Robert Lewis. His helper or assistant, George Millerberg, testified that he was working with the deceased the night he was killed; that they went up onto the engine through the cab, then onto the running board, where they examined the injector. Witness stood inside the cab, holding the torch while Lewis stepped outside and looked at the injector. Lewis then sent witness to the air room, about 300 feet away, for another injector. Witness was gone about four minutes. When he returned he found Lewis lying on the floor about 3 feet from the engine, and parallel with it, his head toward the front. Lewis was breathing very heavily, and not moving a muscle. Witness noticed a cut below the eye and along the cheek bone. He and Lewis had only one torch between them, and Lewis was using it. Other evidence showed that the skull was fractured, and that there was

an opening into the brain. A physician testified that such an injury could not have been caused by a fall from the running board.

There is no question under the evidence but that the injury was caused by a gas explosion. Several employes working in the roundhouse in the near vicinity heard a crash and felt the shock. The cover or float was found sticking in the roof above the engine. The nipple on the end of the float was sticking in the plank. It was driven into the wood its entire length, which was 2½ or 3 inches. Neither water nor carbide was found in the tank after the accident, and the water can was missing.

There was considerable testimony as to what the custom or practice was to prevent an explosion when an engine was placed for repairs. There was evidence to the effect that in April, 1919, the practice in the roundhouse was to disconnect the hose, take the float and water can out, put the can on the running board and the float between the hand rail and the boiler, open the bottom cock, and draw the water and surplus carbide out. Then after a few minutes there would be no danger of an explosion.

The evidence is quite conclusive that the machinist who was directed to make repairs on the engine had no duty to perform in connection with putting the generator in a safe condition. This duty was performed by other employes to whom the duty was assigned. The evidence tends to show that if these precautions are not taken and a lighted torch comes in contact with the gas an explosion is inevitable. The evidence also tends to show that there is no danger unless the generator leaks gas or the hose becomes disconnected, allowing the gas to escape.

Taking the evidence as a whole, there seems to be no escape from the conclusion that an explosion actually took place, and that it was caused either by the generator leaking gas or by the hose becoming disconnected. Either condition would account for the explosion, for it is not disputed that Mr. Lewis was working with a lighted torch.

The defendant earnestly contends that there is no evidence whatever that the generator was leaking gas, and that if the hose became disconnected it must have been disconnected by Mr. Lewis himself, either accidentally or otherwise, in which event the defendant would not be liable. This contention of defendant is vigorously contested. Plaintiffs contend with much earnestness and considerable force that the proximate cause of the injury was placing and leaving the carbide and water in the generator, and neglecting to remove the float therefrom before the engine was set out for repairs. These contentions of the respective parties will receive further consideration before concluding this opinion.

[1] During the course of the trial one of plaintiffs' witnesses, after stating that he had seen carbide generators in operation, was asked by plaintiffs' counsel if they ever leaked gas. The witness answered: "Yes; they do." Counsel for defendant moved that the answer be stricken on the ground that it was immaterial and irrelevant. The court assumed that the question was preliminary, whereupon plaintiffs' counsel said:

"No; It is not preliminary. * * * If we can show that such tanks do actually leak, then it is evidence to go to the jury."

The gist of defendant's contention is that plaintiffs were seeking to establish defendant's negligence by showing that an equipment similar to the one in question sometimes failed to properly function. As stating defendant's position, we quote the following from its brief:

"The law, we believe, is well settled that one cannot show an act or acts of negligence at other times or places, in order to prove a person guilty of a specific act of negligence. This doctrine is supported by many cases."

Counsel then cite the following: *Lockhead v. Jensen*, 42 Utah, 99, 129 Pac. 347; *People's Gas Co. v. Porter*, 102 Ill. App. 461; *International & G. N. R. R. v. Ives*, 31 Tex. Civ. App. 272, 71 S. W. 772; *Clark v. Smith*, 72 Vt. 138, 47 Atl. 391; *C. & B. & Q. R. R. v. Lee*, 60 Ill. 501; *Robinson v. F. & W. R.*, 7 Gray (Mass.) 92; *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018; *Dalton v. C. & P. Ry. Co.*, 114 Iowa, 257, 68 N. W. 272; *Delaware, etc., R. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569, 35 L. Ed. 213.

There can be no doubt as to the correctness of the rule stated by defendant in the excerpt above quoted. There is, however, some question as to the application of the rule to the question presented here. Counsel for plaintiffs, replying to defendant's contention, state their position as follows:

"Counsel for defendant mistake the reason on which it was admitted, and contend that it shows other acts of negligence at other times and places. That is not the proposition involved. It was not a question of negligence that the type of generator leaked, but was a question of construction of the type of generator in question, and whether that type as ordinarily constructed usually leaked, and, since that type usually leaked, the one in question being similarly constructed, would do the same thing."

As illustrating this view the following authorities are cited: 1 Wigmore, §§ 451 to 458; *Brierly v. Davol Mills*, 128 Mass. 291; *Flaherty v. Powers*, 167 Mass. 61, 44 N. E. 1074; *Findlay Brewing Co. v. Bauer*, 50 Ohio St. 560, 35 N. E. 55; *Blackman v. Collier*, 65 Ala. 312; *Davis v. Sweeney*, 80 Iowa, 391, 45 N. W. 1040; *Kramer v. Messner*, 101 Iowa, 88, 69 N. W. 1142; *Avery v. Burrall*, 118

Mich. 672, 77 N. W. 272; *People v. Thompson*, 122 Mich. 411, 81 N. W. 344; *Carpenter v. Corinth*, 58 Vt. 216, 2 Atl. 170.

Without commenting upon the cases cited by either plaintiffs or defendant with the view of determining their application to the instant case, we feel warranted in expressing serious doubt as to whether the answer of the witness which defendant sought to have stricken had any bearing whatever upon the question of defendant's negligence. The form of the question which elicited the answer does not conclusively indicate an attempt to prove negligence by showing that the generator leaked gas, but rather as showing the habit of that particular type of instrumentality.

In any event, as we view the case, assuming that the question was asked for the purpose of proving defendant's negligence, and that the answer was prejudicial, irrelevant, and immaterial, still defendant has no just grounds of complaint, for the reason that no objection was seasonably made. If defendant's contention is correct, the question on its face showed that it was irrelevant and immaterial as to the defendant's negligence. This being the case, it was the duty of defendant to object to the question itself, and not wait until an unfavorable answer was given, and then move to strike it out. This court has heretofore passed upon this identical question, and placed itself in harmony with the courts in many other jurisdictions of the country. In *Spiking v. Consolidated Ry. & Power Co.*, 33 Utah, 313, 93 Pac. 838, cited by respondent, an action prosecuted for a death caused by negligence on a street crossing, plaintiffs' counsel, without objection, asked a witness the following question concerning the deceased: "How was Mr. Spiking as to being a careful and cautious man?" The witness answered: "Yes, sir, he was very careful." After the answer was made counsel for appellant immediately moved to strike it out as irrelevant, immaterial and incompetent. The court denied the motion, and permitted the answer to stand. The question was brought to this court for review. The ruling of the trial court denying the motion to strike was sustained. The reasons given for the rule are found on pages 328 and 329 of the Utah report (93 Pac. 838), and appear to be more than ordinarily logical and convincing. We see no reason in the instant case why there should be a departure from the rule.

At the close of plaintiffs' evidence defendant moved for a nonsuit, and when all of the evidence was submitted moved for a directed verdict. Both motions were denied. Defendant excepted to both rulings of the court and argues the exceptions together. The grounds assigned for the motion are: (1) Failure to prove defendant's negligence at all; (2) failure to show that defendant

permitted gas to leak; (3) the evidence shows that deceased was guilty of contributory negligence; (4) the injury, if caused by failure to properly care for the generator, was due to the negligence of fellow servants; (5) the evidence fails to show the proximate cause of the injury; (6) the deceased assumed the risk. The gist of defendant's contention in support of this assignment seems to be that there is no definite proof of any specific act or omission on the part of defendant constituting negligence which was the proximate cause of the injury.

It is true that no one saw the accident happen. No one knew just what Mr. Lewis was doing when the explosion occurred. No one testified that the generator leaked gas, or that the hose was disconnected, thereby permitting gas to escape. No one saw water and carbide in the tank, or noticed the condition of the float. No one saw the generator so as to see whether it had been taken apart, or whether the parts were in place, each performing its function in the generation of gas. No one knows the immediate cause of the explosion, or just how Mr. Lewis came to his death.

The above propositions, in substance, constitute the basis upon which defendant relies in support of the contention that the court erred in denying its motion for nonsuit and directed verdict.

[2] In the opinion of the court, under the evidence in the record, the fact that an explosion actually occurred is an answer to practically every proposition above set forth. If there had been no water and no carbide in the generator under pressure by means of a float on top and no gas leaking or hose disconnected by which gas could escape and no contact between the gas and a lighted torch or other fire there could have been no explosion, and if there had been no explosion Robert Lewis would not have been killed in the manner shown by the evidence. Because there was an explosion it follows as a necessary corollary that the acetylene generator was in working order, with all its parts in place, generating gas at the very moment of the explosion, and the only questions remaining, as far as the motion for a directed verdict is concerned, are: (1) Whether or not directing the deceased, Robert Lewis, to work in and about the engine with the generator in that condition constitutes actionable negligence, or, in other words, was it a safe place in which to work? (2) Was deceased guilty of contributory negligence? (3) Did he assume the risk?

[3] These questions can be answered without circumlocution or extended comment. The custom of the machinists in performing their work was to use a lighted torch. It is stated in the evidence that the generator when in operation sometimes leaked gas. It was also stated that the machinist might in-

advertently disconnect the hose by which gas would be permitted to escape. If the lighted torch came in contact with the gas an explosion would be inevitable. Manifestly, when the generator was generating gas the place was unsafe in which to work with a lighted torch.

[4-6] Was deceased guilty of contributory negligence? There being no direct evidence bearing upon the question, it is presumed he exercised reasonable care. The burden was upon the defendant to overcome this presumption. It failed to discharge the burden. Did the deceased assume the risk? If defendant was guilty of negligence in not providing the deceased a safe place in which to do the work it required him to do, deceased did not assume the risk, unless the danger was so manifest, open, and obvious that a reasonably prudent man in the exercise of ordinary care would have refused to do the work. We find no evidence whatever that the danger was open or obvious. Under the evidence the deceased had no reason to believe defendant would direct him to work on the engine while the generator was in operation. It is, however, contended by defendant that if deceased inadvertently or otherwise disconnected the hose so as to permit gas to escape, it would not be liable. We cannot agree with this contention. We are of the opinion, under the facts of this case, that the jury were warranted in finding that leaving water and carbide in the generator, without removing the float, was the proximate cause of the injury. If this be true, no matter how the gas came to escape, the defendant would be liable unless the deceased purposely disconnected the hose, which, under the evidence, is inconceivable.

Defendant in support of its motion for a directed verdict calls our attention to the following cases, none of which are in point for reasons heretofore stated: *Titus v. Railway Co.*, 136 Pa. 618, 20 Atl. 517, 20 Am. St. Rep. 944; *Fritz v. Elec. Light Co.*, 18 Utah, 493, 56 Pac. 90; *Patton v. Texas & Pac. Ry. Co.*, 179 U. S. 653, 21 Sup. Ct. 275, 45 L. Ed. 361; *Tremelling v. So. Pac. Co.*, 51 Utah, 189, 170 Pac. 80; *Strother v. C. & Q. R. Co. (Mo.)* 188 S. W. 1102; *Murray v. Pittsburg, O., C. & St. L. R. Co.*, 263 Pa. 398, 107 Atl. 21.

The court committed no error in denying defendant's motion for a nonsuit and directed verdict.

Defendant assigns as error the court's instruction No. 8, which reads as follows:

"You are instructed that if you believe from a preponderance of the evidence that it was usual and customary in the shop in which the deceased, Robert Lewis, was employed, and in shops doing similar work, to remove the float from the acetylene tank, and to likewise remove the carbide and water so that gas would not be generated in the acetylene tank before machinists such as the deceased were required

to work in, around, and about the same, and further believe from a preponderance of the evidence that such precautions were necessary in the exercise of ordinary care, and that a reasonably prudent person under like conditions would in the exercise of reasonable care have exercised such precautions, then you are instructed that it was the duty of the railroad company to use reasonable care to remove the float from the acetylene tank and to remove the carbide and water and take such precautions as a reasonably prudent person in the same line of work would take to prevent gas from being generated in said tank; and, if you find that the defendant failed to take such precautions and as a result thereof an explosion occurred, and that by reason of the explosion the deceased met with his death, then you are instructed that the railroad company would be negligent."

This instruction is assailed on two grounds: (1) What was usually or customarily done around other shops is immaterial; (2) the trial court told the jury, as matter of law, that certain facts constituted negligence, and thereby invaded the province of the jury.

[7] It is undoubtedly true that the defendant should not be bound by the practice or custom of other shops, and if that had been the only test submitted by the instruction there might be some ground for defendant's objection. But the instruction reads:

"If you believe from a preponderance of the evidence that it was usual and customary in the shop in which the deceased, Robert Lewis, was employed, and in shops doing similar work" etc. (Italics ours.)

It thus appears that the court imposed upon the jury the duty of finding that other shops, as well as that of defendant, adopted a certain custom in doing their work, thereby rendering the plaintiff's chances to obtain a favorable verdict more precarious than it would have been if the proof had been limited to the custom in defendant's shop. Defendant certainly was not prejudiced as far as that feature of the instruction was concerned.

[8] It is contended, however, that the jury were instructed that certain facts constituted negligence, and that the court thereby invaded the province of the jury. In support of this contention many cases are cited: *Smith v. Cummings*, 39 Utah, 306, 117 Pac. 38, Ann. Cas. 1913E, 129; *Ryan v. U. P. R. Co.*, 46 Utah, 530; *Ill. Cent. R. Co. v. Griffin*, 184 Ill. 9, 56 N. E. 337; *Memphis St. Ry. Co. v. Haynes*, 112 Tenn. 712, 81 S. W. 374; *St. Louis & S. W. Ry. Co. v. Gill* (Tex. Civ. App.) 55 S. W. 386; *C. & B. & Q. R. Co. v. Kraysenbuhl*, 65 Neb. 889, 91 N. W. 880, 59 L. R. A. 920.

In *Smith v. Cummings*, supra, the trial court assumed to instruct the jury that certain facts, if established, constituted prima facie ownership in the plaintiff. This court held that the instruction was prejudicial error. If as matter of law the facts stated had constituted prima facie ownership in the plaintiff, this court would not have reversed the judgment. That, in our opinion, is the controlling distinction between that case and the case at bar.

In *Ryan v. Railroad*, supra, the trial court assumed to instruct the jury concerning the weight that should be given to certain facts. This court reversed the judgment. These cases are clearly distinguished from the instant case. So are the cases cited by defendant from other jurisdictions.

A close analysis of the instruction to which objection is made discloses the fact that only such conduct or omissions of defendant are said to constitute negligence as should be declared negligent as matter of law. The jury were told in substance that if they believed from a preponderance of the evidence that it was the custom in defendant's shop, and other shops engaged in similar work, to use certain precautions (specifically naming them), and "further believed from a preponderance of the evidence that such precautions were necessary in the exercise of ordinary care, and that a reasonably prudent person under like conditions would in the exercise of reasonable care, have exercised such precautions," then it was the duty of the defendant to adopt such precautions, and if it did not do so, and an explosion occurred resulting in death, the defendant company would be negligent. (Italics ours.)

It is quite manifest from the analysis we have made that the court did not *unqualifiedly* instruct the jury that certain conduct or omissions of defendant would constitute negligence. *The jury were given the right to determine whether the precautions referred to were necessary in the exercise of ordinary care.* If the jury found they were necessary, then they were instructed that the failure of the defendant to adopt such precautions would constitute negligence. The language in italics so qualifies the entire instruction as to leave to the jury the determination of every fact and the weight that should be given to it in arriving at their verdict.

We find no error in the record. The judgment of the trial court is affirmed, with costs.

CORFMAN, C. J., and WEBER, GIDEON, and FRICK, JJ., concur.

TRYONE KNITTING MILLS v. RUBIN.
(No. 2562.)(Supreme Court of New Mexico. Oct. 6,
1921.)*(Syllabus by the Court.)*1. Payment \S 65(6)—Burden of proof is upon party interposing plea of payment.

The plea of payment is an affirmative defense, and the burden of proof is upon the party interposing this plea.

2. Sales \S 357(2)—Judgment rendered plaintiff where defendant acknowledges receipt of goods, alleges payment, but introduces no proof thereof.

Where in a suit for a balance due for goods sold and delivered, the defendant acknowledges the receipt of the goods and their value as alleged, pleads payment, but fails to introduce evidence in support of his plea, judgment for the amount sued upon is properly given for the plaintiff.

Appeal from District Court, Chaves County; Brice, Judge.

Action by the Tryone Knitting Mills against Barney Rubin in the justice court, where judgment was rendered against the defendant, and on appeal to the district court and trial de novo judgment was again rendered for the plaintiff, and the defendant appeals. Affirmed.

J. C. Gilbert, of Roswell, for appellant.

Alexander J. Nisbet, of Long Beach, Cal., for appellee.

RAYNOLDS, J. This case originated in the justice of the peace court, precinct No. 1 of Chaves county, N. M., where judgment was rendered against the appellant in the sum of \$150, balance due for goods sold and delivered. Plaintiff alleged the original bill was for \$284, on which \$114 had been paid. An appeal was taken to the district court, where, upon trial de novo, judgment was again rendered for the appellee, and appellant therefore appealed therefrom to this court.

Appellant assigns four errors which may be considered as two propositions: First, that the court below erred in not sustaining his demurrer to the evidence at the close of the appellant's case: and, second, that the court erred in refusing to make findings of fact and conclusions of law as requested by the appellant, the defendant below.

No written pleadings were filed in the justice or the district court, the defense of the defendant being, as stated on page 21 of the transcript, that the defendant did not owe the account.

In our opinion this case turns upon one proposition. At page 39 of the transcript after the close of the evidence for the plain-

tiff, the defendant by his counsel made the following statement:

"Mr. Gilbert: The contention of the defendant is this: That these were certain goods, amounting to \$284 and some cents, shipped to him by the plaintiff in October and November; that these goods were paid for, each and every one that was shipped; that we do not owe them anything for these goods. We do not deny receiving these goods to that amount."

[1] The defendant introduced no evidence to support his plea of payment. The plea of payment is an affirmative defense and the burden of proof is upon the party interposing this plea. 21 R. O. L. par. 131, and cases cited.

[2] After this admission was made by the defendant, a motion for judgment by the plaintiff for the amount sued for, if made, could have been properly sustained. The court did not therefore err in giving judgment for the plaintiff, when the defendant refused to introduce any evidence of payment after having admitted receiving the goods, and also having admitted that they were of the value alleged by the plaintiff.

As this point is decisive of the whole case the other assignments of error need not be considered.

The judgment is therefore affirmed; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

DOUGLAS FIR LUMBER CO. v. STAR LUMBER CO.
(No. 2498.)(Supreme Court of New Mexico. Oct. 8, 1921.
Rehearing Denied Dec. 2, 1921.)*(Syllabus by the Court.)*

Fraudulent conveyances \S 182(1), 221—"Creditor" in Bulk Sales Law includes one with unexecuted judgment against seller, and he may recover against purchaser where seller is insolvent.

The term "creditor," as used in the Bulk Sales Law (Laws 1915, c. 22), includes one who has obtained a judgment against the seller for his claim, although no execution has been sued out and return made thereon; and such creditor may recover judgment against the purchaser at the sale upon said judgment against the seller, where it is alleged in the complaint in the suit against the purchaser that the seller is insolvent and that the property transferred has been commingled by the purchaser so that it cannot be identified and separated.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Creditor.]

Appeal from District Court, Union County; Lieb, Judge.

Action by the Douglas Fir Lumber Company against the Star Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

F. S. Macy, of Hutchinson, Kan., and Toombs & Taylor, of Clayton, for appellant.
O. P. Easterwood, of Clayton, for appellee.

RAYNOLDS, J. On November 23, 1917, the Clayton Construction Company, a partnership doing business at Clayton, N. M., sold to the Star Lumber Company, the appellant herein, all its merchandise and equipment used in its lumber business at Clayton, N. M. It is conceded that an attempt was made to meet the requirements of the Bulk Sales Law (Laws 1915, c. 22), but that the provisions thereof were not complied with. The purchase price was approximately \$7,000. Part of this money was used in paying some of the creditors of the Clayton Construction Company. The appellee, the Douglas Fir Lumber Company, an Oregon corporation, in October, 1917, sold to the Clayton Construction Company a carload of lumber, in payment of which, on December 31, 1917, a note for \$1,459.22, due in 60 days, with interest at 8 per cent. and attorneys' fees thereon, was given by the construction company to the Douglas Fir Lumber Company. This note not being paid at maturity, suit was brought and judgment recovered against the Clayton Construction Company for \$1,697.48, which sum included interest and attorneys' fees provided in the note. Subsequently the appellee, Douglas Fir Lumber Company, demanded payment of this judgment from the Star Lumber Company, the appellant, and upon refusal brought this suit against said appellant. No execution was sued out against the Clayton Construction Company, but a transcript of the judgment was filed with the recorder of Union county. Upon trial of the case below by the court without a jury judgment was entered in favor of the Douglas Fir Lumber Company against the Star Lumber Company for the amount of its prior judgment against the Clayton Construction Company, with interest, and additional attorneys' fees of \$250 was also allowed in the present suit; the judgment amounting in all to \$1,889.85. The Star Lumber Company appeals to this court from said last-mentioned judgment.

The appellant relies principally upon a demurrer filed by it to the effect that the court was without jurisdiction in a case of this kind; that the complaint did not state facts sufficient to constitute a cause of action, in that appellee, plaintiff below, was in no position to obtain judgment against the appellant, not having exhausted his remedy at law, nor having had an execution returned unsatisfied, nor having obtained a lien on the property transferred to the appellant.

The whole case turns upon the construction of the Bulk Sales Law, namely, chapter 22, Laws 1915, which is as follows:

"Section 1. A sale of any portion of a stock of merchandise, otherwise than in the ordinary course of trade in the regular and usual prosecution of the seller's business, or a sale of an entire stock of merchandise in bulk, shall be void as against the creditors of the seller, unless the seller and the purchaser together shall, at least five (5) days before the sale, make a full detailed inventory, showing the quantity and, so far as possible, with the exercise of reasonable diligence, the cost price to the seller of the various articles to be included in the sale; and unless such purchaser shall, at least five (5) days before the sale, in good faith, make full explicit inquiry of the seller as to the names and places of residence, or places of business, of each and all of the creditors of the seller, and the amount owing each creditor, and obtain from the seller a written answer to such inquiries; and unless such purchaser shall retain such inventory and written answer to his inquiries for at least six months after such sale; and unless the purchaser shall, at least ten (10) days before the sale, in good faith, notify or cause to be notified, personally or by registered mail, each of the seller's creditors of whom the purchaser has knowledge, or can with the exercise of reasonable diligence acquire knowledge, of said proposed sale, and of the said cost price of the merchandise to be sold, and of the price proposed to be paid therefor by the purchaser."

The legislation represented by the above act is of recent origin, but is in force in many states of the United States. The provisions of the law are similar in most instances, and it seems to be conceded that all have for their object the prevention of the sale of goods in bulk until the creditors of the seller have been paid in full. The history of the law, its object, the purpose of its adoption, and construction thereof in many states are found in notes to *Everett Produce Co. v. Smith*, 2 L. R. A. (N. S.) 331, and *McGreenery v. Murphy*, 76 N. H. 338, 82 Atl. 720, 39 L. R. A. (N. S.) 374. It will be noticed by the terms of the statute that when its provisions are not complied with the sale made thereunder is void. Cases construing similar laws in other states are numerous, but the construction given to the law is not uniform. Many states have provisions of law in regard to fraudulent conveyances which are applied to and construed with the Bulk Sales Law, and a uniform or harmonious system is thus brought about. In this state, however, we have no statutory enactments in regard to fraudulent conveyances except as to assignments (chapter 7, Code 1915), which have no application in this case.

The law which we are considering makes no provisions as to the rights of creditors when the terms of the statute are not complied with. In many states a distinction is made between certain classes of creditors,

as, for instance, a lien or judgment creditor being given a right of action in cases where he has made himself a lien or judgment creditor, and denied that right when he is not in such position. See *Kohn v. Fishbach*, 38 Wash. 69, 78 Pac. 199, 104 Am. St. Rep. 941; *Rothchild Bros. v. Trewella*, 38 Wash. 679, 79 Pac. 480, 68 L. R. A. 281, 104 Am. St. Rep. 973. Other states give the creditor a right to sue the purchaser at such a sale and obtain a personal judgment against him, although no lien has been obtained, nor garnishment process sued out. *Daly v. Sumpter Drug Co.*, 127 Tenn. 412, 155 S. W. 167, Ann. Cas. 1914B, 1101. From the language of the act and the apparent purpose thereof, we assume that the governing principle in legislation of this kind is that—

"Courts look with favor upon the rights of creditors, and will afford them every remedy and facility to detect and defeat any effort to defraud them of their just rights, and courts of law and courts of equity generally have concurrent jurisdiction in the matter of affording relief against fraudulent conveyances of debtors." 20 Cyc. 655.

As no distinction is made as to creditors and no remedy is given to them in attempting to collect their claims, many interesting questions arise which are not necessary for the determination of this case but which we note in passing. It is not apparent whether the law favors the diligent creditor who seeks to collect his claim from the purchaser, or whether the purchaser holds the property transferred as a trustee for all the creditors of the seller. To hold the purchaser as a trustee for the amount and value of the property transferred to him for the claims of the creditors of the seller is probably the most equitable method in such a case. Such a holding would be in conformity with the theory of the assignment and bankruptcy laws. But the Legislature has attached no conditions precedent to the creditor's recovery, nor has it determined the liability of the purchaser under such a sale. The word "creditors," as used in the statute, in its broadest sense would include all creditors of the seller from whom assets had been removed out of which they could collect their claims. It would include even mortgagees with deficiency judgments of this class. It would also include claims which might be contingent, and give the right of action to all who had claims at the time when by the transfer or sale the assets of the seller were decreased to such an extent that their accounts or claims could not be paid in full. It would, of course, include all creditors, whether or not they had by process of law attached or garnished the seller or his purchaser and segregated by process certain assets of the seller, out of which they sought to have their claims satisfied. By a broad construction of the law, the transfer from

the seller to the buyer might render the latter liable, not only for the value of the assets transferred to him, but for all the seller's debts, although largely in excess of the property transferred.

We thus see that by the unlimited terms of the statute it would apparently cover many cases not intended by its makers, and we must seek a reasonable construction of it in the case before us.

Where the statute has not been complied with, as has been held by many courts, the sale is voidable only at the instance of any creditor. As between the parties the sale is valid. The sale thus being voidable, it would seemingly follow that the procedure is governed by that applicable to any ordinary transaction voidable because of fraud. Here we have a transfer of personal property subject to execution if it had remained in the hands of the debtor and vendor. It is transferred to the vendee in fraud of the rights of creditors of the vendor. The creditor in this instance is seeking to subject the property to execution, and such would be his remedy if the property were still in the hands of the vendee.

The complaint in this case shows that property of the debtor of much greater value than the indebtedness owing the appellee was transferred to the appellant in violation of the bulk sales statutes and in fraud of the rights of the appellee; that the original debtor was insolvent; that a judgment had been obtained against him; that the original debtor had no property in the state subject to execution; that the appellant had commingled the property with other like property owned by the appellant; and that it was impossible to segregate the property upon which appellee had a right to have execution levied.

Because of these facts appellee asked that the sale be avoided and that it have personal judgment against the appellee for the amount of its claim against the original debtor. It is argued that the demurrer should have been sustained because the complaint failed to show the issuance of execution against the original debtor and its return nulla bona. There is authority to sustain the proposition, but before equitable relief will be afforded by the courts in case of a fraudulent transfer of property by the debtor, it is essential for the complaint to show that he has exhausted his remedies at law; and this fact can be established only by the securing of a judgment, the issuance of an execution, and its return nulla bona. The issuance of the execution and its return nulla bona are, however, only evidence of the fact that the complaint has no adequate remedy at law; and this fact can be established by other evidence as completely and conclusively as by the issuance of the execution and the return thereon. A case fully discussing the proposition is that of *Williams v. Adler Goldman Commission Co.*, decided by the Circuit

Court of Appeals (Eighth Circuit) and reported in 227 Fed. 374, 142 C. O. A. 70. It is there held, and ample authority is cited in support of the holding, that nonresidence of the debtor and his insolvency have each been held sufficient to dispense with prior judgment and execution at law; the first because of the great impracticability, if not impossibility, of proceeding against the debtor in that way, and the second because it stands for what the judgment and execution would conclusively prove, and that insolvency may be shown otherwise than by judgment at law and execution returned nulla bona. See, also, *Case v. Beauregard*, 101 U. S. 688, 25 L. Ed. 1004. See, also, case note to the case of *Ziska v. Ziska*, 23 L. R. A. (N. S.) 85, 88.

We have, then, a complaint which, by proper allegations, shows the utter futility of issuing an execution against the property of the debtor, and that all the property of the debtor originally subject to execution has been transferred in violation of law to the defendant in the case, against whom judgment is sought.

The more troublesome question is as to the right of the appellee to a personal judgment against the appellant for the amount of its claim of judgment against the original debtor. Undoubtedly the property only should be proceeded against if available. In other words, if the fraudulent vendee had in his possession the original property transferred to him by the debtor in violation of the statute, the court could avoid the sale and permit the creditor, or creditors, to levy execution upon and sell the property. But here the showing is that the vendee has either disposed of the property or has commingled it with other like property, and has thus placed it beyond the reach of an execution. Thus by the wrong of the vendee the creditor is deprived of his right to reach the property of the original debtor. Under these circumstances we see no reason why the transferee should not be liable to the creditors of the vendor to the extent of the value of goods taken by him and converted in fraud of their rights. There is ample authority to support such right. *Daly v. Sumpster Drug Co.*, 127 Tenn. 412, 155 S. W. 167, Ann. Cas. 1914B, 1101; *Peters Branch Int. Shoe Co. v. Gunn*, 121 Miss. 679, 83 So. 742; *Marlow v. Ringer*, 79 W. Va. 568, 91 S. E. 386, L. R. A. 1917D, 619; *Armfield v. Saleeby*, 178 N. C. 298, 100 S. E. 611.

Confining ourselves to the case, we have a creditor whose claim against the seller is represented by a promissory note upon which he has obtained judgment. The purchaser has not complied with the Bulk Sales Law, and, the sale being void, no property passes to him. If he has disposed of the property or mingled it with his own so that it cannot be distinguished, he is in possession of money or property which the creditor is entitled to

have applied to the payment of this claim.

The principle point upon which the appellant relies, raised by the demurrer in the lower court and the assignment of error, is that the court had no jurisdiction, because the complaint showed on its face that the plaintiff creditor is not in this case one who is in a position to bring the action against the purchaser. As we have stated, the law does not limit creditors to any one class or kind. We conclude, therefore, that a creditor who has obtained judgment against the seller, and who, in his complaint in a suit against the purchaser upon such judgment, alleges that the seller is insolvent and that the goods transferred have been so commingled by the purchaser that they cannot be identified or separated, may recover judgment against the purchaser, although execution on his first judgment has not been issued and return made thereon. Under such a state of pleadings the insolvency of the seller and the commingling of goods by the purchaser dispense with the necessity of issuing the execution and levy thereunder. The extent of the creditor's recovery, the time at which his right accrues to him, and many similar questions suggest themselves to us, but as no proper exception was taken to these points, and the findings thereon in the lower court are not properly alleged as error here, they are not before us for consideration in this case.

For the reasons above stated, the judgment is affirmed; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

COSHUN v. HURLBURT, Sheriff, et al.

(Supreme Court of Oregon. Nov. 22, 1921.)

1. Constitutional law §104—Taxation §696—Holder of tax certificate had no vested right to 15 per cent. interest on taxes subsequently paid.

Although holder of delinquent tax certificate issued in 1915 had a vested right to receive 15 per cent. interest upon the amount specified in the certificate by reason of L. O. L. § 3693 and subsequent sections, as amended by Laws 1913, p. 338, he had no vested right to receive 15 per cent. interest on taxes paid by him in subsequent years; there being no obligation on his part to pay them.

2. Constitutional law §104—No vested right in interest on delinquent taxes.

A so-called rate of interest on delinquent taxes of 15 per cent. per annum is in fact a penalty, in which there can be no vested right.

3. Taxation §696—Holder of tax certificate not entitled to 15 per cent. interest on subsequently paid taxes.

Laws 1917, p. 434, § 7, amending L. O. L. § 3693, as amended by Laws 1913, p. 338, and re-

ducing from 15 per cent. to 12 per cent. interest to be paid on delinquent taxes, does not exclude from its operation subsequent taxes paid by the holder of a delinquent tax certificate issued prior to its passage.

In Banc.

Appeal from Circuit Court, Multnomah County; John McCourt, Judge.

Action by R. H. Coshum against T. M. Hurlburt, as Sheriff of Multnomah County, and another. Judgment for defendants, and plaintiff appeals. Affirmed.

This is an action for damages against T. M. Hurlburt, sheriff of Multnomah county, and the surety on his official bond, and arises out of the following facts: The plaintiff is the purchaser and holder of a delinquent tax certificate issued to him by the sheriff of Multnomah county on April 6, 1917, based upon taxes for the year 1915, together with interest and penalties assessed and levied against certain real property belonging to Eugenie V. Richet. By the terms of the delinquency certificate the same bore interest at the rate of 15 per cent. per annum from date of issuance. Subsequently the plaintiff paid the taxes for the years 1916 and 1917, which were assessed and levied against the property described in the certificate. Thereafter, on December 10, 1918, I. N. Fleischner as executor duly made application to redeem said property from the lien of plaintiff by virtue of said certificate and taxes, penalties, and interest paid by him as aforesaid; and the sheriff permitted Fleischner to redeem the property in question, upon payment of the amount of the delinquent tax certificate with 15 per cent. interest per annum thereon, together with the payment of amounts of the taxes, penalties, and interest paid by plaintiff subsequent to the issuance of said delinquent tax certificate, with interest on the several amounts at the rate of 12 per cent. per annum from the dates of payment of the several sums. The plaintiff declined to surrender his delinquent tax certificate to the sheriff unless the latter would pay to him 15 per cent. instead of 12 per cent. upon the several sums of money paid as taxes, interest, and penalties in discharge of taxes assessed and levied against the property after the issuance of the delinquent tax certificate held by him, and he brings this action to compel the sheriff to make payment to him upon the basis claimed.

Section 3693, L. O. L., and subsequent sections as amended by an act of the Legislative Assembly of 1913 (chapter 184, Laws 1913) provide that delinquent tax certificates shall bear interest at the rate of 15 per cent. per annum, unless a different rate of interest is bid by the purchaser. The statute requires that upon redemption of the property on which the certificate is issued the person desiring to redeem shall not only pay the

amount of the certificate, with 15 per cent. interest, but shall also pay all taxes, penalties, and interest that the holder of the certificate has paid, with 15 per cent. interest per annum from the date of the several payments. The Legislative Assembly of 1917 amended the statutes mentioned so as to provide interest at the rate of 12 per cent.

The plaintiff contends that the statute of 1917 with a new rate of interest provided therein does not apply to delinquent tax certificates issued prior to the time the amendment went into effect, and that it likewise does not apply to taxes, penalties, and interest paid by a holder of such certificates subsequent to the passage of the act of 1917. This claim is based on two grounds: First, that to give the statute effect to change the rate of interest, even on the sums paid as taxes, penalties, and interest accruing after the passage of the act, would violate the obligation of the contract evidenced by the delinquent tax certificate held by plaintiff; and, second, that the statute by its own terms excludes such certificates and taxes paid by the holder thereof from its operation. This latter claim is founded upon section 7 of the act, which reads as follows:

"Nothing contained herein shall affect the rate of interest on or applicable to certificates of tax delinquency issued prior to the taking effect of this act." Laws 1917; c. 227, page 434.

The facts were not controverted, and a motion by defendants for judgment on the pleadings was sustained, whereupon the plaintiff appealed.

W. L. Brewster, of Portland (Chriss A. Bell, of Portland, on the brief), for appellant.

William H. Hallam, of Portland (Walter H. Evans, Dist. Atty., of Portland, on the brief), for respondents.

McBRIDE, J. (after stating the facts as above). [1] The certificate itself is by analogy at least in the nature of a contract between the county and the purchaser; hence it is but reasonable to hold that such contract cannot be impaired by subsequent legislation so as to deprive the plaintiff of 15 per cent. upon the amount specified in the certificate. As to other taxes paid by him, such payments were purely voluntary, and were not necessary to maintain the integrity of the certificate issued to him. To constitute a vested right in plaintiff to receive 15 per cent. on the amount paid on future taxes, there must have been a corresponding obligation on his part to pay them, which is not the case here. "A vested right must be something more than a mere expectation based upon the anticipated continuance of existing laws; it must have become a title legal or equitable to the present or future enjoyment of property." Black Const. Law, 430; Sutherland, Stat. Const. § 164; Steers v. Kinsey,

68 Ark. 360, 58 S. W. 1050; Brooklyn Union Gas Co. v. City of New York, 115 App. Div. 69, 100 N. Y. Supp. 570.

[2] The so-called interest rate on delinquent taxes is in fact a penalty. Colby v. Medford, 85 Or. 485, 527, 528, 167 Pac. 487. There can be no vested right in a penalty. Anderson v. Byrnes, 122 Cal. 272, 54 Pac. 821; Parmelee v. Lawrence, 48 Ill. 331; Bay City R. Co. v. Austin, 21 Mich. 390.

[3] It is further urged by the plaintiff that section 7 of the act of 1917 (chapter 227, Laws 1917), quoted above, excludes from its operation taxes paid by the holder of a delinquent tax certificate. We are unable to see that the rate of interest on taxes paid after the certificate has issued is "applicable" to such certificate. Had the legislative intent been to continue the rate of 15 per cent. with reference to such taxes, it would have been easy to have said so in unambiguous language. The Legislature evidently considered the exaction of 15 per cent. harsh and oppressive; and, as it has the authority, as we have shown, to remedy this injustice, it is reasonable to suppose, in the absence of express language or necessary implication to the contrary, that it intended to proceed to the full extent of such authority.

As a rule, there are only two classes of people who allow their taxes to become delinquent; those who are ignorant that the taxes are due, and those who are pecuniarily unable to pay. And while some penalty is absolutely necessary to prevent undue delay in payment, we should not give a forced construction to the statute in order to increase the burden upon those who are least able to bear it. A penalty of 12 per cent., double the legal rate of interest, is sufficiently burdensome to induce all who are able to do so to pay promptly, and such considerations we think were in the contemplation of the Legislature when the act of 1917 was passed.

The judgment of the circuit court is affirmed.

McCOURT, J., took no part in the hearing or decision of this case.

HEISLEY et ux. v. EASTMAN et al.

(Supreme Court of Oregon. Nov. 22, 1921.)

1. Waters and water courses §157—Purchaser with notice cannot revoke license if vendor could not.

Where a grantee had notice of oral permission by the grantor to a third person to lay a drain across the property, the grantee could not revoke such permission if, in the same circumstances, the grantor could not.

2. Waters and water courses §158½(1)—License to lay drain held subject to condition.

Evidence held to show that an oral license from an owner of land to lay a drain across the land was on condition that the drain should be so maintained as not to interfere with any use which the owner or his assigns might make of the land.

3. Waters and water courses §158½(1)—Evidence held not to show violation of condition of license.

Evidence held not to show that plaintiffs, who had a license from defendant's grantor to maintain a drain on condition that it should be so maintained as not to interfere with the use of the property, refused to lower the drain, but to show that they were willing to lower the drain and so maintain it as not to interfere with defendant's foundry.

4. Waters and water courses §158½(1)—Owner held liable for damages from plugging drain.

Where plaintiffs, having a license to maintain a drain across defendant's property, did not violate the condition of the license, but plaintiffs removed part of the tile and plugged up the drain, causing water to back into plaintiffs' basement, they were liable for the damages thereby caused unless the license was revocable.

5. Waters and water courses §157—Revocable license may be revoked notwithstanding licensee's expenditures.

If permission from a landowner to maintain a drain across the land amounted only to a revocable license, a subsequent owner of the land had the right to revoke the license, though the licensee had not violated its conditions, and though they had acted on the license and expended a large sum of money for improvements, the value of which would be materially lessened if the right of drainage was terminated.

6. Waters and water courses §157—Irrevocable license not subject to termination.

If a license to maintain a drain across land was an irrevocable license, the right could not be terminated without the licensee's consent, so long as they exercised their right of drainage in conformity with the permission granted them.

7. Licenses §58(1)—Passive acquiescence in improvements does not create irrevocable license.

Passive acquiescence in the expenditure of large sums of money and the making of valuable improvements is not enough to create an irrevocable license.

8. Waters and water courses §157—Express gratuitous permission sufficient to create irrevocable license.

An express gratuitous oral permission to maintain a drain across land is sufficient to create an irrevocable license by way of equitable estoppel, when acted upon by the making of valuable improvements which would be lost or materially impaired by the termination of the license, though unaccompanied by the accrual of any benefit to the licensor or partici-

pation by him in the making of the improvements.

9. Waters and water courses \Leftrightarrow 158½(2)—
Complaint held to support decree on theory of irrevocable license by way of estoppel.

In a suit to enjoin interference with a drain laid across defendant's land, a complaint, alleging that defendant's grantor gave plaintiffs a perpetual right of way, and that in accordance with the agreement they laid the drain, held sufficient to support a decree on the theory of an irrevocable license amounting to an easement by way of equitable estoppel.

10. Waters and water courses \Leftrightarrow 157—Licensee held bound to lower drain, but entitled to enter on property for that purpose.

Where a license to maintain a drain across another's land was on condition that the drain should be so maintained as not to interfere with any use of the land, the licensee was bound to lower the drain to avoid interference with the use of a foundry on the land subject to the license, or else forfeit their right to maintain the drain, but in order to lower it were entitled to enter upon the property.

Department 1.

Appeal from Circuit Court, Marion County; George G. Bingham, Judge.

Suit by O. F. Heisley and wife against L. C. Eastman and others. From a decree for plaintiffs, defendants appeal. Affirmed and remanded for directions by lower court.

This suit was brought by O. F. Heisley and his wife, S. Etta Heisley, against L. C. Eastman, C. J. Johnson, and the latter's wife, Edna L. Johnson, for damages, and to enjoin the defendants from interfering with a drain laid across land now owned by Eastman and now occupied by the Johnsons as tenants. A trial resulted in a decree enjoining the defendants from interfering with the drain, awarding the plaintiffs \$190 as damages on account of past interference with the drain, and permitting the plaintiffs to enter upon the land owned by Eastman in order to repair the drain and to lower it if necessary "to make it of its former efficiency, not exceeding two feet below the basement floor." The plaintiffs own and maintain a hospital in Silverton. Fisk street, which extends north and south, is adjacent to and east of the hospital. East of Fisk street is lot 12, and adjoining lot 12 on the east is Silver creek. There is a tile drain embedded in the ground and extending from the basement of the hospital easterly across Fisk street, thence across lot 12 to Silver creek. This tile drain is between 200 and 300 feet in length. Eastman now owns, and since March 6, 1920, has owned, approximately the east half of lot 12, while the remainder or west half of lot 12 is now owned by J. M. Brown. On January 3, 1921, the drain was plugged up at a point on the Eastman premises; and

upon the refusal of the defendants to permit the plaintiffs to remove the plug and repair the drain the plaintiffs began this suit.

In substance the plaintiffs allege in their complaint that the defendants maliciously broke the drain and stopped the flow of water, causing the basement of the hospital to be flooded and the fires in the furnace to be extinguished, to the damage of the plaintiffs; that the defendants forcibly prevented the plaintiffs from removing the obstructions placed by them in the drain, and that they will continue to do so unless restrained by the court. The complaint concludes with a prayer for a decree commanding the defendants to allow the plaintiffs to enter upon the Eastman premises and restore the drain to its former condition, and enjoining the defendants from interfering with the drain and allowing the plaintiffs damages.

Eastman filed a separate answer in which he avers that Brown gave to the plaintiffs, without limitation of time, oral permission to lay through lot 12 a tile drain leading from the hospital to Silver creek; that the permission was given by Brown without the payment of any consideration, but with the express agreement that the drain should be so laid "and from time to time maintained that the same and the use thereof should never in any manner interfere with any use which the said licensor [Brown] and his assigns should desire to put said property"; that thereafter Brown deeded approximately the east half of lot 12 to Eastman; that Eastman constructed a foundry on the premises purchased by him; that in order to enable Eastman to use the premises for a foundry it was necessary that the drain be lowered; that Eastman requested the plaintiffs to lower the drain, but they refused to do so; that thereafter during the winter season of 1920 the plaintiffs collected and discharged large quantities of water through the drain and upon the Eastman premises, weakening the building and destroying parts of it, and flooding the floor of the foundry to the damage of the tenants and Eastman; that the plaintiffs refused to take steps to prevent the flooding, although they were fully aware of existing conditions; that on account of the alleged flooding of the premises and the refusal of the plaintiffs to remedy conditions and their alleged violation of the condition attaching to the license, Eastman on September 24, 1920, by notice in writing terminated the license to maintain the drain across his premises. Eastman concludes his answer with a prayer for a decree enjoining plaintiffs from discharging water upon his premises and for damages caused by flooding the foundry. The Johnsons answered by alleging that they are partners engaged in the foundry business under the name of Silverton Foundry Company, and

that since May 1, 1920, they have been in possession of the Eastman premises, and "have been and are now operating and conducting on said premises an iron and brass foundry and a molding and pattern shop." The Johnsons aver that during the months of November and December in 1920 and the month of January, 1921, the plaintiffs collected and discharged large quantities of water in the foundry, and flooded the floor to their damage. The Johnsons concluded their answer with a prayer for a decree, enjoining the plaintiffs from discharging water upon the foundry premises and for damages. The allegations in the two answers, relied upon by the defendants for affirmative relief, were denied by the plaintiffs.

John H. McNary, of Salem, and Custer E. Ross, of Silverton, for appellants.

L. J. Adams, of Silverton, and L. H. McMahon, of Salem, for respondents.

HARRIS, J. (after stating the facts as above). The plaintiffs purchased their land about five years ago. There was a building on the premises at the time of the purchase, and as we understand the record the plaintiffs began to use the building as a hospital soon after acquiring the property. In about December, 1918, or January, 1919, the plaintiffs concluded to enlarge the hospital by digging a basement and adding 17 rooms and 4 large porches. When the plaintiffs began the work of excavation for the basement they at once discovered that water would accumulate in any basement that might be dug, and that some provision for drainage must be made, or else the basement when dug would be useless. With water in the basement it would be impossible to keep fire in any furnace that might be installed, or to make any other use of the basement; and so the plaintiffs immediately looked about for a way over which to lay a drain to Silver creek. The plaintiffs sought permission from one person, who apparently did not wish to allow the laying of a drain on his premises, and thereupon the plaintiffs requested Brown to permit a drain to be laid across lot 12. At that time, probably January, 1919, Brown owned the whole of lot 12. Brown granted permission, and thereupon the plaintiffs laid a 4-inch tile drain from their premises across Fisk street and thence across lot 12 to Silver creek. The basement was then excavated, a furnace was installed for the purpose of heating the hospital, and the building was enlarged in conformity with the original plans. The line of 4-inch tile which extended from the basement to Silver creek efficiently drained the basement, and, except on one occasion when a stick of wood entered and became fastened in the drain, the basement was kept free from water until January 3, 1921.

[1] On March 6, 1920, Brown sold approximately the east half of lot 12 to Eastman. Brown informed Eastman of the existence of the drain and advised him of the agreement concerning the maintenance of it, and hence Eastman cannot revoke the permission granted to the plaintiffs if in the same circumstances Brown could not. *Shaw v. Proffitt*, 57 Or. 192, 217, 109 Pac. 584, 110 Pac. 1092, Ann. Cas. 1913A, 63. On about March 19, 1920, Eastman began the construction of the foundry building on the land purchased by him; and on about May 1, 1920, the defendants C. J. Johnson and his then partner Felice took possession of the premises pursuant to a verbal agreement of lease made with Eastman. In July, 1920, Felice sold his interest to C. J. Johnson, and since that time the Johnsons have operated the foundry.

When the foundry was built the drain had, of course, been already laid in a ditch dug for it, and then covered over with earth. The drain was laid along the south side of lot 12 until a point near the east end of the lot was reached, and there the line of tile diverges slightly from the south side of the lot. O. F. Heasley explains this departure by saying that—

"Mr. Brown stated that I could keep to the southern portion, and I did, until I got down to the other end of the lot, and there was so many bushes there I got permission to go around those bushes. Being as they never expected to build on that end, we did not keep strictly to the south and next to the creek, but, excepting as to the bushes, we kept to the south end as he requested."

The east end of lot 12 inclines towards the creek. The foundry was built over the drain, so that the drain enters the foundry near the southwest corner of the building and passes out beneath the east side of the building. When the ground was prepared for the foundry it was necessary to remove earth from the west side of the area upon which the building was to be placed and to fill in the east side of such area in order to secure a level surface; and this resulted in putting the drain deeper beneath the floor on the east side of the building and bringing it nearer the surface of the floor at the southwest corner at the point where the tile enters beneath the building. The foundry floor is of earth, as no other kind of floor is suitable.

According to one witness the floor is slightly lower near the southwest corner of the building than elsewhere. The top of the drain is between 2 and 4 inches from the surface of the floor near the southwest corner; and according to one witness this is the condition for about 3 feet along the drain, while, according to another witness, the depth of the floor covering the drain is "not over 2 inches" for a distance of "6 or 8 feet, probably 10." At some time between May

1 and July, 1920, Felice did some work inside the foundry and near the southwest corner of the building, with a view of installing a brass furnace. O. J. Johnson testified that—

After he and Felice took possession of the foundry Felice "started work to construct a brass furnace, and in excavating for it he came on this pipe with a pick and made a hole in the pipe. It is about two inches below the floor there. * * * He bent a piece of tin lid over the hole and put earth over the top."

This break in the tile caused by the pick in the hands of Felice was "in the southwest corner of the building."

It is admitted by all parties that Brown gave the plaintiffs permission to lay a drain across lot 12; and it is also admitted that no time limit was placed upon the right of the plaintiffs to maintain the drain. In other words, Brown understood that he was giving to the Heisleys, and they understood that they were receiving the right perpetually to maintain the drain across lot 12.

[2] It is contended, however, by the defendants that permission to maintain the drain was upon the condition that the plaintiffs should so maintain it as not to interfere with any use which Brown or his assigns might wish to make of the land; that the plaintiffs violated this condition imposed by Brown; and that therefore the plaintiffs forfeited the right to maintain the drain. The plaintiffs say that when Brown granted permission to lay the drain nothing was said about the location of the drain or the manner in which it should be maintained, except that it should be laid along the south side of the lot. The plaintiffs also say that, even though it is held that permission to lay the drain was given by Brown upon the condition alleged in the answer, the condition has not been violated by them, and that therefore the right to maintain the drain cannot be revoked.

Brown testified:

"I granted them the privilege of laying a drainpipe through lot No. 12 * * * so long as he was to keep it in condition so it would not interfere with the surface use of the property, or the use of the owner, whatever you may call it. * * * I gave him the privilege of going through there."

Brown also testified—

That it was his understanding that Heisley could "stay * * * as long as he maintained it and did it without interference of the property; that he had the right to let it drain through there, but whenever he didn't why then that terminated. * * * My understanding was that could be maintained there perpetually as long as it did not interfere with the property. That was the essence of the whole thing; it must not interfere with the property."

Our conclusion is that by the clear weight of the evidence the permission given by Brown was upon the condition as stated by him. There were no buildings on the lot at the time permission was granted; but that the future construction of buildings was considered is made evident by the fact that the drain was placed along the south line so that interference with future building would be avoided as much as possible. Brown was not paid for the privilege, and it is not likely that he would have granted such a privilege gratuitously without protecting himself by an agreement that the drain be so maintained as not to interfere with the future use of the lot. Brown was called by the plaintiffs as their witness, and hence they have vouched for his credibility. It is a significant fact, too, that according to O. F. Heisley's own testimony the plaintiffs were willing to lower the drain or to change it, not only when the foundry was in course of construction, but also on December 12, 1920, as well as subsequently; and this avowed willingness to lower or alter the drain is strong evidence of a recognition by the plaintiffs of a duty on their part to lower the drain or alter its location if necessary to avoid interference with Eastman's use of his own property.

[3] Having concluded that the right of maintenance is conditional, we now inquire whether the condition has been violated. Eastman says that on March 19, 1920, he addressed a letter to O. F. Heisley, informing the latter that Eastman would "at once" begin the construction of a foundry, and requesting Heisley to lower the drain so that "it will be at least 2 feet below the finished floor of the foundry." Heisley says that he never received the letter. Eastman claims that a few days afterwards he saw Heisley, and that when he verbally requested Heisley to lower the drain the latter refused. Heisley claims that he did not refuse to lower the drain. The evidence is in hopeless conflict; but we do not think that the evidence warrants us in finding that the plaintiffs refused to lower the drain. O. F. Heisley says that Eastman requested him to "see the contractor," and that if the drain "was in his way, I should lower it;" that he did see the contractor, and that the latter said "it is not in the way, and you won't have to lower it." Arnett, the contractor, was not called as a witness, and it is fair to assume that if Heisley did not have a conversation with Arnett as related by him, the defendants would have called Arnett to contradict the testimony of Heisley. Arnett was not called as a witness. Nor can we overlook the fact that Eastman said nothing more to Heisley about the drain, and made no complaint whatever until December 12, 1920. Nor can it be forgotten that when Felice broke the

drain with his pick he immediately repaired the break with some tin, and then covered it with earth, and neither the tenants nor the landlord made any complaint to Helsley or demanded that the drain be lowered or removed or discontinued. There is no evidence in the record indicating that Eastman or his tenants said anything more to the plaintiffs about the location or condition of the drain until December 12, 1920.

On a Sunday in December, 1920, Eastman had occasion to enter the foundry, and upon doing so found that water was being discharged from the drain onto the floor. Eastman says that December 19th was the date, but the plaintiffs and another witness say that December 12th was the date. At any rate, on this occasion Eastman found water discharging from the drain at a point near the southwest corner of the foundry, and we think the evidence fully warrants the conclusion that the point of discharge was the place where Felice had broken the tile with his pick; and we also think the evidence supports the inference that the break made by Felice was the proximate cause of the water appearing on the foundry floor on December 12, 1920. When testifying as a witness in opposition to the application for a preliminary injunction Eastman stated: "The water was oozing out there (the place where Felice broke the tile)." Eastman further testified at the trial that the tile "was broken when I went over to it." Eastman enlarged the break and took out some of the tile, and with a sack plugged up one end of the break so as to stop the flow of water from the hospital, but left part of the break open so that the water could be drained out of the foundry and into Silver creek. Eastman says that there was an obstruction between the break in the tile and the creek; that he cleared the drain of the obstruction with a rod and a wire; and that he "got something out of it." According to the testimony of Eastman, after the drain was cleared of the obstruction, the floor was soon freed from the water on it.

Eastman notified the plaintiffs by telephone that the drain was flooding the foundry floor. O. F. Helsley at once went to the foundry, and upon his arrival offered to lower the drain. According to the testimony of Fred Peek:

"Helsley asked him [Eastman] if he could lower the tile, and he said he would be willing to put workmen in there next morning and lower the tile as deep as he said, so deep enough that it would be for all times out of the way, if he would allow him to do it. Mr. Eastman said he could not say, because he would have to see Mr. Johnson first."

The plug was permitted to remain in the tile for only a short time, and was removed

before the water backed up and accumulated in the basement of the hospital.

The plaintiffs did not lower the drain for the reason that they were not permitted to enter the foundry. Under date of December 20, 1920, Eastman addressed a letter to O. F. Helsley, saying:

"After having considered your proposition of running a new drainpipe across the foundry floor I would rather not have it there at all, but should you prefer to construct it in a manner suitable to Mr. Johnson, I will sell you a right of way across the property for \$100. If this should not be acceptable to you, please discontinue before January 1, 1921, the use of my property for your drainage."

On December 24, 1920, Eastman sent O. F. Helsley a letter notifying the latter that, "I * * * do hereby terminate your right to use" the drain. Notwithstanding the letter of December 24th the water continued to run through the drain until January 3, 1921.

O. J. Johnson plugged up the drain on January 3, 1921, because he says the foundry floor was being flooded with water from the drain. Plugging the drain caused water to accumulate in the basement of the hospital to a depth of over 20 inches. The fire in the furnace was extinguished. The plaintiffs were obliged to purchase and use oil stoves and another kind of stove in the hospital. There were patients confined to their beds in the hospital. The rooms could not be kept comfortable with the stoves. This condition produced much annoyance and some distress. O. F. Helsley went to the foundry and, according to the testimony of a disinterested witness, he "called Mr. Johnson before him and told him he was willing to open up the drain, but Mr. Eastman would not let him." The plaintiffs were unable to use the furnace in the basement until about January 14, 1921. The defendants kept the drain plugged up and refused to permit the plaintiffs to enter upon the premises to repair or lower the drain. The plaintiffs then uncovered the drain at a point immediately west of the foundry, and the tile was broken and the water there discharged from the drain, with the result that the water so discharged damaged the foundry. If, however, the defendants had permitted the plaintiffs to repair the drain, no damages would have been suffered by them. The plaintiffs advised the defendants that it would be necessary to discharge the water from the drain west of the foundry unless the plaintiffs were permitted to enter upon the Eastman premises and repair the drain.

The plaintiffs began this suit about or soon after January 14, 1921, and upon their application a preliminary injunction was granted, restraining the defendants from interfering with the drain. Since the issuance of the preliminary injunction, so far as is disclosed

by the record, the basement has been free from water and the foundry has been dry. O. F. Heisley admits that one night during a telephonic conversation he "told them" that he would not lower the drain; but he further said that—

"The next day I went down and seen them, and we partly made arrangements to lower the drain and run it over to another part of the foundry and put in a couple of elbows."

We infer that this telephonic conversation occurred at some time between December 12 and December 20, when all parties were apparently much embittered. We think, however, that the evidence shows that the plaintiffs were willing to lower the drain when the foundry was constructed, and also on December 12, 1920, and on January 3, 1921.

[4-7] Having concluded, as we have, that the permission given by Brown was granted on condition that the drain be so maintained as not to interfere with any use which Brown or his assigns might make of lot 12, Eastman was entitled to revoke the right to maintain the drain across his premises if the plaintiffs violated the condition upon which their right was granted and held. Having concluded, however, as we have, that the plaintiffs did not violate the condition of their right of drainage, but that they were willing to lower the drain and so maintain it as not to interfere with the foundry, it follows that the defendants must respond in damages for the loss caused by water in the hospital basement, unless it can be said that the permission granted by Brown did not constitute an irrevocable license. If the permission granted by Brown amounted to no more than a revocable license, although acted upon and followed by the expenditure of a large sum of money for improvements, the value of which will be materially lessened if the right of drainage is terminated, then Eastman had the right to revoke the license, even though the plaintiffs did not violate the condition upon which the license was given. If, on the other hand, the facts produced an irrevocable license, the right acquired by the plaintiffs cannot be terminated without their consent, so long as they exercise their right of drainage in conformity with the permission granted them. Although it was once ruled that passive acquiescence in the expenditure of large sums of money and the making of valuable improvements produced an implied license (*Curtis v. La Grande Water Co.*, 20 Or. 34, 23 Pac. 808, 25 Pac. 378, 10 L. R. A. 484), this rule was later repudiated, and it is now settled that passive acquiescence in the making of improvements is not enough to create an irrevocable license (*Ewing v. Rhea*, 37 Or. 583, 587, 62 Pac. 790, 52 L. R. A. 140, 82 Am. St. Rep. 783). In the instant case there was an express permis-

sion, and, therefore, if the other elements necessary to constitute an irrevocable license are present, then the plaintiffs have a right which is revocable only when they fail to observe the condition upon which the right was granted.

[8] But it is argued that an oral, gratuitous permission, although followed by the making of substantial improvements upon the faith of such permission, cannot result in an irrevocable license unless it is also shown: (1) That a consideration was paid to the licensor; or (2) that a benefit accrued or does accrue to the licensor from the exercise of the license; or (3) that the licensor participated with the licensee in a common enterprise in making the improvement. The defendants take the position that a mere naked, although express, permission to allow a drain, even though acted upon by the making of valuable improvements, cannot produce an irrevocable license. No consideration was paid to Brown; nor did he participate in laying the drain. Brown testified that the pipe "drained the other part of the lot; if there was any surface water it would carry it away there too"; and yet he also testified that it did not make any difference to him "whether the part of the lot was drained or not so far as" he was not using it. Possibly this benefit in the circumstances found here would be sufficient to bring the instant case within that class of precedents which hold that an accruing benefit is sufficient, as in *McPhee v. Kelsey*, 44 Or. 193, 200, 74 Pac. 401, 75 Pac. 713; *Sumpter Ry. Co. v. Gardner*, 49 Or. 412, 416, 90 Pac. 499; *Shaw v. Prott*, 57 Or. 192, 204, 109 Pac. 642, 110 Pac. 1092, Ann. Cas. 1913A, 63; and yet we cannot ignore the fact that neither Brown nor Heisley had in mind any notion of a benefit to lot 12 when the permission was granted. Moreover, we do not understand that Brown or the Heisleys contemplated that the latter were obliged to lay or maintain an "open" tile drain. Indeed, we infer from the record that it would have been entirely satisfactory to Brown if the plaintiffs had laid a drain made of iron pipe, and in that event the drain would not and could not benefit any part of lot 12. Furthermore, if subsequently it should become necessary, in order to comply with the conditions attached to the right of drainage, to remove the open tile and lay iron or other pipe impervious to water, no benefit could accrue to lot 12. We therefore deem it appropriate to ascertain whether a naked express and gratuitous permission is enough when executed to create an irrevocable license.

The authorities are in hopeless and irreconcilable conflict upon the question as to whether an oral license becomes irrevocable when acted upon by the making of valuable improvements which would be lost or

materially impaired if the license should be terminated. See note in 31 Am. St. Rep. 712. Stated broadly, it may be said that the authorities can be divided into two classes: One holding that an oral license is revocable at the will of the licensor, regardless of the expenditures made by the licensee; and the other holding that such a license may become irrevocable if executed. Unquestionably a majority of the courts have ruled that an oral gratuitous license is revocable, on the theory that to decide otherwise is to override the statute of frauds. The precedents forming the other or minority class proceed upon different theories; some going upon the ground that when the licensee expends large sums of money in making an improvement the license becomes executed so that what was at its inception a license is ultimately transformed into a grant; and others going on the ground of equitable estoppel and holding that a court of equity will not permit the licensor to cloak himself with the statute of frauds, and under its cover perpetrate a fraud upon the licensee by revoking the license, upon the faith of which the licensee has made valuable improvements which he would not have made without such license. 17 R. C. L. 579.

In the final analysis the doctrine of equitable estoppel furnishes the foundation for probably the larger portion of the cases belonging to the minority class. *Stoner v. Zucker*, 148 Cal. 516, 83 Pac. 808, 113 Am. St. Rep. 301, 7 Ann. Cas. 706; *Gyra v. Windler*, 40 Colo. 366, 91 Pac. 36, 13 Ann. Cas. 843; 25 Cyc. 646; 1 Williston on Contracts, 311. This jurisdiction must, because of many prior adjudications, be placed in the second or minority class of cases; and here, as in most other jurisdictions belonging to the minority class, the doctrine of equitable estoppel is recognized as the basis for holding an oral license to be irrevocable. *Curtis v. La Grande Water Co.*, 20 Or. 34, 44, 23 Pac. 808, 810, 25 Pac. 378, 10 L. R. A. 484; *McBroom v. Thompson*, 25 Or. 559, 566, 37 Pac. 57, 42 Am. St. Rep. 806; *Shaw v. Proffitt*, 57 Or. 192, 212, 109 Pac. 584, 110 Pac. 1092, Ann. Cas. 1913A, 63; *Kelsey v. Bertram*, 63 Or. 563, 565, 127 Pac. 777.

In *Fraser v. Portland*, 81 Or. 92, 96, 158 Pac. 514, 9 A. L. R. 614, we directed attention to the fact that some of our precedents appeared to give support to the doctrine that an express oral permission, if acted upon, would be sufficient to create an irrevocable license, but that other precedents contained language indicating the necessity of the payment of a consideration or the accrual of a benefit to the licensor. Neither the payment of a consideration nor the accrual of a benefit to the licensor nor participation by the licensor in the making of improvements meets the requirements of the statute of frauds where land is involved; for the pres-

ence of either one of these three elements, even though combined with the fact that, acting upon the faith of an express oral permission, valuable improvements have been made does not enable the licensee to say that he has met the requirements of the statute of frauds, but it does enable the licensee to call upon a court of equity to say to the licensor: "You are estopped to perpetrate a fraud through the aid of the statute of frauds." It must be conceded that in this jurisdiction participation by the licensor in a common enterprise may, when combined with other requisite elements, produce an irrevocable license amounting substantially to an easement. A gratuitous oral permission, standing alone, may be just as influential upon the conduct of the licensee as an express permission, plus participation by the licensor. In many instances the fact that a consideration is paid, or the fact that a benefit accrues to the licensor, or the fact that the licensor participated in making the improvements may of itself furnish all the more reason for applying the doctrine of equitable estoppel; but so long as it is held that participation by the licensor is sufficient to work an estoppel, it cannot be logically or consistently held that an express gratuitous permission, although unaccompanied by participation or the payment of a consideration or the accrual of a benefit to the licensor, is not enough to create an equitable estoppel.

Nothing that was said in *Curtis v. La Grande Water Co.*, 20 Or. 34, 23 Pac. 808, 25 Pac. 378, 10 L. R. A. 484, was subsequently overruled, except the holding concerning passive acquiescence. In not one of the precedents cited in *Fraser v. Portland*, 81 Or. 92, 158 Pac. 514, 9 A. L. R. 614, was it necessary for the court to decide whether an express gratuitous permission was insufficient to produce an irrevocable license, for every one of those cases dealt with a situation where a consideration was paid to or received by the licensor, or a benefit accrued to him, or he participated, or he did nothing more than passively to acquiesce; and, indeed, in not one of those precedents was it squarely held that an express oral permission, even though executed by the making of valuable improvements, could not produce an estoppel. The majority opinion rendered in *Shaw v. Proffitt*, 57 Or. 92, 109 Pac. 584, Ann. Cas. 1913A, 63, and especially the opinion rendered on the petition for a rehearing, makes it clear that this court at that time entertained the view that the doctrine announced and applied in *Curtis v. La Grande Water Co.*, 20 Or. 34, 23 Pac. 808, 810, 25 Pac. 378, 10 L. R. A. 484, was still in force, except so far as that precedent had declared that passive acquiescence produced an irrevocable license. The facts in *Ewing v. Rhea*, 37 Or. 583, 62 Pac. 790, 52 L. R. A. 140, 82 Am. St. Rep. 783, where the doctrine of pas-

sive acquiescence was expressly overruled, and in *Lavery v. Arnold*, 36 Or. 84, 57 Pac. 906, 58 Pac. 524, furnished in each instance a pure example of passive acquiescence. After an examination of our own precedents and a consideration of the conclusions announced in them, and after an analysis of the reasons assigned for those conclusions, it is our view that neither the direct payment of a consideration nor the accrual of a benefit to the licensor nor participation by the licensor is a *sine qua non*, although these elements, when present either singly or in combination, may strengthen the right of a licensee to invoke the aid of a court of equity to prevent the perpetration of a fraud upon him. An oral and gratuitous permission, when acted upon by the expenditure of a considerable sum of money in the construction of valuable improvements, which have been made on the faith of such permission and would not have been made in the absence of such permission, and would be either destroyed or materially lessened in value by a revocation of such permission, presents a situation making the doctrine of equitable estoppel peculiarly applicable, especially when the limits of that doctrine are measured by the reasoning employed in our own precedents upon the subject of oral licenses; and this conclusion is in harmony with the views expressed by some other courts. *Rerrick v. Kern*, 14 Serg. & R. (Pa.) 267, 16 Am. Dec. 497; *Stoner v. Zucker*, 148 Cal. 516, 83 Pac. 806, 113 Am. St. Rep. 301, 7 Ann. Cas. 706; 1 *Williston on Contracts*, 311; 17 R. C. L. 576, 579.

In the instant case the plaintiffs made valuable and extensive improvements on the faith of the permission granted by Brown, and if such permission so acted upon is revoked the value of the improvements will be materially impaired. The plaintiffs now have a license amounting in substance to an easement which is revocable only if the plain-

tiffs refuse to comply with the condition imposed on them by Brown.

[8] The defendants contend that the second amended complaint is insufficient to support a decree for the plaintiffs if such decree is based upon the theory of an irrevocable license amounting to an easement. The second amended complaint is not a model pleading, and yet on the authority of *Shaw v. Proffitt*, 57 Or. 192, 201, 109 Pac. 584, 110 Pac. 1092, Ann. Cas. 1913A, 63, the pleading can be said to be sufficient, especially in the absence of a demurrer interposed in the circuit court; for the plaintiffs aver that Brown gave to them a perpetual right of way, and that "in accordance with said agreement" they laid a drain; and these averments, taken with the remainder of the pleading, are sufficient, although barely sufficient to sustain the decree.

[10] If the drain interferes with the use of the foundry the plaintiffs must lower the drain enough to avoid such interference, or else forfeit their right to maintain a drain across Eastman's premises; and in order to lower the drain the plaintiffs are entitled to enter upon the Eastman property. It may be that the parties on one side or the other will desire to have a judicial decision as to whether or not a free and untrammelled use of the foundry floor will require a lowering or alteration of the drain; and in order that the controversy may be settled as completely as is possible, the cause will be remanded, so that the trial court may write at the foot of the decree such directions to the parties as may appear to be proper concerning the question of the immediate lowering or alteration of the drain. We decline to allow costs to any of the parties in this court.

The decree is affirmed, and, for the purposes above explained, the cause is remanded.

BURNETT, O. J., and McBRIDE and BROWN, JJ., concur.

LE DOUX v. HOROWITZ. (No. 10152.)

(Supreme Court of Colorado. Nov. 7, 1921.)

1. Appeal and error §=216(1)—Nondirection of jury not available in absence of request.

An objection that the instructions ignored a contract is a mere objection for nondirection, and is not available error in the absence of requests for instructions covering the point.

2. Appeal and error §=263(1)—Exception to instruction is essential to review.

It is the law, and not merely a rule of the court, that the Supreme Court will not review instructions unless an exception thereto was made in the court below, so as to give the trial court an opportunity to correct the error.

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Action by Phil B. Horowitz against R. A. Le Doux and another. Judgment for plaintiff, and defendant Le Doux brings error. Application for supersedeas and restraining order denied, and judgment affirmed.

John D. Milliken, of Denver, for plaintiff in error.

Frank J. Mannix, of Denver, for defendant in error.

WHITFORD, J. Defendant in error sued to recover the purchase price of 15 shares of the capital stock of the Independent Tractor & Farm Machinery Company from plaintiff in error, and one E. L. Scott, for fraud and deceit practiced upon him in effecting the sale of the stock. The case was tried to a jury, and the trial resulted in a verdict for the plaintiff and against each of the defendants, finding them guilty of fraud and willful deceit. Subsequently, a motion for a new trial was overruled, and judgment for the plaintiff entered on the verdict. The plaintiff in error, Le Doux, brings the case here for review, and asks that the writ of error be made to operate as a supersedeas, and also to restrain the defendant in error from prosecuting a suit on a bond required by the court below as a condition to granting an additional stay of execution.

Plaintiff in error has wholly ignored the requirements of rule 31 (161 Pac. x) of this court in preparing his assignments of error. He has not only failed to "particularly specify the evidence admitted or rejected," as re-

quired by the rule, to which he seeks to object, but he has omitted "to refer to the folio number of the record where such rulings or exceptions appear." However, we have reviewed all of the evidence and find no substantial error in the rulings of the court in the admission or rejection of evidence in any of the particulars sought to be specified in the assignments of error.

[1] Another assignment is that the instructions "entirely ignore the contract of employment." This objection is mere nondirection. It does not appear from the record that an appropriate request covering the point was made and presented to the court by the plaintiff in error. Mere nondirection is not available error in the absence of requests for instructions. *Newton v. Cardwell* B. P. & S. Co., 41 Colo. 492-494, 92 Pac. 914; *Brown v. People*, 20 Colo. 161-167, 36 Pac. 1040; *Whitehead v. Emmerich*, 38 Colo. 13-18, 87 Pac. 790.

[2] Other assignments of error are made to instructions given, but they can be of no avail to the plaintiff in error, because the record is silent on objections and exceptions in the court below. It is well settled that, unless an exception to an instruction is made in the court below, so its attention is directed to the error of law complained of, the court will not review instructions which the trial court was not given an opportunity to correct. This is the law; it is not a rule of court. *Tollifson v. People*, 49 Colo. 219-233, 112 Pac. 794; *Keith v. Wells*, 14 Colo. 321-326, 23 Pac. 991; *Edwards v. Smith*, 16 Colo. 529, 530, 27 Pac. 809; *Denver & R. G. R. v. Ryan*, 17 Colo. 98-104, 28 Pac. 79; *Cunningham v. Ft. Collins*, 47 Colo. 473, 104 Pac. 1134; *Supreme Lodge K. of H. v. Davis*, 26 Colo. 252-262, 58 Pac. 595; *Beals v. Cone*, 27 Colo. 473-488, 62 Pac. 948, 83 Am. St. Rep. 92.

We have carefully read the entire record, and find an abundance of testimony to support the verdict of the jury in every essential element of the charge made against the plaintiff in error. From the evidence as it appears in the record, the jury could not have well done otherwise. We find no substantial error in the record.

The supersedeas and restraining order are denied, and the judgment affirmed.

TELLER and ALLEN, JJ., concur.

§= For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

PEOPLE ex rel. THOMPSON v. PURCELL,
Superintendent of State Industrial School
for Girls. (No. 10147.)

(Supreme Court of Colorado. Nov. 7, 1921.)

**1. Infants \S 16—"Incorrigibility" with refer-
ence to commitment to Industrial School de-
fined.**

Within Rev. St. 1908, \S 3076, relative to the commitment of incorrigible girls to the State Industrial School, the term "incorrigible" means unmanageable by parents or guardians (citing 2 Words and Phrases, Second Series, Incorrigible).

**2. Infants \S 16—Statutes do not authorize
commitment to Industrial School of girls over
16 for mere incorrigibility.**

Rev. St. 1908, \S 3076, authorizing peace officers to arrest girls habitually wandering around the streets, etc., and providing that, if it shall appear to the court or judge that such girl is incorrigible, she may be committed to the State Industrial School for Girls, only authorizes the commitment to such school of girls habitually wandering around the streets, etc., and neither that section (section 3074) relative to girls convicted of any offense, nor any other statute, authorizes the commitment of girls over 16 for mere incorrigibility.

Department 1.

Error to District Court, Jefferson County;
Sam W. Johnson, Judge.

Habeas corpus by the people, on relation of Virginia Thompson, against Elizabeth Purcell, Superintendent of the State Industrial School for Girls. Judgment dismissing the petition, and the relator brings error. Reversed, with directions.

John M. Glover, of Denver, for plaintiff in error.

Victor E. Keyes, Atty. Gen., and Forrest C. Northcutt, Asst. Atty. Gen., for defendant in error.

ALLEN, J. This cause is before us to review a judgment of the district court of Jefferson county, which overruled a demurrer to the return filed in a habeas corpus proceeding, and dismissed the petition.

The return shows that the petitioner for a writ of habeas corpus is an inmate of the State Industrial School for Girls at Morrison, and was committed to that institution by the juvenile court of the city and county of Denver as an incorrigible girl. The proceedings in the juvenile court were instituted against her by a complaint at a time when she was over the age of 16 years. It is assumed in the briefs that she could not have been proceeded against under any act relating to delinquent children, owing to her age. The complaint in the juvenile court recited that she "comes within the provisions of section 3076 of the Colorado Revised Stat-

utes of 1908, * * * in this, to wit: * * * Is incorrigible, and beyond the father's control." She was therefore charged with incorrigibility, and nothing else.

[1] The term "incorrigible" means unmanageable by parents or guardians. See 2 Words and Phrases, Second Series, 1016. Section 3076, R. S. 1908, relied on to sustain a commitment to the State Industrial School for Girls for mere incorrigibility, reads as follows:

"All peace officers in any city, town or county in this state are empowered to arrest all girls habitually wandering around the streets or public places, or anywhere beyond the proper control of their parents or guardian, at unseemly or improper hours. The girl so arrested shall be taken before the court or judge having jurisdiction of the person, as provided in section 32 of this act, and if it shall appear to said court or judge that the said girl is incorrigible, or is growing up in habits of vice and immorality, such girl may be committed to 'The State Industrial School for Girls.'"

[2] The Attorney General, in his brief, refers to this section as follows:

"From the above section, it clearly appears that, if an incorrigible child is brought before the court, it has jurisdiction and power to commit her to the State Industrial School for Girls."

We cannot reach that conclusion. The section empowers peace officers to arrest without a warrant girls "habitually wandering around the streets," etc., and under certain circumstances such girls may be committed. It is not provided that any girl found to be incorrigible may be committed to the school. A girl may be incorrigible and still not be a streetwalker. The only class of girls coming within the provisions of the section above quoted are those described therein. This conclusion is aided by a reference to section 3074, R. S. 1908, reading in part as follows:

"When any girl under the age of eighteen years and over the age of six years shall be convicted of any offense known to the laws of this state and punishable by fine or imprisonment, or both, * * * the court before whom such conviction shall be had, may, at its discretion, sentence such girl to the State Industrial School for Girls. * * *"

There is nothing in this section having to do with mere incorrigibility. Section 3076, R. S. 1908, already quoted, supplements the section last above quoted by providing for the commitment of girls found "wandering around the streets," etc. The complaint involved in the instant case alleged no facts which would give the court jurisdiction to commit the petitioner to the State Industrial School for Girls, she being over the age of 16 years and not within the statutes relat-

ing to delinquent children. Neither did the findings of the juvenile court show such facts. In no finding or order is it recited that she was arrested for, or found guilty of, "habitually wandering around the streets," etc., but the return filed in this case incorporates various orders of the juvenile court, which, in the matter of findings, go no further than to say that "the court finds that the parents of said child are unable to correct the said child."

The return, therefore, shows that the juvenile court had no jurisdiction to commit the petitioner to the State Industrial School for Girls. It was error to overrule the demurrer to the return. The judgment is reversed, with directions to discharge the petitioner from the custody of the respondent.

TELLER, J. (sitting for SCOTT, C. J.), and WHITFORD, J., concur.

KAESS v. BOARD OF COM'RS OF CHAFFEE COUNTY. (No. 9809.)

(Supreme Court of Colorado. Nov. 7, 1921.)

Waters and water courses §—156(5)—Conveyance held to include interest in seepage water theretofore acquired.

A conveyance by the owner of land and water rights of one-half of his land and an undivided half interest in a designated irrigating ditch and water rights acquired by the original construction and enlargements thereof includes a one-half interest in the appropriation of the seepage water made by the owner through that ditch two months prior to the conveyance.

Error to District Court, Chaffee County; James L. Cooper, Judge.

Action to quiet title to water rights by W. E. Kaess against the Board of County Commissioners of Chaffee County. Judgment for defendant, and plaintiff brings error. Affirmed.

James T. Locke, of Canon City, for plaintiff in error.

Wallace Schoolfield, of Salida, for defendant in error.

WHITFORD, J. The plaintiff in error was the plaintiff below in a suit to quiet title to a water right. Judgment was for the defendant. The plaintiff comes here on error. From the record it appears that in December, 1890, one O. E. Harrington conveyed by warranty deed to Chaffee county 160 acres of land, also a water right, the extent of which is the subject of this controversy.

After a description of the land, the deed describes the water right as follows:

"Also an undivided one-half interest in and to that certain irrigating ditch known as the Harrington ditch, numbered 7 by decree of the district court of said Chaffee county, and one-half of all water rights and priorities acquired by the original construction and various enlargements thereof."

In 1866 Harrington constructed this ditch to carry water to his 320 acres of land lying at the lower end of the ditch, and in June, 1890, was decreed 6 cubic feet of water by the district court in a general water adjudication proceeding. Thereafter, in October, 1890, he, as the sole owner of the ditch and of the 320 acres of land, made and filed in the proper office his verified statement of claim under the statute for certain seepage and spring water arising in the ditch for domestic and agricultural purposes, stating:

That the "waters from said springs, and each of them, had been used by this claimant each year since said springs first arose, and have been so used by means of the said described ditch for domestic and agricultural purposes upon the lands described herein, and for the purpose of making his appropriation more complete, and that the number of acres of land under and to be irrigated by said ditch is about 320, and without the use of said water from said springs as aforesaid claimant would not have sufficient supply to properly irrigate his said lands."

In December following, after taking this action with respect to the seepage water, he executed the deed to Chaffee county as above mentioned.

In 1910 Harrington conveyed by deed to the plaintiff in error the remaining 160 acres of land owned by him, describing the water right conveyed as follows:

"All of his right, title, and interest in and to the seepage water flowing in and through the ditch known as the Harrington ditch, to the extent of not to exceed one cubic foot per second of time."

The plaintiff in error claims all of the seepage water, and contends that the Harrington deed to the county conveyed no part of the seepage water in the ditch. This contention is not tenable. Harrington acquired the right to the seepage water two months prior to the time he executed the deed to the county. By expressly conveying one-half interest in the ditch, the grantor manifestly intended to convey one-half of all water rights connected therewith. All of the circumstances disclosed by the record support this construction. He conveyed one-half of his land, one-half of his ditch, and we think it is clear that he intended to convey one-half of his water. We think the judgment below was correct.

Judgment affirmed.

TELLER and DENISON, JJ., concur.

PEOPLE ex rel. COLORADO BAR ASS'N v. CLASS. (No. 9925.)

(Supreme Court of Colorado. Nov. 7, 1921.)

1. Judges ¶21—Appearing before Legislature for party to contest not "practice of law."

Rev. St. 1908, §§ 248 and 249, prohibiting judges of the district court from performing services as attorney or being interested in any profits arising out of practice in any of the courts, etc., refers to the practice of law as generally understood, and does not apply to an appearance before the Legislature for a party to an election contest.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Practice of Law.]

2. Attorney and client ¶38—Not ground for disbarment for judge to call grand jury's attention to violation of election laws by opponent of one whom he was representing.

It is not ground for disbarment of an attorney that while judge of the district court and while representing a party to an election contest before the Legislature he directed the grand jury's attention to reports that the other party to the contest had spent money largely in excess of the amount to which he made affidavit, where the instruction would have been proper except for the fact that he represented a party to such contest, and the instruction had no direct bearing upon the contest.

3. Attorney and client ¶51—Privilege of any attorney to call acts of other attorneys to court's attention.

It is the privilege of every attorney to call to the attention of the Supreme Court any act of a licensed attorney which may fairly be considered to disqualify him.

En banc.

Original proceedings in disbarment by the People, on relation of the Colorado Bar Association against Harry S. Class. On demurrer to the information. Demurrer sustained, and rule to show cause dismissed.

James H. Pershing, of Denver, for petitioner.

William H. Gabbert and Edward C. Stimson, both of Denver, and Charles E. Southard, of Greeley, for respondent.

TELLER, J. The Attorney General, in response to a petition by the State Bar Association, filed in this court an information against the respondent charging him with having violated the law by acting as an attorney for one Sweinhart in an election contest before the General Assembly, while said respondent was holding the office of judge of the district court of the First judicial district, and, further, that he had shown himself unfit to hold a license to practice law, by reason of the fact that while he was act-

ing for said Sweinhart in said contest he directed a grand jury to investigate the election expenditures of one Radinsky, the other party to the contest.

It is represented that the respondent, for the reasons above stated, should be disbarred and prohibited from practicing law in this state.

A rule against the respondent to show cause was issued, and, by way of return, he demurs to the information. The question before us, then, is: Do the facts alleged and admitted by the demurrer call for the disbarment of the respondent?

[1] The first charge is that the respondent by appearing as attorney in the election contest violated the law; and reference is made to sections 248 and 249, Revised Statutes 1908, as the basis of the charge.

Section 248, among other things, prohibits judges of the district court from counseling or advising in, or writing any petition or answer or other pleading in any proceeding, or performing any services as attorney or counselor at law, or being interested in any profits or emoluments "arising out of practice in any of said courts." The reference is to district and county courts.

Section 249 provides that a violation of the act shall be punished by a fine of not less than \$20, nor more than \$100.

It is unnecessary to consider all the questions raised in the brief of the eminent counsel who appear for the respondent. We agree with them upon the proposition that respondent's appearance for one of the parties in the election contest was not a violation of the statute in question; and this is true, though his name was signed as attorney for one of the parties. The statute clearly refers to practice of the law as it is generally understood; that it to say, to practice in courts. Any person, whether an attorney or not, may appear for a party to an election contest before the Legislature. Such an appearance does not constitute practicing law.

[2] The other charge concerns the action of respondent in instructing the grand jury.

From the exhibit attached to the information it appears that about two weeks before the respondent's term of office as a district judge expired he gave to the grand jury the instruction of which complaint is made. In the papers filed in the election contest, charges of corruption were made against certain election officials. The respondent instructed the grand jury that inquiry should be made as to the action of these officials, to the end that, if the charges were well founded, proper indictments might be returned. As a part of this instruction the respondent directed the grand jury's attention to the fact that it was reported that the contesting party had spent money largely in excess of the amount to which he had made

affidavit in his return to the Secretary of State. The grand jury was advised that this was a matter to be investigated.

No question is made that this last instruction would have been proper, except for the fact that the respondent was representing a party to the contest. That being the case, we cannot say that the giving of the instruction, which was proper and commendable aside from the relations of the respondent to the contest, showed unfitness for the proper discharge of the duties of an attorney at law. At best, it was a question of the propriety of the action under the circumstances. We do not see in the instruction itself anything which would have a direct bearing upon the contest, and cannot therefore hold that the instruction was given with a view to the benefit of the party whose interest the respondent was defending. Such being the case, it affords no ground for disbarment.

[3] We cannot close this matter without announcing our disagreement with the criticism, made by counsel for respondent, of the action of the State Bar Association in presenting this petition. It is the privilege, if not the duty, of every attorney to call to the attention of this court any act of a licensed attorney which may fairly be considered to disqualify him. Calling attention to breaches of professional duty should be encouraged, rather than denounced, and it is only by the exercise of constant vigilance on the part of the members of the bar that the profession may be kept up to that high standard which should characterize it.

For the reasons above stated, the demurrer is sustained, and the rule to show cause is dismissed.

SCOTT, C. J., and DENISON, J., not participating.

KENDRICK v. PRICE. (No. 10186.)

(Supreme Court of Colorado. Nov. 7, 1921.)

1. Brokers \S 86(1)—Verdict for commission sustained by evidence.

In an action to recover a broker's commission for the sale of defendant's land, in which defendant filed a counterclaim for commission for the sale of plaintiff's land, conflicting evidence held to warrant the jury in finding that plaintiff procured the purchaser for defendant's land, and that there was no agreement to pay a commission for the sale of plaintiff's land so as to sustain a verdict for plaintiff.

2. Appeal and error \S 1033(9)—Verdict unauthorized by instructions held justified by admission.

In an action for a broker's commission, in which defendant filed counterclaim against

plaintiff for a similar commission, the verdict allowing the plaintiff an amount which had no basis in the pleadings and instructions, but which could have been arrived at by deducting from plaintiff's claim an unclaimed commission on sales of plaintiff's land, concerning which plaintiff testified there was no agreement to pay commission, but the sale was to purchasers procured by defendant, and he was willing to allow a commission, did not prejudice defendant, and he cannot complain thereof.

Department 3.

Error to District Court, El Paso County; Arthur Cornforth, Judge.

Action by W. L. Price against W. H. Kendrick. Judgment for plaintiff, and defendant brings error. Application for supersedeas denied, and judgment affirmed.

Orr & Little, of Colorado Springs, for plaintiff in error.

W. D. Lombard, O. B. Horn, and Eugene D. Preston, all of Colorado Springs, for defendant in error.

BURKE, J. Defendant in error brought this action against plaintiff in error to recover \$3,500 commission on the sale of real estate, and a balance of \$169.06 on an open account. Plaintiff in error denied generally as to the commission, admitted as to the open account, and counterclaimed for \$2,240 commission on sale of real estate alleged to be due him from defendant in error on a separate transaction. Defendant in error denied as to the counterclaim. From verdict and judgment against plaintiff in error in the sum of \$3,452.51, this writ is prosecuted. The cause is now before us on an application for supersedeas. The parties are hereinafter designated as in the trial court.

Twenty-seven alleged errors are assigned. Two propositions only are seriously urged in the briefs of counsel for defendant: (1) The refusal of the court to sustain defendant's motion for a nonsuit, made at the close of the taking of all testimony, and based upon the assertion that the evidence was insufficient to establish that plaintiff was the procuring cause of the sale and did establish that the purchaser was procured by the defendant himself; (2) that the verdict is unsupported by the evidence, and is the result of passion, caprice, and prejudice, as shown by the alleged fact that no computation permissible under the evidence and the instructions could justify the sum awarded. Briefly stated, the sole question thus presented is, "Is the verdict supported by the evidence?" The determination of this question has thus necessitated an examination of the entire bill of exceptions of 142 pages. This we have read with great care.

1. Plaintiff testifies to a contract between himself and defendant under the terms of

which he was to receive a commission of \$8,500 for finding a purchaser for defendant's 1,750 acres of land at \$30 per acre, which contract he fulfilled by producing one Bell, who bought at that price. Defendant admits a contract with plaintiff for such a commission in the sum of \$2,500 for producing a cash purchaser, but asserts that he, and not the plaintiff, produced the purchaser Bell.

Defendant testifies to a contract for a commission for producing a purchaser for plaintiff's 320 acres of land, said commission to be such sum over \$20 per acre as the land sold for; that he did produce such a purchaser, who bought at \$27 per acre, whereby the sum of \$2,240 was earned. Plaintiff denies this contract, but admits an offer to sell his land to defendant for \$20 per acre cash, which offer he says was never accepted, but merely met by defendant with a counter proposition of \$18 per acre contingent upon defendant's sale of his 1,750 acres.

[1] The law of this jurisdiction governing commissions on the sale of real estate is well settled, and there are no substantial conflicts in the authorities. Many of the cases are cited in the briefs of counsel. We are in full accord with these decisions, and it is not here necessary to review them, nor can any good purpose be served by abstracting the evidence before us. Suffice it to say that it is conflicting, and an examination of the transcript alone might lead us to a conclusion different from that reached by the jury. Bell, the purchaser of defendant's land, lived in Texas. It is undisputed that he saw some of defendant's literature there, and was contemplating a trip to Colorado to examine lands in the vicinity of defendant's; that he there became acquainted with plaintiff's brother, through whose initiative plaintiff opened up a correspondence with him, describing defendant's ranch as one of the properties for sale; that he came to Colorado, on his first visit, accompanied by plaintiff's brother and at a time when defendant was absent from the state; that plaintiff showed him defendant's ranch, among others, and interested him in it. It is not clear that Bell had any actual correspondence with defendant before leaving Texas, or

knew through any source than plaintiff that defendant's ranch was for sale. The jury may well have concluded from this evidence that plaintiff had produced the purchaser and was entitled to the commission.

The evidence is in the same condition as to the counterclaim, and, though conflicting, the jury may well have determined therefrom that the contract alleged between the parties for the sale of plaintiff's 320 acres never existed.

[2] 2. The pleadings and instructions alone present no justifiable basis for the sum returned in the verdict, but there was offered in evidence a communication from plaintiff to defendant, under date of November 3, 1920, plaintiff's purported statement of account, with a 5 per cent. credit of commission on this transaction, in the sum of \$432, which plaintiff explained by saying that, although there was no contract therefor, he had in fact sold his land to customers whom defendant had brought from the state of Iowa, had failed to interest in property of his own, and thereafter introduced to plaintiff; that by reason of these facts he had then considered it an act of simple justice to make such an allowance, and was still willing to do so. Assuming that the jury took plaintiff at his word, and gave defendant this credit in making their computations, the sum returned is easily accounted for, is justified by the evidence, and was within the province of the jury. Whatever plaintiff might now say as to that credit, defendant was clearly not prejudiced thereby, and cannot be heard to complain.

We are thus forced to the conclusion that the verdict before us is supported by the evidence, and cannot be disturbed. *Hallack et al. v. Stockdale et al.*, 14 Colo. 198, 23 Pac. 340.

Aside from the matters already considered, this record doubtless discloses a few minor errors, none of which, however, could in our opinion be held prejudicial. The supersedeas is accordingly denied, and the judgment affirmed.

TELLER, J. (sitting for SCOTT, C. J.),
and BAILEY, J., concur.

SCHMIDT et al. v. WITHER et al.
(No. 10128.)

(Supreme Court of Colorado. Nov. 7, 1921.)

Judges ¶30—District judge in one district cannot issue writs in suits pending in other districts.

A district judge sitting in chambers in one district cannot issue writs of certiorari or prohibition or orders affecting litigation in a suit pending in another district, by reason of the absence of the judge of the latter district, under Rev. St. 1908, § 3837, and Sess. Laws 1911, p. 247.

En Banc.

Error to District Court, Routt County;
Francis E. Bouck, Judge.

Action by Archibald Wither and another against Tony Schmidt and another. Judgment for plaintiffs before a justice. From a judgment quashing a writ of certiorari and prohibition, requiring the justice of peace to certify record and prohibiting him from further proceedings therein, defendants bring error. On application for supersedeas. Judgment affirmed.

W. C. Reilly and Joseph K. Bozard, both of Steamboat Springs, and Carlson & Erickson, of Denver, for plaintiffs in error.

A. M. Gooding and C. R. Monson, both of Steamboat Springs, for defendants in error.

BAILEY, J. Plaintiffs in error were defendants in an action in forcible entry and detainer in a justice court in Routt County. Upon the theory that the issues involved title to real property they moved a transfer of the cause for trial to the district court of the county. This motion was denied. Trial was had and judgment rendered in the justice court, upon which a writ of restitution issued. They then petitioned the district court of Routt County for a writ of certiorari and prohibition, requiring the justice of the peace to certify his records in the aforementioned cause to the district court and prohibiting him from further proceedings therein. The judge of the district court of Routt County being absent, plaintiffs applied to the presiding judge of the district court in Denver for the writ, basing their application upon an affidavit showing the absence from that jurisdiction of the Routt County judge. In response to the petition, the writ was allowed, by the presiding judge of the Second Judicial District, sitting at chambers in Denver, and upon his order, the writ was issued out of the district court of Routt County. Presently thereafter defendants in error filed a motion to quash the writ so issued, which upon due hearing was allowed and judgment entered accordingly. To review this judgment plaintiffs below bring the cause here

and ask that the writ of error be made a supersedeas.

Many questions are raised and argued in the application but it is necessary to determine but one, which effectually disposes of the matter. That question goes to the power and authority of a district judge, sitting in one district, to make an order in any cause pending in another district.

It is true that district courts are courts of general jurisdiction and that writs, processes and orders operate on persons and property throughout the state, when issued by any judge within his jurisdiction. But such writs and orders may be issued by the several judges only while sitting in and acting for the respective districts within which such writs or orders issue.

In *Kirby v. Rock Island Ry. Co.*, 51 Colo. 82, 116 Pac. 180, the district judge of the Tenth District was sitting at Denver and acting as a judge of the Second Judicial District. When so acting, affidavits appertaining to a contempt proceedings alleged to have been committed in the Tenth Judicial District were presented to him, a warrant of attachment was issued and made returnable at Pueblo, in the Tenth Judicial District. Because the writ was issued by the judge of the Tenth District outside of his district while holding court in Denver a motion to quash the attachment was made, which was overruled. In discussing the effect of a writ or order issued under such facts and circumstances this court in that case said, at page 89 of 51 Colo., at page 152 of 116 Pac.:

"Enough has been said to clearly show that the chambers of a district judge, at which he must do such judicial business as may be done out of court, cannot be located without the territorial limits of his district, and that any judicial act pertaining to the courts of his district, done by him outside of his district, is without authority of law, and therefore void. Outside of his district, he is not a judge of his district, in the sense that he can do judicial business pertaining thereto. From this, it must necessarily follow that the presentation of the affidavits in this case and the action of the judge thereon, outside of the limits of his district, were nullities, and were not a presentation thereof and action thereon by the judge of that district, as contemplated by law. This being so, no jurisdiction was ever acquired of these proceedings, and the motion to quash ought to have been sustained. It is contended by the defendant in error that, inasmuch as the plaintiff in error included in his motion matters consistent with the jurisdiction over his person, he thereby waived the issuance of the attachment outside of the Tenth Judicial District. The error of the defendant in error, in its contention, is to assume that this question goes to the jurisdiction over the person of the plaintiff in error. That is not the case. The question goes to the jurisdiction of the court over the particular subject matter of these

proceedings. That was not waived nor conferred by consent."

The statute provides, section 3837, R. S. 1908, that the judges of the district courts "shall have power within their respective jurisdictions, and it shall be their duty, upon application made as hereinafter mentioned, to grant writs of certiorari to remove causes from before justices of the peace into the district court," etc.

Chapter 97, Session Laws 1911, provides what may be done by judges of courts of record in vacation, in chambers, but these things must be done "in their respective districts and counties." There is nothing, either in the code or statutes, which permits a district judge, sitting in chambers in one district, to issue writs or orders affecting litigation in suits pending in other districts. The judgment of the trial court in dismissing the writ, which the judge of the Denver District, under the facts and circumstances here disclosed, was without authority to issue, is right, and should be and hereby is affirmed. Judgment affirmed.

TURNBULL v. COLE. (No. 9804.)

(Supreme Court of Colorado. Nov. 7, 1921.)

1. Sales \S 473(1)—Conditional sale not valid against innocent purchasers.

A sale contract reserving a secret lien to the seller, will not be recognized as giving him title against interested parties without notice.

2. Sales \S 451—Secret conditional sale, valid where executed, not recognized by comity.

Though a contract of sale secretly reserving title to the seller was valid where executed, the recognition of such title against the subsequent purchaser or incumbrancer without notice is contrary to the policy of the state, and such contract will not be recognized by comity to the detriment of citizens of the state.

Allen, Bailey, and Whitford, JJ., dissenting.

En Banc.

Error to District Court, City and County of Denver; Julian H. Moore, Judge.

Action by Oscar M. Cole against L. W. Turnbull to recover possession of an automobile. Judgment for plaintiff, and defendant brings error. Affirmed.

Charles Ginsberg and Walter E. Schwed, both of Denver, for plaintiff in error.

Howard & McCrillis, of Denver, for defendant in error.

TELLER, J. Defendant in error had judgment in an action to recover an automobile on which he had a chattel mortgage. Plaintiff in error, defendant below, had taken possession of the automobile as agent for one Jones, who claimed title under an assignment of a contract of sale made in Utah, by which one Keightley, as purchaser of the car, agreed that, until he had paid the balance of the purchase price according to the terms of said contract, the vendor thereof should retain the title to it. It was further stipulated that, if the purchaser failed to perform any part of his agreement, as set forth in said contract, or if the vendor, a corporation, should "at any time deem itself insecure," it might take possession of the car and sell it, and apply the proceeds to payment on any balance due on the purchase price, accounting to the purchaser for any excess. But, if the proceeds did not pay such balance, costs of sale, and attorneys' fees, the purchaser should still be liable for such balance.

The car was removed from Utah without the knowledge or consent of the vendor or of Jones, brought to Colorado, and sold to one Bell, who mortgaged it to Cole to secure a promissory note of \$600.

Defendant in error concedes that a conditional sale does not pass title according to the decisions of the courts of Utah. That being so, plaintiff in error contends that, under the rule of comity between states, the courts of this state should give effect to the contract, notwithstanding the fact that in this state such contracts are held to be absolute sales as against creditors and purchasers without notice of the vendor's claim of title.

The only question to be determined is as to the correctness of the trial court's action in rejecting said contention.

[1] It is settled in this jurisdiction that contracts like that here under consideration, reserving a secret lien to the vendor, will not be recognized as leaving title in the vendor, as against interested parties without notice. *Weber v. Diebold S. & L. Co.*, 2 Colo. App. 68, 29 Pac. 747; *George v. Tufts*, 5 Colo. 162; *Tufts v. Beach*, 8 Colo. App. 35, 44 Pac. 771; *First Cong. Church v. Grand Rapids Co.*, 15 Colo. App. 46, 60 Pac. 948; *Andrews v. Colorado Savings Bank*, 20 Colo. 313, 36 Pac. 902, 46 Am. St. Rep. 291; *Jones v. Clark*, 20 Colo. 353, 38 Pac. 371; *Clark v. Bright*, 30 Colo. 199, 69 Pac. 506; *Coors v. Reagan*, 44 Colo. 126, 96 Pac. 986; *Puzzle Co. v. Morse Co.*, 24 Colo. App. 74, 131 Pac. 791.

[2] In *Coors v. Reagan*, supra, this court quoted with approval from *Weber v. Diebold Safe Co.*, supra, a statement that "transactions of this character are not favored, and are opposed to public policy." We are there-

fore of the opinion that the trial court was right in holding that the contract, though valid in Utah, could not be enforced in this state, because such action would be contrary to public policy, and would result in detriment to the interests of a citizen of this state. Both of these grounds furnish exceptions to the general rule of comity as applied to the enforcement of contracts.

In *Dearing v. McKinnon Hardware Co.*, 165 N. Y. 78, 53 N. E. 773, 80 Am. St. Rep. 708, the court, dealing with a mortgage valid in Michigan, and attempted to be enforced in New York, said:

"Judicial comity does not require us to enforce any clause of the instrument, which, even if valid under the *lex domicilii*, conflicts with the policy of our state relating to property within its borders, or impairs the rights or remedies of domestic creditors."

Boydson v. Goodrich, 49 Mich. 65, 12 N. W. 913, is to the same effect.

In *Skiff v. Solace*, 23 Vt. 279, the court had under consideration the rights of an attaching creditor to a property which had been mortgaged in New York and moved to Vermont. Of the rule of comity, the court said:

"But such recognition does not take place by any foreign state, when it would be incompatible with its own authority, or prejudicial to the interests of its own subjects."

Finding no error in the record, the judgment is affirmed.

ALLEN, J. (dissenting). This is an action in replevin to recover the possession of an automobile. In October, 1918, the property was situated in the state of Utah and owned by the Hyland Motor Company of that state. The company entered into a conditional sale and title-retaining contract in that state with respect to the automobile, and in accordance with such contract delivered possession of the car to the conditional vendee, retaining title in itself. It is conceded in the briefs on both sides that the seller could recover the property under its title-retaining contract if the automobile had at all times remained in Utah, and all the transactions had occurred only in that state. The courts in Utah follow the rule which is stated in 35 Cyc. 675, as follows:

"A sale of goods on the condition that the property therein shall remain in the seller until the price is paid, in the absence of fraud, is valid against third persons, claiming under the buyer as subsequent purchasers (or) mortgagees."

See *Standard Steam Laundry Co. v. Dole*, 22 Utah, 311, 61 Pac. 1103; *First Nat. Bank of Evanston v. Bank of Waynesboro* (C. C. A.) 262 Fed. 754.

If all the transactions had occurred in the state of Colorado, the mortgagee, having

had no notice of the seller's lien or title, would prevail. *Puzzle Co. v. Morse Co.*, 24 Colo. App. 74, 131 Pac. 791.

In view of the conflict between the rule prevailing in Utah and that adopted in Colorado with reference to conditional sales, the question becomes whether the title-retaining contract made and valid in Utah is enforceable in Colorado against the mortgagee, plaintiff below, though such conditional sale would be invalid if it had been made in this state. Generally the law of the place where the contract was made will govern. 35 Cyc. 666. In 24 R. C. L. 453, § 750, it is said:

"It is generally held that, if a conditional sale is valid in the state where made, without recording, but the buyer, without the knowledge or consent of the seller, thereafter removes the property to another state, and there sells it to a bona fide purchaser, the seller may recover the property in that state, notwithstanding the conditional sale would have been invalid there for want of recording."

In *Studebaker Bros. Co. v. Mau*, 13 Wyo. 358, 80 Pac. 151, 110 Am. St. Rep. 1001, this rule was applied in favor of a conditional vendor of a foreign state (Utah) against a bona fide purchaser of the state of the forum. In *Adams v. Fellers*, 88 S. O. 212, 70 S. E. 722, 35 L. R. A. (N. S.) 385, the same principle was applied in favor of a party, residing in a foreign state who had rented a motion picture machine, against a bona fide purchaser of such machine. The same rule has been followed in this state by our Court of Appeals in *Harper v. People*, 2 Colo. App. 177, 29 Pac. 1040, reviewed in a note in 64 L. R. A. 833. In that case a conditional sale contract, made and valid in the state of Kansas, was enforced in this state against attaching creditors of the conditional vendee. That case is cited in support of the following statement in section 339, p. 539, *Williston on Sales*:

"It has been held that if in the jurisdiction where the sale was made it was good against purchasers or creditors of the buyer, the seller's title will prevail against such persons also though they acquire their rights in another state where purchasers and creditors of a conditional-buyer are protected."

In *Harper v. People*, *supra*, the court said:

"It would not be profitable to discuss the reason of the rule, nor to determine whether it ought to be put on the recognized comity existing between the different sovereignties, or on the well-settled principle of *lex loci contractus*, which permits the enforcement of a contract according to the established law of the place, so long as it does not contravene the recognized policy of the state of the forum. Both principles are frequently invoked. According to the *Mumford Case* [*Mumford v. Canty*, 50 Ill. 370], the contract will not be deemed to be opposed to the policy of the state unless based upon immoral or criminal consid-

erations. In either case and upon either ground the contract may be upheld."

To repudiate the rule announced in the Harper Case and overrule that case would make and does make the decision in the instant case not only in conflict with the weight of authority on the precise point here presented, but also inconsistent with the great weight of authority on a similar point in the law of chattel mortgages. As to the latter proposition, the following is stated in 11 C. J. 424, § 83:

"The great weight of authority is to the effect that a chattel mortgage, properly executed and recorded according to the law of the place where the mortgage is executed and the property is located, will, if valid there, be held valid even as against creditors and purchasers in good faith in another state to which the property is removed by the mortgagor."

See, also, *Flora v. Julesburg Motor Co.*, 193 Pac. 545. In 24 R. C. L. 453, in connection with the proposition that a conditional vendor may reclaim his property in any state, even though the conditional sale might be invalid in the state of the forum, a note further states that—

"This is the rule which is applied in the case of chattel mortgages as to the effect of the removal of the property to another state without the consent of the mortgagee."

The reason why conditional sales, made in this state, are invalid in this state as against third persons, is that "they are constructively fraudulent as to creditors" and other third persons. *George v. Tufts*, 5 Colo. 162, 165; *Coors v. Reagan*, 44 Colo. 126, 96 Pac. 966. Another reason appears to be suggested in *Andrews v. Bank*, 20 Colo. 313, 36 Pac. 902, 46 Am. St. Rep. 291, in that such sales are in effect chattel mortgages, "and void as to third parties, because not executed and acknowledged in conformity with the chattel mortgage act." Such contracts are not contrary to public policy as that term is used when refusing to apply the principle of *lex loci contractus* in dealing with foreign contracts. A contract, to be contrary to public policy so as not to be enforceable in this state must be one "based on criminal or immoral considerations," as said by our Court of Appeals in the Harper Case. In 13 C. J. 256, § 27, it is said:

"A contract is not necessarily contrary to the public policy of a state merely because it could not validly have been made there; nor is it one to which comity will not be extended merely because the making of such contracts in the place of the forum is prohibited."

See, also, *International Harvester Co. v. McAdam*, 142 Wis. 114, 124 N. W. 1042, 26 L. R. A. (N. S.) 774, 20 Ann. Cas. 614. It is

not disputed, and cannot be, that the foreign contract involved in the instant case is not one "based on criminal or immoral considerations." Under the authorities above cited, it should be given effect in this state.

I am authorized to state that Mr. Justice BAILEY and Mr. Justice WHITFORD concur in the views herein expressed.

REAGAN et al. v. DANIELS et al.
(No. 9887.)

(Supreme Court of Colorado. Nov. 7, 1921.)

1. Pleading **¶343**—Cannot be granted on pleadings when material issue of fact tendered.

A motion for judgment on the pleadings cannot be entertained where a material issue of fact is tendered.

2. Specific performance **¶116**—Answer alleging vendor's lack of title raises material issue, though only partial payment involved.

In a vendor's suit for specific performance, an answer alleging that the vendor had no title raised a material issue, though the suit involved only a partial payment, and not the entire purchase price or the last installment due.

3. Specific performance **¶95**—That vendor has no title is good defense.

It is a good defense to a vendor's suit for specific performance that he has no title whatever, there being a lack of mutuality of remedy, and the rule that plaintiff need not perfect title before decree not applying.

4. Specific performance **¶116**—Answer held to tender issue as to date when payment was to be made.

In a vendor's suit for specific performance, where the complaint filed April 6, 1920, alleged that a specified payment was to be made by April 1, 1920, and that it had not been made, an answer admitting the contract as pleaded by plaintiffs, except that it alleged that there should appear therein the provision that such payment was to be made by April 10, tendered an issue as to the date upon which such payment was to be made.

5. Pleading **¶343**—Judgment on pleadings improperly rendered because material issues were raised.

In a vendor's suit for specific performance in which default in making a payment was alleged, judgment on the pleadings was erroneously granted where the answer raised issues as to the vendor's lack of title, the date when such payment was to be made under the contract, and the fact as to delivery of possession, as the issues so tendered were material.

Department 1.

Error to District Court, Logan County; L. O. Stephenson, Judge.

Action by Fannie M. Daniels and another against Daniel Reagan and others. Judgment for plaintiffs on the pleadings, and defendants bring error. Reversed.

Munson & Munson, of Sterling, for plaintiffs in error.

Coen & Sauter, of Sterling, for defendants in error.

ALLEN, J. This is a suit for specific performance of a contract chiefly concerning land, which will more fully appear hereinafter. On motion of plaintiffs, the trial court rendered judgment in their favor upon the pleadings. The defendants bring the cause here for review.

The principal question presented for our determination, and the only one necessary to be decided upon this review, is whether the court erred in sustaining the motion for judgment upon the pleadings, consisting of the plaintiffs' verified complaint and the defendants' verified answer.

The complaint alleges, among other things, as follows:

"That plaintiffs, on the 24th day of February, 1920, and at all times hereinafter, were the owners in fee simple of [here follows description of a tract of 800 acres of land in Logan county].

"That on the said 24th day of February, 1920, the plaintiffs herein entered into a certain contract or agreement whereby the plaintiffs agreed to sell to the defendants, and the defendants agreed to buy, the lands above described. * * *

The complaint then sets forth the contract, by the terms of which it appears that the purchasers, the defendants, agreed to pay the sum of \$40,000 for the land, together with certain personal property. Of this sum, \$1,000 was to be paid "at the signing of the contract," \$7,000 "by April 1, 1920," and \$8,000 "by November 1, 1920," on which latter date the vendors, the plaintiffs, agreed to execute and deliver "a good and sufficient warranty deed" for the land to the purchasers. The contract further provided for a mortgage from purchasers to secure the balance of the purchase price, and that the vendor agreed to deliver possession of the property to the purchasers "by April 1, 1920."

The complaint further alleges that on April 1, 1920, the plaintiffs demanded of and from the defendants the second payment then alleged to be due, to wit, the sum of \$7,000, and that the defendants then and at all times since refused to make such payment.

Specific performance is prayed for, and other relief sought.

The answer of the defendants admits the contract as pleaded by plaintiffs except as to

the date when the payment of \$7,000 should be made, the answer alleging that—

"There should appear in said contract the following words: 'Parties second part to make second payment by April 10th.'"

The answer further alleges, among other things, as follows:

"That the plaintiffs have failed to comply with the terms of their agreement in this, to wit, that they failed to deliver to the defendants the possession of the said premises, and of the property contracted to be conveyed, as by their contract they agreed to do. * * *

"That the plaintiffs are not the owners in fee of the land; * * * that the records of Logan county do not disclose the facts that the plaintiffs are the owners in fee of said land, but, on the contrary, affirmatively show that the plaintiffs are not the owners of the said land in fee simple, and have not been at any time from the date of the said contract up to and including the present time, and have not been able, at any time since the date of making said contract, up to and including the present time, to convey the premises to these defendants in fee, as they contracted and agreed to do. * * *

We come now to a consideration of the contention that the court erred in granting plaintiffs' motion for judgment on the pleadings.

"In passing upon a motion by one party for judgment upon the pleadings, after issue joined, all the material allegations of the opposite party must be taken as true; and if the pleadings of the opposite party, though defective in form, are nevertheless sufficient in substance to sustain a judgment in his favor, the motion should not be granted." *Rice v. Bush*, 18 Colo. 484, 488, 27 Pac. 720, 722.

[1] As said in the syllabus of *Richards v. Stewart*, 53 Colo. 205, 124 Pac. 740, quoted in *Wallace v. Collier*, 59 Colo. 144, 148, 147 Pac. 660:

"A motion for judgment on the pleadings cannot be entertained where a material issue of fact is tendered."

[2] The defendants' answer does tender material issues, one of which is whether the plaintiffs are the owners of the property. That this is a material issue, and that the allegations of the answer in this respect state a good defense, is apparent from the following statement of the law, found in 25 R. O. L. 274, § 75:

"Specific performance of a contract for the purchase of land will not be decreed where the vendor cannot show a clear title, but merely one concerning which there is a reasonable doubt, or one which is in fact defective."

If a vendor is not entitled to specific performance when he has a defective title, for

the greater reason he is not entitled to the remedy when he has no title whatever. The defendants are entitled to raise this defense now, upon a suit involving a partial payment, just as they would be if the action concerned the entire purchase price or the last installment due. Whether the covenant on their part to make a payment of \$7,000 be regarded as dependent or independent, there is no law or rule of equity that compels a purchaser to pay a substantial amount on the purchase price when it is found that the grantor does not own the property and cannot convey a merchantable title to the premises. Another statement of the rule herein referred to is found in *Smith v. Hunter*, 241 Ill. 514, 89 N. E. 686, 132 Am. St. Rep. 231, as follows:

"All the defendant is bound to show to defeat a bill for specific performance is that the title which his vendor is prepared to tender him is doubtful in its character."

[3] The reason for the rule exists whether the vendor sues to compel the payment of an installment of the purchase price or the entire purchase price. To compel a purchaser to pay a substantial installment, when the vendor's title is defective, is as much a hardship upon him as it is to compel him to pay the entire purchase price, since in either case it virtually compels him to complete the contract on his part and receive no title or a defective title in return. In the instant case the answer did not merely allege that plaintiffs' title was defective, but alleged, in effect, that they had no title whatever. This amounts to alleging that the plaintiffs will never be able to convey a merchantable title, which is a good defense on the ground of lack of mutuality of remedy and does not run counter to the rule that plaintiff need not perfect title before decree; for that rule only applies where "the vendor is finally able to convey a perfect title." See 36 Cyc. 627.

[4] The answer also tendered an issue as to the date upon which the payment of \$7,000 was to be made. The complaint fixed such date at April 1, 1920. The answer alleged the date to be April 10, 1920. The complaint was filed April 6, 1920.

Another issue of fact tendered by the answer is whether the plaintiffs delivered possession to the defendants of the property on April 1, 1920.

[5] The issues tendered by the answer were material issues, requiring the taking of evidence and a trial of the cause upon its merits. It was error to grant a motion for judgment upon the pleadings.

The judgment is reversed.

TELLER, J., sitting for SCOTT, O. J., and WHITFORD, J., concur.

BURKE v. INDUSTRIAL COMMISSION
et al. (No. 10136.)

(Supreme Court of Colorado. Nov. 7, 1921.)

Master and servant \Leftrightarrow 361—Discharged taxicab driver held not an "employee" within Compensation Act by ratification.

Where driver of taxicab was discharged from his employment and thereafter, without employer's knowledge or consent, took on a trip persons who had the day before requested the employer that he be chosen as driver for the trip, and was killed on the trip, and the passengers thereafter paid the employer for the trip, the relation of master and servant did not exist under the Workmen's Compensation Act at the time he was killed, and his dependents were not entitled to compensation; neither the doctrine of ratification nor estoppel being applicable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Employ6.]

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Proceeding by Mary D. Chadwick and William Chadwick, the widow and minor child of John B. Chadwick, under the Workmen's Compensation Act, to obtain compensation for his death, opposed by John F. Burke, the employer. There was an award of compensation, which was affirmed in part and reversed in part by the district court, and the employer brings error. Reversed and remanded.

George J. Lemmon and John R. Smith, both of Denver, for plaintiff in error.

Victor E. Keyes, Atty. Gen., and John S. Fine, Asst. Atty. Gen., for Industrial Commission.

John E. Rinker, of Denver, for defendants in error Chadwick.

BAILEY, J. The case is here on error to review a judgment of the district court of the City and County of Denver, affirming in part and reversing in part, an award of the Industrial Commission of Colorado.

Claimants are the widow and minor child of John B. Chadwick, who suffered injuries from which he died, while driving an automobile belonging to John F. Burke, proprietor of a taxicab line, operating in and about the City of Denver.

It appears that Burke, in conducting his business, employed from four to fourteen drivers, and that in the summer season many of his men and machines are engaged in transporting passengers to and from various mountain resorts. Decedent had been so employed by Burke for some considerable time. On the day preceding the accident a party of Texas tourists arranged with Burke for a

trip to Estes Park, and requested that Chadwick be sent as driver. Burke replied that he would try to get Chadwick, but could not guarantee to do so. At that time Chadwick had driven a party to Colorado Springs. He returned the same evening, and in consequence of complaints received by Burke of Chadwick's careless and reckless driving on that trip was then and there discharged, and directed to report at the office in the morning for a settlement. The next morning, the day of the accident, Chadwick, instead of reporting at the office as directed, took the car he had been accustomed to drive, called for the party of tourists who had previously arranged with Burke for the Estes Park trip, and left with them. This was without the knowledge or assent of Burke, and directly against and contrary to his specific orders to the effect that Chadwick should come to the office on that morning for settlement of his accounts, because of his discharge upon the previous evening.

While making the return trip from Estes Park, Chadwick attempted to turn the car out of a rut on a muddy road, when it upset, pinning him underneath, resulting in injuries from which he died a few days later. The passengers were brought to Denver, and later paid Burke the regular fare for the trip.

The Commission failed to directly find that Chadwick had been discharged, but from irresistible inference did so find in that it declared that Burke in accepting payment from the tourists ratified the act of Chadwick in going out for the trip, which acceptance of payment by Burke the Commission held reinstated Chadwick as an employee. The Commission's findings for all practical purposes were findings that Chadwick was not in the employment of Burke at the time of the accident. That he was not in such employment at that time is conclusively established by the proofs, the testimony of four witnesses to the effect that Chadwick was discharged on the evening before the accident being absolutely uncontradicted.

There is no conflict in the testimony upon the fact of Chadwick's discharge, and the question of his reinstatement is strictly one of law and not of fact. The Commission found that he was an employee solely upon an alleged ratification by Burke of his act in taking the car, without authority, as above noted. This view was adopted by the district court.

It seems clear to us that the acceptance by Burke of pay for the use of his automobile and equipment could have and did have no effect whatever upon the status of Chadwick. Chadwick was either an employee of Burke at the time of the accident, or he was not. If he was not, then we fail to see how any subsequent act of Burke in dealing with third parties could change Chadwick's relations to

him. Whatever the law may be upon the subjects of ratification and estoppel, under the circumstances here shown, as applied to third persons, manifestly, as between Burke and Chadwick, upon the undisputed facts, neither the doctrine of ratification nor estoppel has the slightest application, and both the Commission and the district court were in error in holding to the contrary. If Chadwick was not in the employment of Burke when injured his heirs have no standing under the Workmen's Compensation Act (Laws 1919, p. 700). It conclusively appears that when Chadwick was injured, he had been discharged, and was a mere volunteer, wrongfully engaged in driving the Burke car. The law must leave him where it finds him, for since that situation was brought about by his own wilful and deliberate wrong, upon no possible theory is he or are his dependents in position to ask or receive compensation at the hands of Burke.

Since the case is determined upon this particular point, it becomes unnecessary to either consider or decide any of the many other interesting and important questions argued and submitted.

Judgment reversed and cause remanded.

TELLER and BURKE JJ., concur,

COLORADO & S. RY. CO. v. FORD.
(No. 10189.)

(Supreme Court of Colorado. Nov. 7. 1921.)

1. Railroads §327(1)—Motorist's failure to stop not contributory negligence.

The mere fact that the driver of an automobile did not stop in approaching a railroad crossing does not establish contributory negligence in all cases.

2. Railroads §350(16)—Motorist's contributory negligence in not looking held for jury.

In an action for damages to automobile at a railroad crossing, evidence held not to show conclusively as a matter of law that the motorist could have seen the approaching train, the engine of which was backing without showing any lights, in time to have avoided the accident if he had looked as he claimed to have done.

3. Railroads §350(13)—Motorist's contributory negligence in going at excessive speed held for jury.

Where an automobile driver testified that an engine approaching a railroad crossing was backing without showing any lights and that he did not see it until it was close upon him, the fact that he was then going at a speed which made it impossible to stop before entering upon the crossing so that he was obliged to accelerate and run off the road, resulting in in-

jury to his automobile, does not conclusively establish that his speed was so excessive as to render him guilty of contributory negligence as a matter of law.

Department 1.

Error to District Court, City and County of Denver; Clarence J. Morley, Judge.

Action by J. J. Ford against the Colorado & Southern Railway Company. Judgment for plaintiff, and defendant brings error. Application for supersedeas denied, and judgment affirmed.

E. E. Whitted, J. L. Rice, and J. Q. Dier, all of Denver, for plaintiff in error.

W. E. Clark, of Denver, for defendant in error.

ALLEN, J. This is an action for damages resulting to an automobile in an accident at a railroad crossing. The plaintiff recovered a judgment, and the defendant brings the cause here for review, applying at this time for a supersedeas.

The complaint charged negligence, and as to that matter there is now no controversy. The answer set up the defense of contributory negligence.

Counsel for plaintiff in error state, and we likewise find, that the assignments of error present but one question for our determination, and that is whether or not as a matter of law the plaintiff was guilty of such contributory negligence as to bar recovery. Only so much of the evidence as is sufficient to dispose of this question will be hereinafter stated.

On April 17, 1920, at about 10 o'clock p. m., the plaintiff, accompanied by other persons, was driving an automobile, proceeding south on Logan street, in the city and county of Denver. The railroad track of the Colorado & Southern Railway Company, the defendant, crosses Logan street diagonally at a point toward which plaintiff was driving. As plaintiff was nearing this place, the crossing was being approached by a passenger train of the defendant. The train was being drawn by a locomotive traveling backward, the tender being ahead. The plaintiff's evidence is to the effect that he was driving at the rate of from 10 to 12 miles per hour when approaching the crossing, and that when he was "30 to 50 feet" from the crossing he saw a dark object, the tender of an engine, approaching.

On seeing the moving locomotive tender, the plaintiff believed that his machine would collide with it if he attempted to stop; in other words, that the automobile could not be stopped before reaching the track. Plaintiff thereupon stepped upon the accelerator, increasing the speed of the car, in an attempt to cross the track ahead of the train. In doing so, he steered the automobile to-

ward the right, so that it would reach the track at a point a short distance away from where the locomotive then was, and approaching the crossing from his left. He succeeded in getting his machine across the track at that point before it was reached by the train. A collision was avoided. The track at the point where plaintiff crossed it is beyond or near the edge of the intersection of the street and the railroad right of way, and crossing arrangements are not provided for, the rails not being planked. As a result of driving the automobile across the track, over unplanked rails, beyond the usual crossing place, the machine was damaged.

The plaintiff testified that at the time of the accident no bell was ringing upon the locomotive, no bell signal system was in operation at the crossing, and that there were no lights of any kind upon the approaching locomotive tender.

The street on which plaintiff was traveling was wet, muddy, and slippery. The curtains of the automobile were in use, so that the car was inclosed, except for an open space at the driver's, the plaintiff's, left.

Referring to the occasion of approaching the crossing, the plaintiff testified:

"I looked and listened because I always was familiar that there was a track there, and always bore that in mind. I didn't hear anything and didn't see anything, and all of a sudden this black object appeared. I stepped on it and turned it off to one side to get across because I knew if I went to stop it would hit me.

"Q. Now, when you stepped on it, as you say, you mean you put your foot on the accelerator? A. Yes.

"Q. In an endeavor to get ahead of the tender to avoid a collision? A. Yes."

[1] The plaintiff did not stop in approaching the railroad crossing, but it is not claimed, and it could not be held, that because of such fact alone the plaintiff was guilty of contributory negligence. In section 685, Berry, *Automobiles* (3d Ed.), the author, citing many cases, says:

"In most of the states the rule is that reasonable care in approaching a railroad crossing does not ordinarily require a motorist to stop, but that it does require him to look and listen, and to exercise reasonable care to select a place where the act of looking and listening will be reasonably effective. Generally, stopping is not essential unless both seeing and hearing are ineffectual without doing so."

[2] The defendant's train was traveling slowly, and, pointing out this fact, counsel for defendant assert that "it is a vain thing for the plaintiff to assert that he looked and listened." This contention may be disposed of, as it was in *Union Pacific Co. v. Larson*, 66 Colo. 15, 17, 178 Pac. 573, and in the same language, to wit:

"In this case, however, the question of whether plaintiff, had he looked, must of necessity have seen the engine approaching, is in sharp dispute. It does not conclusively appear, had he looked and listened as he claims he did, that he must have seen his danger in time to have avoided it."

[3] The point most pressed by plaintiff in error is that the speed of plaintiff's automobile was such that he could not stop after he did see the engine tender, and it is contended, in effect, that this shows that plaintiff was not in the exercise of due care. In this connection the opinion in *Great Western Ry. Co. v. Lee*, 198 Pac. 271, is relied on. That case, however, is distinguishable from the instant case. It involved no facts concerning danger from collision with a locomotive traveling backward, without lights, in the nighttime. The conclusion there reached was in the light of the rule that a motorist must use care proportioned to the probable danger in passing over railroad crossings. Applying the same rule in the instant case, we cannot say that the facts show, as a matter of law, that the plaintiff did not use such due care. In *Van Auken v. Railway Co.*, 96 Mich. 307, 55 N. W. 971, 22 L. R. A. 33, the court said:

"And we think it should be at least a question for the jury as to whether a traveler is in fault in failing to anticipate and guard against such an unusual thing as the running of a train without a headlight."

The case of *Hines v. C., M. & St. P. Ry. Co.*, 105 Wash. 178, 177 Pac. 795, was an action by one who, while proceeding in his automobile, was struck at a crossing by a locomotive moving backwards in the dark without a headlight. The court there held that the plaintiff, under the circumstances, was not guilty of contributory negligence as a matter of law in failing to stop before driving onto the crossing. The opinion in that case applies a rule which well might be observed in the instant case, and states it by quoting from *Hull v. S., R. & S. R. Co.*, 60 Wash. 162, 110 Pac. 804, as follows:

"A victim of an accident is entitled to have his conduct judged by the circumstances surrounding him at the time of the accident—by the conditions as they appeared to one in his then situation—and if his conduct, when so judged, appears to be that of a reasonably prudent person, he cannot be said to be guilty of negligence."

In the light of the rules hereinbefore stated, we do not find that the plaintiff was guilty of contributory negligence as a matter of law from the facts appearing in the record. There is no error in the rulings complained of, all of which involve the question above discussed.

The application for a supersedeas is denied, and the judgment is affirmed.

TELLER, J., sitting for SCOTT, C. J., and WHITFORD, J., concur.

HASSELL IRON WORKS CO. et al. v. INDUSTRIAL COMMISSION et al. (No. 10086.)

(Supreme Court of Colorado. Nov. 7, 1921.)

Master and servant §405(4)—Evidence held to support compensation award for death by lightning.

Evidence held to support a finding that the death of an oxy-acetylene welder by lightning while working on a steel bridge was caused by an accident arising out of his employment within Workmen's Compensation Act 1915, § 8.

Error to District Court, El Paso County; J. W. Sheafor, Judge.

Proceeding by Elizabeth Hrutkai, on behalf of herself and minor children of John Hrutkai, for an award under the Workmen's Compensation Act, opposed by the Hassell Iron Works Company, employer, and the Ocean Accident & Guarantee Corporation, insurer. The employer and insurer brought action in the District Court to set aside the findings and award of the Industrial Commission. Judgment for the defendants, and the plaintiffs bring error. Affirmed.

Fred W. Varney and Chas. W. O'Donnell, both of Denver, for plaintiffs in error.

Victor E. Keyes, Atty. Gen., and John S. Fine, Asst. Atty. Gen., for Industrial Commission.

Martin M. Burns, of Colorado Springs, for defendant in error Elizabeth Hrutkai.

ALLEN, J. This is an action brought in the district court of El Paso county to set aside the findings and award of the Industrial Commission in the matter of a claim presented under the Workmen's Compensation Act. The district court confirmed the findings and award, and plaintiffs bring the cause here for review.

The claim for compensation filed with the Industrial Commission was made by and on behalf of the dependents of a deceased employé, one John Hrutkai. The findings and award were in favor of the claimants. The claim was resisted by the employer and the insurer, plaintiffs in error here and plaintiffs below.

The findings of the Commission, so far as now material, are as follows:

"That John Hrutkai, deceased, was killed by an accident arising out of and in the course of his employment while performing services arising out of and in the course of his employment while working for the * * * employer at Ship Rock, N. M., on September 9, A. D. 1918. That while so employed and while engaged in operating an oxy-acetylene torch and wrecking a steel bridge on an island in the San Juan river, near Ship Rock, N. M., the said John Hrutkai was struck by lightning, death resulting instantly. That his death was the immediate result of the accident above described, and arose out of and in the course of his employment. * * *

The objections of the plaintiffs in error to the findings and award of the Commission are stated in various ways in the complaint and in the assignment of errors, but they may be summed up in this, namely, that there is no evidence to support the finding that the accident arose out of the employment.

The materiality of the objection, as thus stated, results from that provision of section 8, c. 179, Session Laws of 1915, which makes it one of the conditions precedent to the right to compensation that the injury or death of the employé be proximately caused by accident arising out of his employment.

The only question that need be determined upon this review is whether there is evidence to support the finding that the accident arose out of the employment. In *Pasini v. Industrial Commission*, 64 Colo. 350, 171 Pac. 370, this court said:

"This court may consider only the legal question of whether there is evidence to support the findings, and not whether the Commission has misconstrued its probative effect. The award is conclusive upon all matters of fact properly in dispute before the Commission, where supported by evidence, or reasonable inference to be drawn therefrom."

The employé concerned in the instant case was killed by lightning. It is claimed by the plaintiffs in error that, upon the facts appearing in the instant case, the Commission could not find that the accident of being struck by lightning arose out of the employment. It appears to be assumed on both sides that a correct statement of law relevant to this matter is that found in 1 *Honold on Workmen's Compensation*, 423, as follows:

"The employer cannot ordinarily be held liable for compensation for disability from sunstroke, freezing and lightning. These are forces of nature which he cannot foresee and prevent, and the employee is ordinarily no more subject to injury from such sources than others. But where the work and the method of doing the work exposes the employee to the

forces of nature to a greater extent than he would be if not so engaged, the industry increased the danger from such forces, and the employer is liable."

In the light of the statement just quoted, the contention of the plaintiffs in error may be said to be that there is no evidence that the employé, John Hrutkai, was exposed to the danger of being struck by lightning to a greater extent than he would be if not engaged in his employment. Upon this point there is evidence of the following facts:

At the time of being struck by lightning, Hrutkai was working upon a steel bridge which was partly in water and partly upon a river bank. He was an oxy-acetylene welder. His employment required him to use, and he did use, a platinum lighter, a torch, a small wrench, and a pair of pliers. He had some of these tools on his person when he was struck by lightning. The tools were carried over the spot on his body on which burns were found. At the time of the accident the ground was damp, and an electrical storm was in progress. A witness for the claimants describes the bridge and the surrounding conditions, as follows:

"The bridge washed down the river, * * * a quarter of a mile; it was a steel bridge. * * * That is a pretty swift river; it was 50 feet from the bank to the bridge and it was about 32 feet high from the floor to the highest part of the arch; there was about 47 tons of steel in it. When it went down it seems as though it hung on an abutment and went down end first, and when it struck it doubled up in the center and twisted in a kind of a mass. There was about 20 feet in the water that we had to cross to get out to the bridge and the balance was on the other side; it lay on the island. He [Hrutkai] was at the lower end of the bridge. * * * He was still working the last I seen of him, and had a torch in his hand cutting."

The witness Andrew Reid was experienced upon the subject of lightning protectors for street cars, and was an electrician. He testified that he had given special attention and consideration to devices and means for the protection of street cars against lightning, and studied the action of lightning in devising those means of protection. He further testified, in answer to a hypothetical question, to the effect that the deceased would be exposed to a greater hazard from lightning because of the place at which he was working and the conditions of his employment.

The Commission could have found, as a reasonable inference to be drawn from the evidence, that the steel in the bridge and the water underneath caused an attraction for lightning, and was a conductor thereof to an extent much greater than was common to

points elsewhere in the vicinity, and could have so found even if the testimony of the witness Reid had not been admitted. As said in *Passini v. Industrial Commission*, supra, we cannot consider whether the Commission misconstrued the probative effect of the evidence. We cannot say that the Commission ought to have found that the conditions under which Hrutkal was working did not add to his hazard of being struck by lightning. The facts in the instant case are as favorable for claimants as the facts found in *State ex. rel. Coal & Ice Co. v. Dist. Court*, 129 Minn. 502, 153 N. W. 119, L. R. A. 1916A, 344, 9 N. C. C. A. 129. In that case a driver of an ice route was struck and killed by lightning after having sought shelter under a large elm tree, situated near an iron fence. The court held the evidence "sufficient to sustain a finding that the accident to the decedent resulting in his death was one arising out of his employment."

The plaintiffs in error cite *Hoenig v. Industrial Commission*, 159 Wis. 646, 150 N. W. 996, L. R. A. 1916A, 339, 8 N. C. C. A. 192, where compensation was denied to the

dependent of an employé who was struck by lightning and killed while employed at work on a dam. In that case, however, the Industrial Commission itself found that the deceased was not exposed to a hazard from lightning stroke peculiar to the industry, or differing substantially from hazard from lightning stroke of an ordinary outdoor work, and the Wisconsin Supreme Court invoked the rule that the findings of the Commission should not be disturbed where there is any substantial basis for them in the evidence. This court has frequently announced the same rule, and under it we cannot disturb the findings of the Commission in the instant case.

Other cases on the subject may be found in the cases above cited, and in a note in 13 A. L. R. 977.

In our opinion there was evidence to support the finding that the accident arose out of the employment. The judgment is affirmed.

SCOTT, C. J., not participating.

OPHIR INV. CO. v. ALEXANDER REALTY CORPORATION. (No. 16483.)

(Supreme Court of Washington. Nov. 29, 1921.)

Corporations ¶98—No demand for and refusal to issue stock shown.

Where defendant corporation, on purchasing certain real property from plaintiff, gave plaintiff, as part of the purchase price, its receipt for \$4,500 "in full payment for 45 shares of stock" in defendant, "certificate of stock to be issued as soon as stock book has been opened," and about a month before suit plaintiff was informed by defendant that its stock book had not been opened and that no stock certificate had been issued to any subscriber, at which date or since no demand had been made by plaintiff for a certificate of stock, there was no cause of action growing out of demand by plaintiff for issuance of stock with refusal by defendant; the legal effect of plaintiff's taking the receipt being a promise given and accepted that a stock certificate would be issued as soon as the stock book was opened.

Department 1.

Appeal from Superior Court, Pierce County; W. O. Chapman, Judge.

Action by the Ophir Investment Company against the Alexander Realty Company. From judgment for defendant, plaintiff appeals. Affirmed.

Grant A. Dentler and John A. Sorley, both of Tacoma, for appellant.

Grosscup & Morrow and Chas. A. Wallace, both of Tacoma, for respondent.

MITCHELL, J. The Alexander Realty Corporation was incorporated under articles dated January, 1919. It appears all of its capital stock of \$600,000 was subscribed. It does not appear if the stock was paid up. It purchased certain real property from the Ophir Investment Company and as a part of the purchase price therefor signed and delivered its receipt as follows:

"Tacoma, Wn., June 18, 1919.

"Received from Ophir Investment Co. forty-five hundred dollars in full payment for 45 shares of stock of the Alexander Realty Corporation. Certificate of stock to be issued as soon as stock book has been opened. This stock representing part of the purchase price for lots 25 and 26, block 505 New Tacoma.

"Alexander Realty Corporation,
"H. F. Alexander, President."

In July, 1920, the Ophir Investment Company not having received a certificate of stock in the usual form under the seal of the company and the signatures of its officers, this suit was commenced. The complaint sets out the receipt of June 18, 1919, and in paragraphs 4 and 5 it is alleged:

"That said defendant at all times since said 18th day of June, 1919, has failed, neglected,

and refused to cause said 45 shares of stock or any part thereof, to be issued and delivered to said plaintiff although demand therefor has been made upon said defendant by said plaintiff.

"That said plaintiff is damaged in the sum of \$4,500, together with interest thereon at the rate of 6 per cent. per annum from the 18th day of June, 1919, because of said defendant's failure, neglect, and refusal to issue and deliver to said plaintiff said 45 shares of stock as aforesaid."

Judgment was demanded in the sum of \$4,500, together with interest from June 18, 1919.

The answer denied that any demand was ever made for a certificate of stock and admitted that no certificate of stock had been issued to the plaintiff. The plaintiff in its reply to certain allegations of affirmative matter set up in the answer admitted "that defendant has never opened stock books and that no demand has ever been made by plaintiff upon said defendant to open said stock books." It further admitted that at the date of the final payment on the lands purchased, June 18, 1920 (about a month before the suit was brought and a year after the delivery of the receipt set out in the complaint), the plaintiff was informed by the defendant that its stock book had not been opened and that no stock certificate had been issued to any subscriber, at which last-named date or since no demand has been made by the plaintiff for a certificate of stock. Upon the trial of the case without a jury the court granted a motion of the defendant to dismiss the action, at the close of plaintiff's case. From a judgment of dismissal the plaintiff has appealed.

It is argued by counsel for the appellant that the respondent has refused, upon demand, to issue a certificate of 45 shares of stock; that the refusal amounts to a conversion, thus perfecting a cause of action in damages at the election of the injured party; and that where there is no proof of actual or market value of the stock (the case here) the value is presumptively its par value. A number of authorities is furnished in support of the contention. What may some time be spoken of as a refusal, upon demand, to issue a certificate of stock to one entitled to it, may not necessarily amount to a conversion. But let that be as it may, the rule, if it be favored, cannot be applied in this case for the lack of facts upon which to rest it. There is no claim on the part of the appellant in either the pleadings or proof that there has ever been any demand by it for a certificate of stock or refusal of it by the respondent other than what occurred on June 18, 1919, at the time of the giving of the receipt in question. The account of that transaction as testified to by the president of the appellant corporation was that on June 18, 1919, when he delivered the deed (evi-

dently he meant contract for the sale of the land because the last of the purchase price was not to be paid and deed given until June 10, 1920) to the officers of the respondent corporation, he stated that he did not consider it was proper for him to deliver it until he had the stock, and was told that he (officer of the respondent corporation) could not deliver the stock but would give a receipt—that he could not deliver the stock because the stock book had not been opened and he did not know when it would be opened. This account of what occurred was corroborated by other witnesses who were present on that occasion. It was according to that understanding the receipt was issued. It follows therefore that, whatever preliminary negotiations and conversations with reference to the stock may have been had on that occasion, they became merged into the written receipt that was made by one party and taken by the other. The receipt says, "certificate of stock to be issued as soon as stock book has been opened." The language, with which the appellant was content as shown by its acceptance of the receipt, is inconsistent with the claim of a demand by the appellant for a present delivery of the certificate, and at the same time negatives the idea of a refusal on the part of the respondent to deliver the certificate, in the sense of its constituting a conversion. In this respect the legal effect of the transaction was a promise given and accepted that as soon as the stock book was opened a certificate would be issued, and as already stated, there is no claim of a demand or refusal at any subsequent date. There is no pleading or proof that the appellant has been refused any notice of or denied participation in the business affairs of the respondent; nor is there any pretense or claim of fraud in the transaction, while by its pleading the appellant admits that at the time the action was commenced the stock book had not yet been opened so as to issue stock to any subscriber or person entitled thereto. Judgment affirmed.

PARKER, C. J., and FULLERTON, TOLMAN, and MACKINTOSH, JJ., concur.

EDDY v. SPELGER & HURLBUT, Inc. (No. 16680.)

(Supreme Court of Washington. Nov. 29, 1921.)

1. Evidence \Leftrightarrow 509—Medical opinion as to which bruise was made by first impact of automobile held incompetent.

In an action for injuries received by a woman who was struck by an automobile, which caused a great many discolorations and bruises upon her body, where the testimony

showed that expert opinion could not determine which bruise was made by the initial impact of the automobile, it was error to permit a doctor to express an opinion that plaintiff had been first struck at a discolored place on her back.

2. Municipal corporations \Leftrightarrow 706(8)—Instruction as to violation of law requiring brakes held outside of issues.

In an action for injuries to a pedestrian struck by an automobile, an instruction that Laws 1915, p. 385, requires every motor vehicle to be equipped with brakes and warning signals, and that, if defendant's vehicle violated any provision thereof, and such violation was a proximate cause of the injury, plaintiff could recover unless negligent, was erroneous where the only negligence alleged was excessive speed and failure to give warning, and there was no pleadings or proof that the brakes on the car were defective.

3. Appeal and error \Leftrightarrow 1066—Instruction allowing recovery for negligence outside of issues held prejudicial.

In an action for injuries to a pedestrian struck by an automobile, where the only negligence alleged was excessive speed and failure to sound warning, as to which the evidence was of a meager and conflicting character, an instruction permitting recovery for negligence based on failure to have proper brakes was prejudicial to defendant.

4. Municipal corporations \Leftrightarrow 705(10)—Ordinance regulating pedestrians held not applicable to passenger alighting from street car.

A city ordinance prohibiting pedestrians from stepping into the portion of a street open to traffic at a point between street intersections, where their presence would be obscured, refers to a pedestrian stepping from the curb to the roadway, and is not applicable to a pedestrian alighting from a street car and crossing the street behind the car.

5. Municipal corporations \Leftrightarrow 706(6)—Evidence held to raise jury question as to negligent speed of automobile.

In action for injuries to a pedestrian struck by an automobile, where the evidence was conflicting as to whether plaintiff was on the crossing, and the driver admitted he was going 12 miles an hour, which exceeded the speed permitted at a crossing, and there was other evidence showing excessive speed, prohibited by Laws 1915, p. 385, the refusal of the trial court to take the issue of speed from the jury was not error.

Department 2.

Appeal from Superior Court, King County; Calvin S. Hall, Judge.

Action by Mary Eddy against Spelger & Hurlbut, Inc. Judgment for plaintiff, and defendant appeals. Reversed, with instructions to grant a new trial.

James B. Murphy and Ward C. Kumm, both of Seattle, for appellant.

Longfellow & Fitzpatrick, of Seattle, for respondent.

MACKINTOSH, J. Respondent, near the corner of Second avenue and Pine street, in the city of Seattle, was run into by a delivery car belonging to the appellant.

Respondent's theory of the case is that she alighted from the front end of a north-bound Second Avenue street car, which had stopped at the southerly crossing of Pine street, and had passed in front of the car and was walking on the crossing when she was run into by the south-bound automobile of the appellant.

Paragraph 8 of respondent's complaint charged that:

"That said injuries to plaintiff's person were caused and produced by the carelessness of defendant and its servants and agents, and particularly in this, to wit: That said defendant, its agent and servant, negligently and carelessly ran the said auto delivery truck at the time of the accident herein mentioned at a rapid, dangerous, unlawful, and excessive speed without giving warning to said plaintiff, contrary to the laws of the state of Washington and in violation of Ordinance No. 39720 of the city of Seattle."

The appellant's theory of the case is that the respondent alighted from the rear end of the street car and passed around the rear end for the purpose of crossing to the west side of the street; that when she came into view of the appellant's driver he had passed the crossing, and was so close upon her that it was impossible to avoid striking her. The appellant, in its answer, pleaded certain affirmative defenses, among which was the violation by the respondent of the city ordinance regulating the rights and duties of pedestrians and motor vehicles, section 52 of the ordinance being:

"Pedestrians shall not step into that portion of the street open to moving traffic at any point between street intersections where their presence would be obscured from the vision of approaching traffic by a vehicle or other obstruction at the curb, except to board a street car, or to enter a safety zone, at right angles."

The jury returned a verdict in favor of the respondent, from which the automobile owner has appealed.

It is first urged that a motion for a new trial should have been granted by the trial court, for the reason that the evidence and the physical facts preponderate so strongly in the appellant's favor that the entire evidence in the case cannot be said to support the verdict. The motion was properly denied, however, as, although the eyewitnesses to the accident were few, there was sufficient evidence supporting the plaintiff's theory of the case to entitle it to submission to the jury.

[1] It is next urged the court was in error in allowing the doctor who had examined the respondent after the accident to testify that the respondent had been first struck at

a discolored place upon her back. One of the material questions in the case for the jury to determine was the position of the respondent at the time she was struck; that is, whether she was facing the truck or whether she had been struck by it while crossing the street, and when she could not see it. The testimony showed that there were a great many discolorations and bruises upon the respondent's body, and that expert opinion could not determine which one of these discolorations or bruises was made by the initial impact of the automobile. It was therefore error to allow the doctor, who had not been an eyewitness of the accident, to testify as to his opinion in regard to the matter. While this error may not have been sufficiently prejudicial of itself to entitle the appellant to a new trial, it was nevertheless error.

[2, 3] The next error assigned is based upon the following instruction given by the court to the jury:

"Also there was in force at the time of said collision section 22, c. 142. Laws of 1915 of the state of Washington, as follows: 'Every motor vehicle shall be provided with good and sufficient brakes and with a suitable bell, horn, or other signal, which shall be rung or blown as a signal or warning to any person or whenever there is danger of a collision or accident.' I instruct you that if you find from a fair preponderance of the evidence that the operator of defendant's auto truck violated any of the provisions of the foregoing statutes, and if such violation was the proximate cause of injury and damage to plaintiff, then said defendant would be liable for such injury or damage, unless you further find that at said time plaintiff was guilty of contributory negligence."

Referring to the eighth paragraph of appellant's complaint, which was the only one alleging the negligence which caused the injury, we find therein that the acts of negligence alleged are excessive speed and failure to give warning. The case was tried upon this theory, and nowhere, either in the pleadings or the proof, was there any evidence which went to the question of their being other than good and sufficient brakes upon the car, and the instruction which allowed the jury to find the appellant guilty of negligence, if any violation had taken place of the provisions of the automobile law which was called to their attention, was an instruction not based upon any allegation or proof, and was therefore erroneous, and was so erroneous as, of necessity, must have prejudiced appellant's rights, since the evidence of the negligence charged was of a meagre and conflicting character.

[4] The next error assigned is the refusal of the court to give an instruction advising the jury that the respondent would be guilty of negligence, as a matter of law, for having violated section 52 of the city ordinance hereinbefore set forth. As we read that

section, it has no application to the facts in this case, but it is a section referring to a pedestrian stepping from the curb to the roadway, and was not drawn for the purpose of covering cases such as the one at bar. The court did properly instruct the jury as to the effect of the violation of the other section of the ordinance which had been pleaded.

[5] It is further alleged that the court erred in refusing to grant appellant's motion to take the question of speed from the consideration of the jury. This motion was properly denied, as there was evidence sufficient to go to the jury; some testimony, in fact, was given by the driver of the appellant's car himself that he was driving at the rate of 12 miles an hour, which was an unlawful rate of speed if it was the speed used at the place where the respondent claims the injury occurred, to wit, the crossing, and in addition to that the law of this state provides, in chapter 142, Laws 1915, that no person shall drive a car at a greater rate than is reasonable and proper, having a regard for the traffic, etc., and there is a question presented under the circumstances of the case whether the driver of the car was violating that statutory provision. Hence we find no error in the refusal of the court to take the issue of speed from the jury.

The last assignment of error is in regard to the amount of the verdict, but it is unnecessary for us to consider this question in view of the fact that we are remanding the case for new trial.

The judgment is reversed, with instructions to grant a new trial.

PARKER, C. J. and MAIN, HOLCOMB, and HOVEY, JJ., concur.

UNITED STATES CAST IRON PIPE & FOUNDRY CO. v. ELLIS et al.
(No. 16300.)

(Supreme Court of Washington. Nov. 22, 1921.)

1. Sales \S 273(2)—Warranty of fitness implied where seller knows purpose for which article is intended.

Where a buyer orders a specific article from a dealer or manufacturer, stating the purpose for which the article is intended to be used, and trusts to the judgment of the seller the selection of the article which shall be suitable for the intended purpose, there is an implied warranty that the article furnished shall be reasonably fit for the intended purpose.

2. Sales \S 273(5)—No warranty implied where article manufactured to specifications.

When the article ordered is to be manufactured according to certain prescribed specifica-

tions, or is an article well known and defined in current trade, the contract is complied with when an article is furnished which is manufactured in accordance with the designated specifications, or is an article of the standard kind known to the trade, even though the seller may know the purpose for which it is intended and it proves unfit or unsuitable for the purpose.

3. Sales \S 181(12)—Evidence insufficient to sustain finding that joints of water pipes broke because of defects.

In an action for balance due on purchase price of water pipes used in the construction of a water main, evidence held insufficient to justify a finding that joints of pipe which broke did so because of defects in their manufacture.

Department 1.

Appeal from Superior Court, King County; A. W. Frater, Judge.

Action by the United States Cast Iron Pipe & Foundry Company against L. R. Ellis and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Kerr & McCord and Stephen V. Carey, both of Seattle, for appellants.

Bogle, Merritt & Bogle, of Seattle, for respondent.

FULLERTON, J. By the record in this cause it is disclosed that the city of Seattle entered into a contract with the appellant Ellis by the terms of which the appellant agreed to furnish the necessary piping and install for the city two certain water mains through a concrete tunnel which the city had theretofore caused to be constructed. The tunnel was some 900 feet in length, was circular in form, and about 12 feet in diameter. It was designed to carry mains in addition to those the appellant was required by his contract to install, and one of these, a water main 42 inches in diameter, had then been laid on the floor of the tunnel. Above this main steel "I-beams" had been inserted across the tunnel 8 feet apart, and it was on these beams that the appellant was required to lay the mains which he undertook to install. The plans and specifications accompanying the contract prescribed the character of the work with particularity. One of the mains was to be constructed from joints of pipe 24 inches in diameter of a kind known as "class D flanged cast-iron pipe with plain, straight flanges," to be bolted together in a described manner, and was required to withstand when in place a water pressure of 225 pounds per square inch.

The appellant purchased the pipe for the mains from the respondent. When the 24-inch main was laid in the tunnel some three of the joints of pipe broke on the application of test pressures. These breaks occurred at different tests, and were separately replaced. Owing to the cramped space in which the

workmen were required to work and the great weight of the joints, the work of replacing a broken joint was exceedingly difficult and costly. The appellant conceived that the expense of replacing them was an expense for which the respondent was liable by the terms of the contract under which the pipes were purchased, and withheld from the purchase price the cost of the replacement. The respondent disclaimed liability, filed a claim of lien for the unpaid part of the purchase price against the statutory bond given by the appellant to the city, and thereupon instituted the present action to enforce the claim. The appellant sought to set off the expense he had incurred in replacing the broken joints of pipe, and on the issue of the respondent's liability for the expense so incurred, the cause was tried by the court sitting without a jury. The trial court disallowed the set-off, and entered a judgment in favor of the respondent.

The contract between the appellant and respondent is evidenced by certain telegrams and letters passing between appellant and the respondent's agent. Preparatory to bidding on the work, the appellant interviewed the agent, and ascertained from him the cost at which his company could furnish the required pipe, exhibiting to the agent at that time the plans and specifications the city had prepared for the work. Later on, and after the appellant had been awarded the contract for the work, he sent to the agent a telegram, ordering with other sized pipe "eighty-three joints twenty-four inch flanged D" pipe, confirming the order a few days thereafter by a letter in which he gave shipping directions, and in which he stated that the pipe was "to fill the specifications of the city of Seattle for the service mains and accessories of the Lake Union tunnel." In due time the pipe was furnished by the respondent, and, after inspection and such tests as could then be applied by the appellant, was installed in the pipe line. On turning on the water after the pipe had been installed, a joint of the pipe broke, when the pressure of the water reached some 25 pounds to the square inch. This joint was taken out and replaced by another, and the water again applied, when another joint broke at about the same pressure. This was likewise replaced, and the water again applied, when another joint gave way at a somewhat increased pressure, although at a pressure much less than the pipe was required to withstand under ordinary working conditions, and, of course, at a pressure much less than the appellant guaranteed with the city that the pipe would withstand when in place.

As to the cause of the breaking of the pipe the trial court made no specific finding. It did, however, make the following findings:

"That the 24-inch cast-iron flange pipe mentioned in said telegram of defendant Ellis, which

is set forth in paragraph 8 of these findings, also in said answer thereto of plaintiff, which is set forth in paragraph 9 of these findings, also in said letter of defendant Ellis, which is set forth in paragraph 11 of these findings and designated as class D, was and is a standard, well-known, and definite kind and class of cast-iron flange pipe, which was manufactured by plaintiff and by other manufacturers of cast-iron pipe, according to standard specifications for such manufacture, and the same was so designated as class D in order to identify such pipe as being such known, described, and definite article. That defendant Ellis in ordering such pipe intended to order, and plaintiff in agreeing to fill such order, intended to supply, said 83 lengths of such known, described, and definite pipe.

"That no one of the said three pipes broke because of the water pressure to which it was so subjected, nor did any one of said pipes show any sign or evidence of any defect in any particular whatever. That the breaks in said pipes were each circumferential and not such as would be made by internal water pressure, nor such as would result from said pipes being defective or too poorly made to withstand the pressure and strains which the same were expected and intended to be subjected to. That pieces were cut from two of said broken pipes, at both sides of the breaks therein, and such pieces were subjected to tensile strain tests, and each thereof tested above the requirements for material in such pipes. That each of said pipes was measured and found to be of the proper thickness.

"The court finds that none of the pipe so sold by plaintiff to defendant Ellis, on account of which said defendant claims damages against plaintiff in this action, showed any deficiency in size, thickness, quality of material, insufficiency in construction, or to any defect whatsoever, and that defendant Ellis has wholly failed to establish by the evidence in this case that any such pipe was in any manner defective, or that any loss or damage sustained by him was due to or caused by any breach of plaintiff's contract with him for the sale of said pipe; and defendant Ellis wholly failed to sustain either of his affirmative defenses herein, except as to the payments for freight and gaskets credited to him as aforesaid."

As grounds for reversal of the judgment entered the appellant makes two principal contentions; first, that in the contract under which the piping was purchased there was an implied warranty of fitness for purpose; and, second, that the evidence preponderated in favor of the conclusion that the pipes were defective because of faults in their manufacture.

[1, 2] Noticing the first of the contentions, this court has held, and it is perhaps the general rule, that where a buyer orders a specific article from a dealer or manufacturer, stating the purpose for which the article is intended to be used, and trusts to the judgment of the seller the selection of the article which shall be suitable for the intended purpose, there is an implied warranty that the articles furnished shall be reasonably fit for the intended purpose. See *Hausken v. Hod-*

son-Feenaughty Co., 109 Wash. 606, 187 Pac. 319. But the converse of the proposition is equally the rule, namely, that when the article ordered is to be manufactured according to certain prescribed specifications, or is an article well known and defined in current trade, the contract is complied with when an article is furnished which is manufactured in accordance with the designated specifications, or is an article of the standard kind known to the trade, even though the seller may know the purposes for which it is intended to be used, and it afterwards proves to be unfit or unsuitable for the intended purpose. *Caldwell Bros. & Co. v. Coast Coal Co.*, 58 Wash. 461, 108 Pac. 1075; *Mianus Motor Works v. Vollans*, 83 Wash. 680, 145 Pac. 997.

It seems to us clear that the contract falls within the last rather than within the first of these rules. The order was for a stated number of joints of pipe of a given diameter of a kind, as the evidence disclosed and as the court found, well known in current trade by the name by which it was described. The respondent was given no right of selection. It was not permitted to question the fitness of the pipe for the purpose intended. If it filed the order at all, it was bound to furnish standard pipe of the designated kind. Plainly, we think, there could be no warranty of fitness for purpose. To so hold would be to hold that the respondent, by selling the pipe, impliedly warranted the sufficiency of the city's plans and specifications for the construction of the main.

[3] On the second contention, we agree with the trial court that the evidence was not sufficient to justify the conclusion that the joints of pipe which broke, broke because of defects in their manufacture. On this question there was little or no direct evidence of defect in the pipes themselves. The conclusion is drawn largely from the fact that the pipes burst under such a slight hydraulic pressure, a pressure which an engineer testifying for the appellant stated was "about what an ordinary tin can would withstand." But the nature of the breaks—the fact that they were circumferential rather than longitudinal and the fact that they broke under such a slight pressure—seems to us to indicate that the predominating strain which caused the breaks was something other than the pressure of the water. Concerning the effect of the water pressure, one of the appellant's principal witnesses testified that—

A hydraulic pressure of 25 pounds to the square inch "would have no noticeable effect on the pipe. * * * Ordinarily I would not expect such a pipe to break solely from a hydrostatic pressure of 25 pounds, and would feel that if it did break there might be other contributing causes."

What the other contributing causes were we think the evidence plainly indicates. The

pipe form in the main was of cast iron having little or no flexibility. It was rigidly bolted together, leaving no flexibility at the joints. The beams upon which it was laid did not form a straight line, but a line with a slight vertical curve. The consensus of the testimony of the engineers is that such a mode of installation for this character of pipe was not in accord with scientific engineering, as it engendered strains which piping of this sort was not contemplated to withstand. The appellant himself testified (we quote from the abstract):

"The test that was made a part of the line before it was connected up was at the suggestion of Mr. Martindale, a representative of the plaintiff. We tested the north end of the line at his suggestion. We put a flange at the break in the tunnel, and then tested the north end separately to 225 to 230 pounds, and it stood that test without any leaks developing. Then we connected the south end, and tested in the same way, and it stood the test. * * * Mr. Martindale's position was something to the effect that the cause of the break was the non-flexibility of the line; that that being bolted absolutely solid was the reason for the pipe breaking. That was his position, and was why he asked to test the separate ends before they were joined up solidly. We made that test and it proved satisfactory. Afterwards, when the pipe was connected up, it broke again, after I was out of there. I believe it was Mr. Martindale's contention that the reason of the three breaks was that the pipe had all been joined together so it was practically inflexible. I don't remember that he said that in his opinion if we did bolt it up again without lead sleeves to give it flexibility it would break again. I don't remember of him expressing any such opinion.

"Mr. Martindale was there about August 8th or 9th, right after the third break, and went down into the tunnel and saw the line and talked over the matter. He suggested the inflexibility of the line as the possible cause of the break, but he was, I think, as much puzzled as anybody else. His statement and conclusion was that the test he suggested would eliminate the possibility of outside causes. I don't remember that he made the statement that if it was joined up again without giving it flexibility it would break again. I would not say he did not make such a statement.

"At that time we sawed out a piece of the broken pipe for Mr. Martindale to take away and have a tensile test made. The tensile test showed, I think, the requirements for that class of pipe. They were all considered good tests. So far as those tests showed, the material of which the pipe was made was good material."

We think it unprofitable to pursue the inquiry further. In our opinion the evidence sustains the conclusion of the trial court. The judgment will stand affirmed.

PARKER, C. J., and BRIDGES, MACKINTOSH, and HOLCOMB, JJ., concur.

**NORTHERN GRAIN WAREHOUSE CO. v.
NORTHWEST TRADING CO.**
(No. 16329.)

(Supreme Court of Washington. Nov. 2,
1921.)

1. Customs and usages ¶10—In "c. i. f." contracts, court follows rule of uniform interpretation.

Although the term "c. i. f." may be used in connection with the price of commodities, the term affects the title on delivery, under the uniform interpretation, and the court will not establish a rule which is inharmonious with the general custom of merchants throughout the trading world.

2. Sales ¶201(4)—"C. i. f." contracts transfer title on delivery to carrier.

Under a "c. i. f." contract the transfer takes place at the time of the delivery of goods to the carrier.

3. Sales ¶202(6)—Delivery of documents entitling purchaser under a c. i. f. contract to physical possession held to take place of bill of lading.

In an action for damages to a shipment of bags from Calcutta to Seattle, in accordance with a c. i. f. contract, passing title to the purchaser on delivery to the carrier, the delivery of the shipping documents and insurance policy in order to complete the transaction need not be made until a reasonable time has elapsed, and, upon delivery to the purchaser of documents entitling it to physical possession, it cannot complain that no bill of lading was delivered.

4. Sales ¶202(6)—In a c. i. f. contract title passes when goods are delivered to carrier, and seller need not own goods at time of sale.

In action by a buyer against a seller for damages to a consignment of goods shipped from Calcutta to Seattle under a "c. i. f." contract, that the goods were not owned by defendant when sold to plaintiff was not material, as the goods were appropriated to plaintiff's contract; the title being transferred from the former owner to defendant and from defendant to plaintiff at the time the goods were put aboard the ship, even though plaintiff was not entitled to possession till he had received the documents and complied with the contract.

Department 1.

Appeal from Superior Court, King County;
Everett Smith, Judge.

Action by the Northern Grain Warehouse Company against the Northwest Trading Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Wright, Kelleher, Allen & Hilen and William H. Gorham, all of Seattle, for appellant.

Piles & Halverstadt, of Seattle, for respondent.

MACKINTOSH, J. On December 10, 1917, the following contract was entered into between the appellant and respondent, whereby the appellant purchased from the respondent the goods therein described:

"Commodity: Wheat bags.

"Quantity: 100,000.

"Quality: Best grade.

"Shipment: March/April, 1918, from Calcutta.

"Price: \$0.17 each c. i. f. Seattle.

"Terms: Sixty days sight draft acceptance on presentation with documents attached.

"Marked: N. W. T. Seattle 8041/A.

"Remarks: Sold through Chas. H. Lilly & Co."

At the time the contract was entered into the respondent had purchased from Becker, Grey & Co., of Calcutta, wheat bags sufficient to cover the amount of this contract, and had established credit in London sufficient to protect Becker, Grey & Co. In the spring of 1918 Becker, Grey & Co. shipped the goods on board the Fuca Maru, consigning them to the "Textile Alliance," "account Northwest Trading Company." On June 3, 1918, the goods arrived at Seattle, and on June 6th the respondent notified the appellant of the arrival and inclosed a guaranty approved by the "Textile Alliance." On June 14th the respondent discovered part of the goods were damaged, but failed to notify the appellant of that fact. The respondent on June 24th, not having the bill of lading, gave to the carrier an indemnity bond, and on June 26th procured from the carrier's warehouse an order made to itself which it indorsed to the appellant and attached the same to a draft, which was presented by the respondent to the appellant, who accepted the draft and thereby obtained possession of the warehouse order, and on the following day took actual possession of the goods, when it learned of the damaged condition of a portion of them. On this same day, June 27th, draft was received from Becker, Grey & Co. with the documents attached. The respondent obtained the documents and procured a release of the indemnity bond, which had been given to procure the warehouse order, by delivery of the bill of lading. While the goods were in transit the appellant, a couple of times, made inquiry of the respondent as to "our 100 bales purchased from you," in reply to which the respondent twice recognized the bags as being the property of the appellant.

The consignment of the goods by Becker, Grey & Co. to the "Textile Alliance" is explained by the fact that during the war times the goods were necessarily so consigned by reason of the President's proclamation and order of the War Trade Board, which required that goods of the character in ques-

tion be so consigned in order that the "Textile Alliance" might approve of the sale and delivery of the goods. Owing to war conditions, the bill of lading did not take the usual course, and it was by reason of those conditions that in lieu of the bill of lading being delivered to the appellant the documents above referred to were used and the delivery made in the manner described. This course was pursued in order to facilitate the physical delivery of the bags to the appellant.

The testimony shows insurance had been written upon the bags under a blanket policy, which was in effect during the months in which the goods were shipped and were on the seas.

Somewhere on the voyage of the *Fuca Maru* the goods were injured by sea water, and this action is brought for the purpose of determining who shall bear the loss. The appellant is seeking damages because 27,000 of the 100,000 bags were delivered in damaged condition; its position being that the title had not passed at the time the damage occurred, while the position of the respondent is that, under the contract as above set forth, title had passed at the time of delivery to the carrier in Calcutta. The bare question in this case is as to the effect of that contract.

The respondent's contention is that this is a "c. i. f." contract, and that, in accordance with the established rule, under such a contract a delivery is complete when the goods have been actually delivered to the carrier for transportation, while the appellant claims that the use of the letters "c. i. f." in the contract refer only to the matter of price, and that title did not pass until delivery in Seattle, under the same restrictions as would be applied had those three letters not been used in the contract, and that in this case no title passed until either actual or constructive delivery of the goods by presenting the bill of lading, with draft attached, and the purchaser had accepted the draft and thereby obtained the bill of lading.

[1, 2] It is appellant's argument that this case is governed by what this court said in the case of *Collignon & Co. v. Hammond Milling Co.*, 68 Wash. 626, 123 Pac. 1083, and it quotes that part of the opinion which follows:

"There is nothing in a c. i. f. sale differentiating it from other sales, so far as the question under consideration is concerned. The distinguishing feature of such a sale is that the contract price includes the costs of insurance and the freight to destination in addition to the invoice cost of the goods. An offer and acceptance on that basis, therefore, does not, more than in other sales, determine as between buyer and seller when or where the title to the goods passes from buyer to seller. That depends upon the intention of the parties to be determined as in other cases."

The expression of this court in that case is, if read literally, not supported by the authorities and has, in fact, been overruled by our decision in *Andersen-Meyer Co. v. Northwest Trading Co.*, 196 Pac. 630, where we had under consideration a "c. i. f." contract. In the *Collignon* Case, *supra*, a "c. i. f." contract was considered without any reference to the English and American authorities which have passed upon this form of contract under the law merchant, and which have established, with scarcely a dissenting opinion anywhere, that a "c. i. f." contract, although the term may be used in connection with the price of the commodities, yet affects the title on delivery. These contracts, being so generally used, have received a uniform interpretation, and it will not do to introduce confusion into commercial activities by establishing a rule which is inharmonious with the general custom of merchants throughout the trading world.

In addition to the cases cited in the *Andersen-Meyer* Case, *supra*, reference may be made to the very recent case of *Smith Co. v. Marano*, 267 Pa. 107, 110 Atl. 94, 10 A. L. R. 697; *Law & Bonner v. British-American Tobacco Co.*, [1916] 2 K. B. 605; *C. Sharp & Co. v. Nosawa & Co.*, [1917] 2 K. B. 814; *Mambre Sacharrine Co. v. Corn Products Co.*, [1919] 1 K. B. 198; *Stroms, Brucks, Aktie & Bolag v. Hutchinson*, [1905] A. C. 515.

The use of the expression in the *Collignon* Case, *supra*, that the determination of when title should pass "depends upon the intention of the parties" in a sale "c. i. f." is not supported by the authorities, and is misleading, unless by it is understood that an intention contrary to that established by the use of "c. i. f." must be unmistakably shown in the contract itself, as the courts hold that the use of the term "c. i. f." establishes that the transfer is at the time of delivery to the carrier, even though the contract may call for delivery at some other time. In the *Law & Bonner* Case, *supra*, the English court held that a provision in the contract that for a period after shipment the goods were to be at the risk of the seller was repugnant to the "c. i. f." terms, and that, although that clause appeared in the contract, it could have no application to a transaction which was also "c. i. f."

In the case of *Smith & Co. v. Moscahlades*, 193 App. Div. 126, 183 N. Y. Supp. 500, which is quoted in the *Andersen-Meyer* Case, the New York court held that in a sale "c. i. f." a statutory provision of the New York sales act that property does not pass until the goods have been delivered to the buyer or have reached the place agreed upon was, "unless a different intention appears," inapplicable, for a "c. i. f." contract imports an intention differing from that set out in the statute, and falls within the exception.

In the case of *Smith & Co. v. Marano*, su-

pra, the defendant agreed to buy merchandise from the plaintiff at a price "c. i. f.," and the goods were destroyed by submarine while in transit on the high seas. The defendant was held liable for the purchase price; as delivery to the carrier was delivery to the defendant. In that case no particular emphasis was placed on the delivery of the shipping documents; it appearing they were actually tendered to defendant with sight draft for the amount due.

In *Smith & Co. v. Moscahlades*, above, it was further held that a delivery to the carrier of goods bought "c. i. f." was an unconditional appropriation, and the title passed to the buyer, even though the purchase price was payable before the buyer was entitled to the actual delivery of the goods, or the delivery of the bill of lading, which in that case was made to the order of the seller and indorsed by it to the buyer.

In the case of *Mambre Saccharine Co. v. Corn Products Co.*, supra, it was held that the seller could effectively tender the proper documents to the purchaser and claim delivery, although he knows at the time of the tender the goods have been lost in transit.

[3] Delivery of the shipping documents and the insurance policies in order to complete the transaction need not be made until a reasonable time has elapsed. In this case documents which entitled the appellant to physical possession of the property, though other than the bill of lading, were delivered to the appellant, which entitled it to physical possession of the property, and it is in no position to complain that the bill of lading was not delivered.

[4] Some point is made of the fact that shipment from Calcutta was not made to the appellant as consignee, and that the respondent was not the owner of the goods sold to the appellant. We see no merit in this position for it is a common commercial transaction for merchants to make purchases and resell the goods to their customers without first getting actual physical possession of the goods themselves, and that is what was done in this case; the goods were distinctively marked and set aside to the appellant, and, although they may have been consigned to the account of the respondent, nevertheless were so segregated and distinguished as to have been appropriated to the appellant's contract. The bill of lading which was made out to the respondent was, immediately upon its receipt, indorsed and attached to the draft, and, as was said in the *Marano Case*, supra, this merely indicated "appellee's intention to retain property in the goods to secure performance by the defendant of his promise to pay for them, and did not, by the express words of the sales act, relieve him from the risk that was upon him from the

time the goods were delivered to the carrier." The title was transferred from Becker, Grey & Co. to respondent and from respondent to appellant at the time the goods were placed on board the *Fuca Maru* for transportation, although the appellant was not entitled to the physical possession of the property until it had received the documents and complied with the terms of the contract. As the trial court said, in a memorandum opinion:

"There was no hint or reservation that the title would pass upon payment of the draft or subsequent approval of the plaintiff."

The judgment is affirmed.

PARKER, C. J., and BRIDGES and HOLCOMB, JJ., concur.

PEARCE v. PUYALLUP & SUMNER FRUIT GROWERS' CANNING CO. (No. 16474.)

(Supreme Court of Washington. Nov. 28, 1921.)

1. Sales §71(3)—Seller held not liable for more than one car of goods ordered, in absence of proof it had more.

A seller, which, in response to an offer to buy five cars of a certain kind of cabbage, the first car to be shipped the first of the next week, wired the buyer that it would start shipping cabbage as per his offer, and would furnish as many cars as it had, but might not have five cars to supply, obligated itself to sell and ship to the buyer at least one car of the kind of cabbage ordered, and as many more up to five as it had or could obtain, but, in the absence of proof that it had cabbage of the kind ordered, it was not bound to ship any other cars.

2. Sales §418(2)—Buyer may recover difference between contract price and market value at time of breach of contract to sell and deliver.

The measure of damages for breach of a contract to sell and deliver goods is the difference between the contract price and market value at the time of the breach.

Department 1.

Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

Action by B. F. Pearce against the Puyallup & Sumner Fruit Growers' Canning Company. From a judgment dismissing the action, plaintiff appeals. Reversed, with instructions.

Byers & Byers, of Seattle, for appellant. M. F. Porter, of Puyallup, for respondent.

BRIDGES, J. By this action the plaintiff sought to recover damages of defendant be-

cause of its failure to ship to him three carloads of cabbages. The case was tried by the court, which made findings of fact and conclusions of law, the conclusions being to the effect that the action should be dismissed. Later a judgment was entered dismissing the action, and the plaintiff has appealed therefrom. The testimony not being before us, the question is, Do the findings sustain the judgment of dismissal? The court found that, on November 13, 1918, the respondent sent out to the trade a circular letter, reading as follows:

"We are pleased to advise that we are now receiving from our growers an excellent quality of Danish Ballhead cabbage, which we can furnish in crates at 1¼ c. per lb. f. o. b. Puyallup, in carloads at 1½ c. per lb. f. o. b. Puyallup. A crate holds about 160 lbs. The cabbage is firm, well trimmed, and of good quality. We can ship one crate or many carloads."

On the same day appellant submitted to respondent an offer, subject to confirmation, of—

"\$16 a ton crated on 5 cars of fancy, medium size, graded Danish Ballhead cabbage, of a greenish color, f. o. b. cars Puyallup, cabbage to be free from any and all diseases and frost and inside growth. First car to be shipped first of next week, the other four cars to follow, one car every 3 days. * * *"

On the following day respondent, by wire, requested appellant to come to its place of business and inspect the cabbage. This the appellant refused to do, but asked for a confirmation or rejection of his order, and on December 16 the respondent wired appellant as follows:

"Will start shipping cabbage as per your letter 13th, but may not have full five cars to supply. Will furnish as many cars as we have. Believe there will be from 3 to 5 possibly more if you desire them. Trust this is satisfactory."

Appellant accepted the offer.

[1] The theory of the trial court was that these several letters and telegrams failed to make a contract for any cabbage whatsoever. In so holding we think it was in error. We construe respondent's telegram of December 16 to mean that it obligates itself to sell and ship to appellant at least one car of the kind of cabbage ordered, and as many more, up to five in all, as it has or can obtain from its growers. Appellant's order of the 13th was for five cars, the "first car to be shipped first of next week," and respondent agreed that it would "start shipping cabbage as per your letter of the 13th. * * *" This could mean nothing else than that respondent agreed to ship the first car at the time mentioned in the order. But it did not bind itself to ship any other cars unless it had the

kind of cabbage ordered, for it expressly told appellant that it "may not have full five cars to supply. Will furnish as many cars as we have." If it had more cars of cabbage which would comply with the order, then it obligated itself to ship them, up to five in all. The burden was on appellant to show that respondent had cabbage of the kind ordered. Apparently he failed to make any such showing. At any rate, the findings do not indicate that respondent had any such cabbage. Such being the situation, we hold that respondent was obligated to ship but one car. Since it did not ship any, it is liable in damages for the failure to ship the one car.

[2] The appellant's offer, which was accepted by the respondent, was \$16 per ton, and that each car should contain 15 tons. The court found that at the time these cabbages should have been shipped the market price was 1¼ cents per pound. These figures would indicate that the appellant was to pay \$240 per car, and that at the time of respondent's breach the market value was \$375, and that appellant's damage is \$135.

The judgment is reversed, with instructions to the lower court to enter judgment for the appellant in the sum of \$135.

PARKER, C. J., and MITCHELL and TOLMAN, JJ., concur.

SPOKANE CITY CLUB v. UNION TRUST CO. et al. (No. 16489.)

(Supreme Court of Washington. Nov. 21, 1921.)

Mortgages §—600(1)—Trustee held not authorized to require redemptioner to pay bonds held by one beneficiary.

Under an agreement between a mortgagee and a lodge desiring to obtain the mortgaged property, whereby the secured notes were transferred to a trustee to be held in escrow until paid, a mortgagee still had a beneficial interest in the trust until the notes were fully paid, so that the lodge could not, after foreclosure sale, require a judgment creditor who desired to redeem, under Rem. Code 1915, §§ 594, 595, to pay bonds held by the lodge which were secured by second mortgage on the premises, thereby requiring the trustee to act contrary to the original mortgagee's interest.

En Banc.

Appeal from Superior Court, Spokane County; David W. Hurn, Judge.

Action by the Spokane City Club against the Union Trust Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

(201 P.)

Wakefield & Witherspoon, Wm. C. Meyer, and Henry L. Kennan, all of Spokane, for appellants.

Charles P. Lund and Frank T. Post, both of Spokane, for respondent.

BRIDGES, J. This case involves the right of redemption from a sheriff's sale of real property. There is practically no dispute concerning the facts. Prior to March, 1911, the Spokane Club, a corporation, gave to J. P. Graves, of Spokane, its notes in the aggregate sum of \$125,000, and secured the payment of them by a mortgage given to Mr. Graves covering certain real property in Spokane. After the Spokane Club gave the Graves' notes and mortgage, it gave to the Spokane & Eastern Trust Company a trust mortgage covering the same property and securing bonds issued or thereafter to be issued. The trust deed or mortgage especially recited that it was junior and subsequent to the Graves mortgage. Spokane Lodge, No. 228, B. P. O. Elks, became the owner of \$7,550 par value of the second mortgage bonds so issued. Ultimately the Spokane Club became financially embarrassed and was unable to pay the Graves notes when they became due. The Elks Lodge, being acquainted with this condition, and being desirous, if possible, of acquiring the property of the Spokane Club, entered into a written agreement with Mr. Graves, which provided that the latter would sell to the former the notes and mortgage so owned by him. The lodge was to make payments of the purchase price in various designated installments. This agreement especially provided that Mr. Graves should surrender into the possession of the Union Trust Company, of Spokane, the notes and mortgage so contracted to be sold, and that the trust company should hold such papers in escrow for the purpose of carrying out the agreement of sale and purchase between Mr. Graves and the Elks Lodge. The agreement further provided that at any time, while the lodge was not in default, it might demand of the trust company that it proceed at once to a foreclosure of the mortgage. Subsequently the lodge made the demand, with the result that the trust company foreclosed the mortgage and was the purchaser at the sheriff's sale of the mortgaged lands for the sum of \$132,194.77, and the sheriff issued to it his certificate of purchase, subject to redemption as provided by statute.

The Spokane City Club, a corporation, became the owner of a judgment against the Spokane Club, and thus put itself in position to redeem from the Graves mortgage foreclosure sale. Before the expiration of the redemption period, it notified the sheriff of Spokane county that on a certain named date it would redeem the property so sold. This fact was communicated by the sheriff to the Union Trust Company, which in turn notified

the Elks Lodge; thereupon that lodge put into the possession of the trust company the second mortgage bonds issued by the Spokane Club, and owned by the lodge, and requested that the trust company add the amount of those bonds, plus the interest thereupon, to the amount necessary to redeem from the certificate of sale held by it. The trust company then notified the sheriff that the amount necessary to be paid for the redemption was the amount which it had paid at the foreclosure sale with interest, and certain expenses, plus \$10,834.32; the latter sum being the face and interest of the second mortgage bonds held by it. The sheriff refused to permit the Spokane City Club to redeem unless it paid the whole amount so demanded by the trust company, and, being unable to redeem otherwise, the City Club paid to the sheriff for redemption the amount due on the certificate of sale, plus the amount due on the second mortgage bonds held by the trust company. This last amount was paid by the City Club under protest. Although the trust company demanded that the sheriff pay it the full amount of the redemption money, he refused to pay the amount in dispute, being the amount of the face and interest of the second mortgage bonds, but did pay all the remainder of the redemption money, and held in his hands the \$10,834.32. The Spokane City Club brought this action against the sheriff and the Union Trust Company to recover that sum, plus interest. There were findings, conclusions, and judgment in favor of the plaintiff, and the defendants have appealed.

Section 594, Rem. Code, reads as follows:

"Property sold subject to redemption, as above provided, or any part thereof separately sold, may be redeemed by the following persons, or their successors in interest: (1) The judgment debtor or his successor in interest, in the whole or any part of the property separately sold, (2) a creditor having by judgment, decree or mortgage, on any portion of the property, or any portion of any part thereof, separately sold, subsequent in time to that on which the property was sold. The persons mentioned in subdivision two of this section are termed redemptioners."

Section 595, Rem. Code, provides as follows:

"The judgment debtor or his successor in interest, or any redemptioner, may redeem the property at any time within one year after the sale, on paying the amount of the bid, with interest thereon at the rate of eight per cent. per annum to the time of redemption, together with the amount of any assessment or taxes which the purchaser or his successor in interest may have paid thereon after purchase, and like interest on such amount; and if the purchaser be also a creditor having a lien by judgment, decree or mortgage, prior to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest."

We are of the opinion that the judgment must be affirmed because, under the agreement between Mr. Graves and the Elks Lodge, making the Union Trust Company a trustee for the purposes mentioned in the agreement, that company had no right or authority to demand of the redemptioner that it pay the sum due on the bonds issued by the Spokane Club, and turned over to it by the Elks Lodge. The power and authority of the Union Trust Company, as trustee, was created and limited by the agreement between the lodge and Mr. Graves. Appellants contend that the Union Trust Company held the certificate of purchase issued by the sheriff for the use and benefit of the lodge, and that Mr. Graves had no interest in the notes and mortgage held by the trust company, except he had a lien upon them to secure the unpaid purchase price, and that his rights in the notes and mortgage were those of a lien holder and nothing more. We cannot agree with this contention. It is our view that the Union Trust Company held the notes and mortgage as trustee both for the lodge and Mr. Graves. The trustee was bound to recognize the rights of Mr. Graves and its obligations to him under its trust, until such time as Mr. Graves had been fully paid by the Elks Lodge. The actual title to the notes and mortgage would be held by Mr. Graves until he was fully paid, at which time the title would vest in the lodge and the trust cease to exist.

The instrument creating the trust and the trustee provided that Mr. Graves assigns the notes and mortgage to the trustee for the purpose of carrying out the agreement. The lodge is to pay to the trustee for Mr. Graves a certain sum of money in installments. It further provides that—

"Time is of the essence of this agreement, and should the lodge at any time fail or neglect to make any payment of principal or interest, as and when the same becomes due, after ten days' notice in writing of such failure, then, and in that event, it shall forfeit all rights hereunder, and Mr. Graves shall be entitled to retain all payments made by it as liquidated damages. Upon notice from Mr. Graves the trust company shall thereafter hold title to the said notes and said mortgage, or to any judgment or decree, or whatsoever form said mortgage shall have taken, or shall hold the property representing the same, in trust, for Mr. Graves without any right, title or interest in the lodge, and upon demand from Mr. Graves it will assign, transfer or convey title thereto to Mr. Graves."

But should the lodge make all the payments of the purchase price, then the trust company shall surrender such notes and mortgage to it. Mr. Graves authorizes the lodge, while it is not in default, to demand of the trustee that it foreclose such mortgage.

Under such an instrument, the Union Trust Company, as trustee, was acting in the interest, not only of the lodge, but Mr. Graves as

well, and, as such, it would not have any authority to do or perform any act detrimental to either the lodge or Mr. Graves, on any act in violation of the duties imposed upon it by the trust agreement. That agreement, by its words, contemplated that the trust company might foreclose the mortgage and might buy in the property at the sheriff's sale, and that in the event of redemption, the money should be paid to Mr. Graves to an amount sufficient to discharge any balance which might be owing to him from the lodge. The interest of the two parties claiming under the trust were necessarily, to some extent, inconsistent, because the whole purpose of Mr. Graves was to get his money, either directly from the lodge or indirectly by redemption, while the lodge was deeply interested in preventing a redemption because that might defeat its expressed desire to acquire the mortgage property for its own use. If the trustee had authority by virtue of the trust agreement to add to the redemption price the \$10,834.32 of the second mortgage bonds, then it would also have had authority to have added the whole amount of such bonds outstanding if, by chance, they had belonged to the Elks Lodge, and in this manner the redemption might have been defeated to the possible detriment of Mr. Graves. It is therefore our view that when the Union Trust Company took from the lodge the second mortgage bonds and demanded payment of them as a condition for redemption, it was acting, not only without authority, but in violation of its trust.

The judgment is affirmed.

PARKER, C. J., and MACKINTOSH, MAIN, HOLCOMB, TOLMAN, MITCHELL, and HOVEY, JJ., concur.

EARLING v. EARLING. (No. 16361.)

(Supreme Court of Washington. Nov. 19, 1921.)

1. Divorce §303(3)—Admissibility of evidence on petition for entire custody of child.

On a divorced wife's petition for entire custody of the minor child of the parties, the court properly excluded evidence as to petitioner's competency as custodian relating to a period preceding the original decree of divorce.

2. Divorce §303(2)—No abuse of discretion in awarding entire custody of child of school age to mother.

On a divorced wife's petition for entire custody of the minor child of the parties on the ground the child had attained school age, and required a permanent home where he could attend school without interruption, the court did not abuse its discretion in awarding the

entire custody to the mother, but the order should be modified to permit the father to have custody during any substantial period when the child is not in school, not exceeding six months each year.

Department 2.

Appeal from Superior Court, King County; John S. Jurey, Judge.

Petition by Mazie Earling against Gogstad Earling. Decree for petitioner, and defendant appeals. Modified and affirmed.

Frank A. Steele and Frank Oleson, both of Seattle, for appellant.

Hadley & Hadley, of Seattle, for respondent.

HOVEY, J. This is an appeal from a supplemental decree modifying a decree of divorce heretofore rendered in an action between the parties by changing the periods of custody of the minor child of the parties.

The original decree was rendered on April 25, 1919, and awarded the child to the parties during alternate periods of six months each. The child has now become six years of age, and is about to be sent to school. The parties both have their homes in the city of Seattle, but live a very considerable distance apart. A petition was filed by the respondent alleging the fact that the child was now ready to enter school and that he required a permanent home where he could attend school without interruption. It further alleged that since the entry of the decree the appellant had remarried, and that his business required him to be in Alaska during a portion of the year, when he would have no permanent home in Seattle.

The evidence showed that both parties are fit, proper, and able to care for this child, and the allegations of the petition so far as we have recited same are not disputed.

The supplemental decree awarded the entire custody to the mother, but provided that the father could have the child during the week-end of one week of each month, and such other times as might be found proper, but provided the child should not be removed from the jurisdiction of the court.

[1] The appellant assigns three errors, the third being the action of the court in sustaining objections to evidence offered as to the competency of the respondent as custodian of the child relating to a period of time preceding the original decree of divorce. In this ruling the court did not err.

[2] The first and second assignments of error question the sufficiency of the facts stated in the petition and the evidence in support thereof to give the court jurisdiction in the proceeding. In our opinion the petition alleged a change in circumstances, namely, the attainment of school age by the child, which justified the court's considering a modifica-

tion, and upon the showing made we believe the trial judge did not abuse his discretion in awarding the entire custody of the child to the mother, but we think the father should have the custody of the child during such period of time as the child is not in school, and that the order as made should be modified to permit the father to have the custody of the child during any substantial period when he is not in school, not exceeding six months in any one year; and the decree appealed from will be modified accordingly, and will stand affirmed in all other respects.

Neither party will recover costs on this appeal.

PARKER, C. J., and MAIN, HOLCOMB, and MACKINTOSH, JJ., concur.

MINARD et al. v. SCHUMAKER. (No. 16663.)

(Supreme Court of Washington. Nov. 22, 1921.)

1. Animals \S 23(1)—Tender of amount due agister necessary on demand for possession.

In action to foreclose an agister's lien upon horses, demurrer was properly sustained to defendant's affirmative defense in which he sought recovery of the value of a horse which could not be produced at the time he went to the farm of plaintiffs for the purpose of receiving the horses, where a tender of the amount due the plaintiffs for pasturage, made at that time or at all, was not pleaded.

2. Appeal and error \S 104(2)—Pleading \S 247—Amendment to allow greater recovery of items accruing before trial held not prejudicial.

In action to foreclose agister's lien on horses, where the horses remained in possession of the plaintiffs after the action had begun and prior to the time of the trial, it was proper to permit plaintiffs to amend the complaint so as to include the pasturage account for this period; and, even though no formal supplemental complaint was filed, defendant was not prejudiced thereby, where recovery for the period subsequent to the institution of the action and prior to the trial was at the same rate as that allowed prior to that time.

Department 2.

Appeal from Superior Court, Lewis County; W. A. Reynolds, Judge.

Action by L. R. Minard and another against L. P. Shumaker. From judgment for plaintiffs, defendant appeals. Affirmed.

Gus L. Thacker, of Chehalis, for appellant. A. E. Rice, of Chehalis, for respondents.

MAIN, J. This action was brought for the purpose of foreclosing a claimed agister's

lien upon five horses. The trial resulted in findings of fact, conclusions of law, and a judgment sustaining the plaintiff's right to recover and for foreclosure of the lien. The defendant appeals.

[1,2] The appellant makes two assignments of error: First, the court erred in sustaining a demurrer to the affirmative defense pleaded in the answer; and, second, that the court erred in entering a judgment for the sum of \$169.80, which was greater in amount than that claimed in the original complaint. As to the first, it appears that after answering the complaint by certain denials and admissions the appellant pleaded an affirmative defense in which he sought recovery of the value of one horse which could not be produced at the time he went to the farm of the respondents for the purpose of receiving the horses. There were originally placed in the pasture six horses. While the answer sought recovery for the horse which was not accounted for, it does not plead a tender of the balance due the respondents for pasturage at the time, or at all. To this affirmative defense a demurrer was interposed and sustained. There being no allegation of tender of the amount due at the time the possession of the horses was demanded by the appellant, it was not error for the trial court to sustain a demurrer thereto. 3 Corpus Juris, 39.

As to the second assignment of error it is argued that the judgment should have been for the sum of \$132.40, the amount claimed in the original complaint, instead of \$169.90, the amount for which judgment was entered. Upon the trial of the cause the question arose as to whether the respondents should recover for the pasturage of the horses after the action had begun and prior to the time of the trial, they having remained in the possession of the respondents during this time. The respondents were permitted to amend the complaint so as to include the pasturage account for this period. This was objected to by the appellant, who claimed surprise and asked for a continuance of the action. No formal supplemental complaint covering the amount accruing subsequent to the institution of the action was filed. The trial court permitted a recovery for the period subsequent to the institution of the action and prior to the trial at the same rate as that allowed prior to that time. Even though no formal supplemental complaint was filed, it is plain from the record that the appellant was not prejudiced by reason of this fact, since the recovery for the pasturage of the horses after the institution of the action was at the same rate as that prior thereto.

The judgment will be affirmed.

PARKER, C. J., and HOLCOMB, MACK-INTOSH, and HOVEY, JJ., concur.

GULL et ux v. K. ENOMOTO et al.
(No. 16646.)

(Supreme Court of Washington. Nov. 19, 1921.)

1. Landlord and tenant \Leftrightarrow 285(1)—Lessee hold not a necessary party to lessors' action against lessee's assignee for possession.

Lessors, suing lessee's assignees for possession on the ground that they were unlawfully in possession and had committed waste and were maintaining a nuisance upon the premises, were not required to make lessee, who was not in possession at the time of the commencement of the action, and against whom no relief was asked, a party to the action.

2. Landlord and tenant \Leftrightarrow 285(4)—Evidence held to show power of attorney from lessee to person in possession a mere subterfuge as against lessor.

In lessors' action against lessee's assignee, who had taken possession notwithstanding lessors' refusal to consent to assignment, in which assignee claimed that by virtue of power of attorney he was in possession merely as lessee's agent, evidence held to show that the power of attorney was merely a subterfuge to give assignee possession without lessors' consent.

Department 1.

Appeal from Superior Court, Pierce County; Ernest M. Card, Judge.

Action by Lydia A. Guill and husband against K. Enomoto and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

J. H. Gordon, and U. E. Harmon, both of Tacoma, for appellants.

A. R. Titlow, of Tacoma, for respondents.

MITCHELL, J. This action was commenced on February 23, 1921, by Mrs. Guill and her husband to recover from the defendants the possession of eight acres of land in Pierce county and damages for waste committed thereon. The property is the separate estate of Mrs. Guill. The cause of action was that the occupancy of the premises was unlawful and without authority, that defendants had committed waste and engaged in the manufacture and disposal of intoxicating liquor on the premises to such an extent as to become a nuisance in the neighborhood, and that written notice had been served upon the defendants to quit the premises. By their answer the defendants admitted the alleged ownership of the lands, admitted they occupied the premises, and that written notice to quit had been served upon them. They denied other material allegations of the complaint and affirmatively alleged that the defendant K. Enomoto was lawfully in possession of the premises as the agent of one S. Yashiki under an unexpired lease, and that the other defendants were upon the premises

by employment for the purpose of assisting in the growing of berries and vegetables to which the premises were devoted. There was a general denial of the affirmative matter in the answer.

Upon the trial without a jury, in March, 1921, the court made findings and conclusions that the possession of the premises by the defendants was unlawful, that they had committed waste, which, together with reasonable compensation for their occupancy of the premises, amounted to the sum of \$200, and that they had committed nuisance on the premises. Judgment was entered in favor of the plaintiff for \$200, that defendants vacate the premises, and that upon the failure or refusal of the defendants to quit possession that a writ of restitution issue to dispossess them. The defendants have appealed.

The testimony shows that Mrs. Guill had given to one S. Yashiki a written lease to the premises for the term of six years from January 1, 1918, at a rental, for all but the first year, of \$125, payable on March 1, and \$125, payable on October 1, of each year, that the lessee had gone into and continued possession until September, 1920, at which time he went to Japan, from whence he has not returned. The testimony, though conflicting, satisfies us, as the trial court found, that upon going to Japan it was the purpose of S. Yashiki, the lessee, not to return. At that time he had paid rent to January 1, 1921.

[1] Because of the unexpired term and because of the power of attorney from the lessee to the appellant Enomoto, of which we shall later speak, it is claimed, as a first assignment of error, that—

"The court has no jurisdiction in this case for the reason that Yashiki, the lessee, is not a party to the action."

Disposing of this assignment, it is enough to notice that no relief was sought, nor has any been given against the lessee. Both the complaint and the judgment, by their terms, run only against the defendants. It was they, and not the lessee, who actually occupied the land at the commencement of the action. It was they who committed the waste and who were shown to have caused and maintained a nuisance on the premises.

[2] The remaining assignments of error relate to the findings and conclusions made by the trial court and its refusal to sign and enter those proposed by the appellants. Upon the subject of waste and nuisance and unlawful possession of appellants we reach the same conclusions that the trial court did. Concerning the right of the appellants to occupy the premises, reliance is had by them upon a power of attorney claimed to have been executed by S. Yashiki to K. Enomoto under a date just prior to his going to Japan. The evidence shows the premises were let to Yashiki at less than a reasonable money

rental because of his personal fitness to cultivate and keep up the place. It is undisputed that just before leaving for Japan the lessee, saying he was going to Japan to remain indefinitely, asked and was refused leave to sublet the lands to other Japanese, and then offered to sell out to the owner the unexpired portion of the term for \$3,000, saying it could be rented to others of his countrymen at a profit over that price, and that the offer was declined. The owner was absent some months thereafter, and upon her return found appellant Enomoto and other Japanese in possession. He asked Mrs. Guill to sublet the premises to him. She refused to do so. Still later he tried, without success, to lease the premises, offering \$600 and finally \$1,000 per year rental. Afterwards Enomoto mailed to her, and still later to her husband, his personal check in the sum of \$125 to pay six months' rent. In each instance the check was returned to the maker. Thereafter notice to quit was served, and this action commenced. During all his negotiations with the respondents, or either of them, Enomoto never referred to any power of attorney from Yashiki, or that he claimed any rights thereunder. The existence of that instrument seems to have been reserved by him for the purposes of his pleading and proof, by which he contends that the original lessee is still in possession through him as agent. The power of attorney, executed in Seattle, unlimited as to time, unconfined as to territory and unrecorded, specifically enumerates a large number of things that may be done in the name of and for the use and benefit of the maker. It is silent, however, as to any authority to operate the berry garden or other kind of similar business. The nearest approach to any such authority is in the words "and to make, do and transact all and every kind of business of whatsoever nature and kind," immediately following the enumeration of a large number of other things altogether different from the pursuit to which these lands were devoted. These facts, with others that need not be detailed, that are shown by the record, satisfy us that the power of attorney and the attempt to make it applicable here are nothing but subterfuge. It is an attempt to circumvent the terms of the lease whereby the lessee agreed, among other things, not to "lease or underlet, or permit any other person or persons to occupy any portion thereof, * * * but with the approbation of the lessor thereto in writing having been first obtained."

Being satisfied from the record that the appellants were in possession of the premises without any lawful authority, that they had committed and maintained a nuisance thereon as alleged in the complaint, and that the amount of damages allowed by the trial court because of waste committed, together with the value of the occupancy of the premises

by the appellants, is correct, the judgment is affirmed.

PARKER, C. J., and FULLERTON, TOLMAN, and MACKINTOSH, JJ., concur.

HALL v. HALL et al. (No. 16349.)

(Supreme Court of Washington. Nov. 29, 1921.)

1. Divorce §276(4)—Evidence held to show deed from husband to his brother was to defraud wife.

Evidence in a divorce suit, and to set aside her husband's deed, held to show that the deed, executed by the husband to his brother when the relations between himself and the wife were strained, and without other consideration than an outlawed indebtedness, was executed with intent to deprive the wife of any relief against such property in the event of a divorce.

2. Divorce §275(2)—Husband's deed held without consideration when grantee never agreed to accept it as payment or security.

A deed from a husband to his brother, attacked by the wife in a suit for divorce, was without consideration assented to by the grantee where the grantee never agreed to accept it in payment of or as security for any sum owing him by the husband.

3. Divorce §275(3)—Husband's deed to brother to defraud wife set aside though brother not guilty of fraud.

Where a husband's deed to his brother was made without consideration and to deprive his wife of any relief against the property in the event of a divorce, the fact that the brother's attitude was passive, and that he was guilty of no actual fraud or moral wrong, did not prevent the setting aside of the deed.

Fullerton, J., dissenting, and Holcomb and Mackintosh, JJ., dissenting in part.

En Banc.

Appeal from Superior Court, Spokane County; Hugo E. Oswald, Judge.

Action by Ada Hall against Elmer Hall and others. From a judgment for plaintiff, defendants appeal. Affirmed.

W. C. Losey, of Spokane, for appellants.
Oscar Cain, of Spokane, for respondent.

PARKER, C. J. The plaintiff Ada Hall commenced this action in the superior court for Spokane county, seeking a decree divorcing her from her husband, the defendant Elmer Hall, and also seeking a decree setting aside a deed to certain real property, described as certain lots in Spokane county, made by him to his brother, the defendant Oliver Hall, to the end that such disposition of the property may be made in the divorce

proceeding under section 969, Rem. Code, as shall appear just and equitable in the protection of her marital rights. A trial upon the merits resulted in a decree awarding to the plaintiff a divorce as prayed for; awarding to the plaintiff the custody of their minor child; reserving to the defendant Elmer Hall the privilege of visiting the child and having the child visit him during school vacations; setting aside the deed in question; awarding to the plaintiff, of the property described in the deed so set aside, one lot and the dwelling thereon, in which she resides with the child; awarding to the plaintiff judgment against the defendant Elmer Hall in the sum of \$450, and the further sum of \$150 attorney's fee, which sums are made a lien upon the other lots described in the deed so set aside; and also awarding to the plaintiff the sum of \$15 per month to be paid to her by the defendant Elmer Hall for the support and maintenance of their child. From this disposition of the cause, the defendants, by the same attorney, have jointly appealed to this court.

It is first contended in appellants' behalf that the evidence does not warrant the awarding of the divorce and the custody of the child to respondent. This branch of the case does not call for the discussion of any question of law. We deem it sufficient for present purposes to say that the evidence quite convinces us that the trial judge was fully warranted in reaching the conclusion he did upon these questions. It would be of no benefit to any one to here review the distressing story disclosed by the evidence.

[1] It is further contended that the trial court erred in setting aside the deed in question, to the end that the lots might be disposed of in the interest of respondent as might seem just and equitable in view of her marital rights. Respondent and Elmer Hall were married in January, 1909. We may concede for present purposes that all of the lots described in the deed in question were and remained the separate property of appellant Elmer Hall since prior to his marriage to respondent. He signed and acknowledged the deed in question, purporting to convey the lots—being all of his real property—to his brother, appellant Oliver Hall, on January 10, 1919. He claims to have made this deed in payment of a debt owing by him to his brother Oliver. It seems plain from the evidence that practically all of the balance which he then may have owed his brother Oliver was so long past due as to be clearly outlawed by the statutes of limitation. We may also observe that the deed seems to have been made at a time when the relations between himself and wife were so strained as to strongly suggest an impending separation. The deed was not delivered, if at all, until some time after its execution. The deed was not recorded until January 20, 1920, a year

after its signing and acknowledgment, and but one week prior to the commencement of this action. The evidence, we think, warrants the conclusion that the total value of the lots was very much greater than any possible balance owing from him to his brother Oliver. While Elmer testifies that he told his brother Oliver, at Colfax, that he was going to deed the property to him, it does not appear from the evidence that his brother agreed to accept the deed in payment of, or even as security for, any sum owing him. We have no competent evidence of the deed ever actually coming into the possession or control of Oliver, nor as to who caused it to be recorded. Elmer testified in part as follows:

" * * * When I came back (to Spokane) I executed this deed. He was not here at the time and I left it in escrow for him. I gave it to Mr. Shaefer and Peter Mertz. I left it there with them and told them if anything happened that he would be paid off for what I owed him. The deed was to be delivered to Oliver; when he got back it was to be delivered to him. The deed was put in an envelope and sealed and I gave instructions to them as my attorney, and I don't know when it was delivered. I did not deliver it. I directed it to be delivered, and he afterwards tried to trade the property off. I was going over to Olympia, and if anything happened to me—a railroad wreck or anything—going over there, I left it there for him. * * * I told him the deed was there for him, and he said: 'Let it go and we will try to trade the property off.' * * * I don't know what date the deed was finally delivered. * * * I don't know how long he had it. I don't think I asked him whether he had the deed or not, because he would never say a word to me or talk with me anything about our troubles."

While Oliver testified at the trial, his testimony did not in the slightest degree refer to the execution or delivery of the deed, but only was to the effect that he was willing to provide and care for his brother and the child to whatever extent their necessities might require. This testimony seems to have been given for the sole purpose of showing that the child would be provided for if awarded to Elmer, its father. Assuming, for argument's sake, that the deed was in a legal sense delivered to Oliver—which may well be doubted—it seems to us that the trial judge was warranted in concluding, as he did, that Elmer Hall executed the deed with intent to deprive his wife of the opportunity of being awarded any relief as against the property described therein, in the event she should be granted a divorce from him.

[2, 3] It also appears to us that there was no consideration for the conveyance; that is, there was no consideration to which Oliver ever assented. Viewing this record as a whole, it seems to us that the question of the setting aside of this deed is in fact much more a controversy between Elmer and his wife than between Oliver and Elmer's wife.

Indeed, it seems to us that, aside from his formal answer in this case prepared by an attorney who was also Elmer's attorney, Oliver's attitude has been only passive. We are quite convinced that he has not been guilty of any actual fraud or moral wrong; but that does not argue, under these circumstances, that the deed should remain in force as the conveyance it purports to be.

The decree is affirmed.

MAIN, TOLMAN, MITCHELL, and HOVEY, JJ., concur.

BRIDGES, J. I concur in the result of the foregoing opinion, but think the deed should be set aside or annulled for the reason that no delivery had been made. Elmer Hall testified:

"I was going over to Olympia and if anything happened to me—a railroad wreck or anything—going over there, I left it for him (Oliver Hall)."

This falls far short of showing such a delivery as the law requires.

FULLERTON, J. (dissenting). I am unable to concur in the foregoing opinion. On the question whether a divorce should be granted, the evidence to my mind is by no means conclusive. The evidence shows that in the battles of words so frequently occurring between the parties the respondent was abundantly able to hold her own, and that in the physical combats she usually emerged the victor. It is not shown that Elmer Hall was always, or even usually, the instigator of these combats, and if it be the rule, as I conceive it to be, that divorce is a remedy for the innocent, not the guilty, I can see no reason for granting a divorce to either party.

But, passing this, there is in my opinion even less reason for setting the deed aside. It is shown without contradiction that the property conveyed by the deed was the separate property of Elmer Hall. The land itself was acquired by him prior to his marriage with the respondent, and the buildings erected thereon, although erected subsequent to the marriage, were paid for in part by money borrowed from Oliver Hall and in part from a legacy which Elmer received from an uncle. This money was loaned by Oliver to the appellant in 1912, and it seems to be assumed by the majority that this was the total advancement and total of the indebtedness owing by Elmer to Oliver. But this overlooks other parts of the record. The appellant lost an arm at the shoulder in an accident. Seemingly there was difficulty in causing the wound to heal and Oliver bore the expense of five different surgical operations, with the accompanying costs of hospital fees, nurses' services, and medicines, before a cure was effected, no part of which was ever repaid. Moreover, Oliver continuously made

advancements to the parties. Indeed, the respondent in her brief says:

"It is conceded that, over a period of a good many years prior to the execution of this instrument, the appellant, Elmer Hall, received considerable sums in contribution from his brother, Oliver Hall."

It is shown, also, that the sum of \$100 was loaned immediately preceding the execution of the deed, at which time Elmer told his brother that he would execute a deed of the property in payment of his obligations to him. Elmer testified also, without contradiction, that the respondent knew of and consented to the execution of the deed, saying to him that she wanted Oliver paid off, as she "was tired of being supported by him." It seems to me, therefore, that there is no justification for the holding that the deed was executed without consideration, or for a consideration less than the value of the property, or for a consideration barred by the statute of limitations.

Nor do I think there is any justification for the conclusion that there was no delivery of the deed. The quotation made from Elmer's testimony in the majority opinion seems to have been taken from the abstract, and to my mind does not clearly reflect his actual testimony. Reading the testimony from the transcript, it seems to me to warrant the conclusion that the escrow was but a temporary disposition of the deed—a disposition pending Oliver's absence from his home—and that it was to be delivered on his return. Certain it is that Elmer never afterwards had possession of the deed, and the instrument itself bears on its face the indorsement of the recording officer to the effect that it was recorded at the request of Oliver. Delivery is largely a question of intent, and when we have a showing of direction on the part of the grantor to deliver to the grantee, followed by a showing of subsequent possession of the deed by the grantee, there is sufficient evidence of a delivery.

As said by the majority, there is not in the evidence any showing of actual fraud or moral wrong on the part of the appellant Oliver Hall. It is said, however, that there is sufficient evidence to warrant the conclusion that Elmer Hall executed the deed with intent to deprive his wife of the opportunity to be awarded an interest in the property. The conclusion seems to be founded on the statement, made earlier in the opinion, "that the deed seems to have been made at the time when the relations between himself (Elmer) and wife were so strained as to strongly suggest an impending separation." But I can find nothing in the record showing anything unusual in the parties' relations at that time. There was then, perhaps, bickering and quarreling between them, but, as I read

the record, this was the usual rather than the unusual in their marital relation, and nothing then occurred more than had occurred many times before and afterwards between them. It must be remembered that the parties lived together for a considerable time after the execution of the deed, and I do not find that the respondent, in her testimony in support of her action for divorce, lays any particular stress on the happenings at the particular time. But, conceding that Elmer had a fraudulent intent, the fact does not warrant setting aside the deed. The deed was made for a valuable consideration, a part of which was a present advancement, and fraud in both grantor and grantee must be shown before that result can follow.

I cannot think, therefore, that there is any justification for the decree of the trial court, and that its decree should be reversed.

HOLCOMB, J. I concur with Judge FULLERTON as to the nullification of the deed, but agree with the majority that the remainder of the decree should be affirmed.

MACKINTOSH, J., concurs.

LONDON GUARANTY & ACCIDENT CO., Limited, v. WESTERN SMELTING & POWER CO. (No. 16749.)

(Supreme Court of Washington. Nov. 19, 1921.)

Accord and satisfaction \S 11(2)—Not shown by receipt of letter inclosing check for balance of advance premium in full payment of our account.

Where the premiums on annual policies of accident indemnity insurance were payable by an advance premium based on the estimated pay roll for the year supplemented by a payment of the balance ascertained upon audit of the pay roll, and insurer owed for the balance of premiums for two prior years, insured's letter transmitting to the insurer the balance of the advance premium for the third year shortly after third year closed, containing the words, "I take great pleasure in inclosing herewith check for" such balance "in full payment of our account," did not show an accord and satisfaction as to the entire premium on the third policy; it being the manifest intention that the check should be full payment of the balance due on the advance premium only, and not on the whole premium.

Département 1.

Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by the London Guaranty & Accident Company, Limited, against the Western Smelting & Power Company for premiums

on three policies of insurance. From that portion of the judgment dismissing the action as to the third policy, plaintiff appeals. Reversed, with directions.

Russell & Blinn, of Seattle, for appellant.
Ballinger, Battle, Hulbert & Shorts, of Seattle, for respondent.

MITCHELL, J. The plaintiff, London Guaranty & Accident Company, Limited, a corporation, sued the defendant, Western Smelting & Power Company, a corporation, to recover the balance due on premiums for three policies of accident indemnity insurance issued to the defendant whereby it insured the defendant against liability for injuries received by the employees of the defendant in and upon certain work it was conducting and to be continued in the state of Montana. The policies were one for each year ending September 7, 1917, September 7, 1918, and September 7, 1919, respectively. The premium to be paid for each year's insurance was based, primarily, upon an estimated pay roll for the different classes of workmen covered by the insurance, which primary payment was to be made at the time of the issuance of the policy, and thereafter the full and true amount of premium on each policy was to be determined by an audit, after the close of the year, of defendant's books with reference to the amount of the different classes of work and consequent grades of hazard engaged in by defendant's employees, with the understanding that the insured would then pay whatever, if any, further amount of premium was shown to be due by such audit.

The defendant by its answer admitted the execution and delivery of the policies and affirmatively pleaded that it had paid premiums thereon as follows: September 14, 1916, \$183.70; May 14, 1917, \$229.23; August 22, 1917, \$60.01; December 21, 1917, \$265.90; July 24, 1919, \$150; October 17, 1919, \$131.70—and that such payments equalled the true amount of premiums earned on the policies. The defense of payment in full was denied by the reply.

As to the first policy the trial court found, among other things, that an advance premium payment of \$183.70 was made, and "that an audit of defendant's pay rolls was thereafter made, and such audit showed earned premium under said policy amounting to the sum of \$515.41, leaving an unpaid balance of earned premium under said policy of \$331.71." As to the second policy the court found, among other things, that an advance premium payment of \$265.90 was made, and "that an audit of defendant's pay roll for the period covered by said policy showed earned premiums amounting to \$768.91, no part of which has been paid except the advance premium of \$265.90 paid thereon, leaving the unpaid balance of earned premi-

um under said policy of \$503.01". As to the third policy the court made findings, among others, as follows:

"X. That the estimate furnished this plaintiff by said defendant of its pay roll under such policy was the sum of \$7,000, and the premium under said policy, based upon such estimated pay roll, was the sum of \$281.70, which sum was thereafter paid to this plaintiff by said defendant.

"XI. That the said estimated premium of \$281.70 was not paid in advance, as provided by the terms of said policy, but was thereafter and after the cancellation of said policy paid by two checks, as follows: A check for \$150, dated July 24, 1919, and a check for \$131.70, dated October 17, 1919. Accompanying said second check was a letter from defendant to plaintiff containing the following words: 'I take great pleasure in inclosing herewith check for \$131.70, in full payment of our account.'

"XII. That the earned premium under said policy during the time it was in force was the sum of \$701.50, no part of which has been paid except the sum of \$281.70, paid by said two checks as aforesaid."

Upon the findings conclusions were entered in favor of the plaintiff for the amounts found to be due on the first and second policies together with interest thereon, altogether in the sum of \$990.76, while as to the third policy it was concluded by the trial court "that the acceptance by plaintiff of the said check of October 17, 1919, amounted to an accord and satisfaction, and plaintiff, by keeping said check, is barred from further recovery under said policy." Judgment was entered in accordance with the conclusions. Neither party took exception to any finding. The plaintiff has appealed from that portion of the judgment dismissing the action as to the third policy.

The defense of accord and satisfaction was not presented by the pleadings, but, in the absence of any statement of facts showing what occurred during the course of the trial, we assume the action was tried upon that defense and denial. Both parties being content with all the findings and with the judgment entered for the appellant for the balance due on the earned premiums on the first and second policies, it follows that the so-called accord and satisfaction has been made to apply only to the premium earned on the third policy. Such was the conclusion of the trial court, as already noticed, and such is the contention of the respondent here, and, with minor exceptions to be noticed later, constitutes the only question in the case.

Upon the subject of accord and satisfaction it was said in *Rogers v. Spokane*, 9 Wash. 168, 37 Pac. 300:

"This is one of the most difficult branches of the law to determine, as the authorities seem to be somewhat conflicting and the circumstances under which the questions arise are so diversified and numerous."

However, it seems to be settled:

"That the rule on this question is brought down by the modern authorities to a question of intention." *Rogers v. Spokane*, *supra*.

Or, as stated in 1 O. J. (Accord and Satisfaction) p. 530, § 16:

"The intention of the parties, which is of course controlling, must be determined from all the circumstances surrounding the transaction."

From the findings it appears: (a) That at the time of the issuance of each of the three policies an advance payment was due based upon an estimated pay roll; (b) that the full earned premium on each policy could be ascertained only by an audit after the close of the year; (c) that the advance premiums were paid upon each of the two first policies; (d) that the audit of appellant's pay roll for the periods covered by the two first policies had been made showing a total of \$990.76 due to the appellant; (e) that the balance of \$990.76 was unpaid at the date of the trial, and hence necessarily unpaid on October 17, 1919, the date of the check considered as an accord and satisfaction; (f) that the advance payment called for by the estimate furnished for the third policy was \$281.70, which "was not paid in advance, as provided by the terms of the policy, but was thereafter and after the cancellation of said policy paid by two checks, as follows: A check for \$150 dated July 24, 1919, and a check for \$131.70, dated October 17, 1919"—and (g) that the earned premium under the third policy during the time it was in force was \$701.50, "no part of which has been paid except the sum of \$281.70 paid by said two checks as aforesaid." It may be further stated that the findings, as well also the pleadings are silent as to the dates of the audits in relation to each of the three policies. It is difficult to perceive there has been any accord and satisfaction whatever. There was no dispute between the parties nor controversy of any kind shown by the record. Respondent's letter inclosed with its check of October 17, 1919, in no way referred to the third policy by name or other designation, nor, of course, to the full earned premium thereon to be discovered by an audit of the pay roll for that year. At the date of that check there was outstanding against the respondent in favor of the appellant hundreds of dollars due above the advance premium payment on the earned premi-

ums under the two first policies, which is now impliedly confessed by the failure of the respondent to contest the findings and judgment thereon. With that situation confronting the parties, it could be contended and indeed concluded with just as much show of reason that the check and letter of October 17, 1919, constituted an accord and satisfaction of the outstanding premium debt of the two first policies as that it did of all the claims arising under the third policy. The \$150 check of July 24, 1919, and the \$131.70 check of October 17, 1919, together equal the \$281.70 which was the total amount due as advance premium payment under the third policy, and it is manifest that it was the intention of the one to pay and of the other to receive the \$131.70 check in full payment of the balance due on account of the advance premium under the third policy and not otherwise. And indeed such was the legal effect of the finding of the trial court that the estimated premium of \$281.70 under the third policy was not paid in advance, but thereafter paid "by two checks as follows: A check for \$150, dated July 24, 1919, and a check for \$131.70, dated October 17, 1919." The conclusion that there was any accord and satisfaction is inconsistent with the intention of the parties as shown by the facts and circumstances surrounding the transaction, and there should have been further judgment for the appellant in the sum of \$419.80—\$701.50 less \$281.70.

It is further claimed appellant is entitled to interest on \$281.70 from the date of the third policy to July 24, 1919, when \$150 was paid thereon, and then on the remainder until October 17, 1919, when the \$131.70 check was given. The acceptance of the last check in full of this account foreclosed the right of this claim for interest. It is further claimed interest should be allowed on \$419.80, the balance found due on the earned premium under the third policy, from May 15, 1919, the date of the cancellation of the policy. This balance of \$419.80 was not due, under the terms of the policy, until the audit was had, and in the absence of any finding as to when that audit was made no interest is allowable to date of the judgment.

Reversed, with directions to increase the judgment so as to include \$419.80 on the third policy.

PARKER, C. J., and FULLERTON, TOLMAN, and BRIDGES, JJ., concur.

ANDRUS v. CHURCH et al. (No. 16732.)

(Supreme Court of Washington. Nov. 29, 1921.)

1. Schools and school districts — 141(5) — Teacher held to have sufficient notice to sustain dismissal.

Where a school-teacher had met directors three times to discuss the trouble between herself and another teacher and the resulting lack of discipline in the school and had made no request for opportunity to introduce evidence, but had at last agreed to resign, the action of the directors in dismissing her under the authority of Rem. Code 1915, § 4481, was not void for failure to give notice and a hearing, if such notice and hearing are required.

2. Schools and school districts — 142—Teacher can recover damages for dismissal without sufficient cause.

A school-teacher who has been dismissed before the expiration of her contract by the school directors without sufficient cause can recover damages for breach of contract in an action thereon.

Department 2.

Appeal from Superior Court, Grays Harbor County; Ben Sheeks, Judge.

Proceedings by Laurena T. Andrus against R. O. Church and others, as Directors of School District No. 70, Grays Harbor County, and Geneva Johnson, as County Superintendent of Schools, to review an action of the Directors in discharging plaintiff as school-teacher. From a judgment setting aside the order of discharge, the Directors appeal. Reversed, and action dismissed.

Geo. Acret, of Aberdeen, and R. A. Lathrop, of Montesano, for appellants.

Vance & Christensen, of Olympia, for respondent.

HOVEY, J. This is an appeal from the judgment of the superior court rendered upon a writ of review in an action wherein the respondent Laurena T. Andrus, a school-teacher, sued the appellants Church and others, as directors of the school district, and the defendant Geneva Johnson, as county superintendent of schools, seeking to review the action of the appellants in discharging the respondent when her term of school was only partly completed.

After issuing the writ and upon return thereto the superior court heard evidence on behalf of the appellants, and at the conclusion thereof entered a judgment holding that, because no notice had been given of the hearing upon the charges preferred against the respondent, the action of the directors was void, and that judgment set aside the orders which had been made.

Although the county superintendent had been made a party, she was dismissed from the proceeding with her costs.

The evidence introduced at the hearing showed that the respondent had been employed by the appellants for the school year commencing on the first Monday in September, 1920. The school in which the respondent was to teach employed two teachers, the respondent being the principal. Shortly after she commenced her work the respondent got into a controversy with her fellow teacher, and a pronounced feud was inaugurated which extended to the pupils in general. The directors were drawn into the controversy and called in the defendant superintendent for advice. The respondent was called before the board and the trouble discussed with her and with the other teacher, who was also present. Matters got no better, and a second meeting was held about a month later, and at this meeting the respondent agreed that if she could not handle the matter, she would resign. It appeared quite clearly from the testimony that the respondent was incapable of handling the situation that she then had to deal with, although she may have been successful in teaching elsewhere, that the discipline of the school was very bad, and that a situation had developed which made further operation of the school impracticable under the then conditions.

After this last meeting matters got no better, and in the month of January the directors met and came to the conclusion that the best thing to do was to discharge both teachers. They therefore saw each teacher in turn. The other teacher agreed to resign, and the respondent agreed to resign and started to write her resignation, but pleaded that she was too much upset to do it at that time and she would do it in the evening. Thereafter respondent changed her mind and refused to resign, and all parties came to Olympia and laid the matter before the state superintendent where they were advised their proceedings were irregular. Thereafter the appellants entered a formal order discharging the respondent.

At this time the performance of the contract has been rendered impossible by the lapse of time, and we assume that the only question to be settled is the legal position of the parties whereby the right of the respondent to recover for the damages, if any, which she may have suffered by reason of the breach of her contract, if such breach be found to be unlawful, may be established.

Our statute (section 4481, Rem. Code) reads as follows:

"Every board of directors, unless otherwise specially provided by law, shall have power and it shall be its duty:

"First. To employ, for not more than one year, and for sufficient cause to discharge, teachers, and to fix, alter, allow and order paid their salaries and compensation. The directors, except in districts of the first class, shall make

with each teacher employed by them a written or printed contract, which shall be in conformity with the laws of this state, and every such contract shall be made in duplicate, one copy of which shall be retained by the school district clerk and the other shall be delivered to the teacher after having been approved and registered by the county superintendent as by law required. * * *

There is no provision in the statute for any hearing or for the procedure to be adopted by the board in case they wish to forfeit a contract and the question now confronting us never seems to have been passed upon by this court.

In our earlier cases suits were permitted by teachers on their contracts in the courts in the first instance, the same being cited in the dissenting opinion to *Van Dyke v. School District*, 43 Wash. 235, 86 Pac. 402. In the majority opinion in that case it was held, however, that the action would not lie in the first instance in the superior court, but that appeals would have to be taken first to the county superintendent and then to the state superintendent under the provisions of section 2318, Bal. Code. This section is now superseded by section 4707, Rem. Code, which provides that in matters involving the construction of contracts appeal shall be taken to the court of the proper resort.

In the case of *State ex rel. Barnard v. Board of Education*, 19 Wash. 8, 52 Pac. 317, 40 L. R. A. 317, 67 Am. St. Rep. 706, we held that in a controversy between a teacher and a district board a member of the board who has expressed hostility toward the teacher and has become a partisan is not qualified to sit in judgment.

In *State ex rel. Caffrey v. Superior Court*, 72 Wash. 444, 130 Pac. 747, we held that, where the county superintendent had become a partisan in a controversy, she would be disqualified to sit as the reviewing officer, and it was upon the principle of that case that the present proceeding was instituted directly in the superior court.

[1.2] We come first to consider what is meant by the power of the board to dismiss "for sufficient cause." Assuming without deciding that notice and a hearing are necessary, we now approach the question as to what notice is necessary and as to whether the respondent had such notice as fairly apprised her of what was taking place and of the grounds of the action of the directors. In this case the respondent had two hearings before the board, and, while it is true that no witnesses were called, neither side demanded them, but the question at issue was fully discussed. The respondent demanded no further hearing, and it appears from the testimony so far introduced respondent did not dispute the facts upon which the board was acting. In her second interview respondent

ent so far accepted the situation as to agree to resign if conditions did not improve, and in her third interview did agree to resign, and in our opinion she had sufficient notice of the facts prompting the board and an opportunity to be heard if she so desired. Of course, she is not bound by the action of the board if they are proceeding contrary to the facts, and in an action upon her contract she can recover damages, if any, if the board breached the contract without sufficient cause.

We think that the judgment entered in this cause was erroneous, and the cause will be reversed, and the action dismissed.

Appellants will recover costs.

PARKER, C. J., and MAIN, HOLCOMB, and MACKINTOSH, JJ., concur.

WISNER v. CARTER et al. (No. 16571.)

(Supreme Court of Washington. Nov. 29, 1921.)

1. Exchange of property \S 8(4) — Evidence held to show fraud.

In action to set aside exchange of property for fraud, evidence held to support judgment for plaintiff.

2. Exchange of property \S 8(5) — Plaintiff entitled to be made whole on rescission for fraud.

Where exchange of lands was rescinded for fraud and the transfers set aside by the court, appellants could not complain that the court, in computing the amount to be paid by respondent for sums paid out by appellants on the properties, refused to allow them credit for the sum of \$100 which the real estate broker had retained as commission on the exchange and a few dollars additional for some expense money, for the respondent had a right to be made whole on the transaction.

Department 2.

Appeal from Superior Court, King County; Clay Allen, Judge.

Action by L. B. Wisner against R. W. Carter and wife and Charles E. Hoard and wife. From judgment for plaintiff against Hoard and wife, the latter appeal. Affirmed.

C. H. Steffen and Andrew J. Ballet, both of Seattle, for appellants.

Whitney & Lee, Kerr, McCord & Ivey, and Stephen V. Carey, all of Seattle, for respondent.

HOVEY, J. In this case the respondent, Lillie B. Wisner, sues to set aside transfers of property made between herself and the appellants, Charles E. Hoard and wife.

[1] Respondent owned two lots upon which

were houses located in an addition to Seattle and which were incumbered with a mortgage of \$1,800 and some mechanics' liens. The testimony varies as to their value, but both properties were disposed of shortly after the deal for a total of \$4,750 on long-time contracts. The appellants owned a tract of land in Pierce county which was within the limits of the Camp Lewis Cantonment site and which they had contracted to sell to one Hudson for \$2,500, there being credited upon the contract the sum of \$1,000 as initial payment with a balance due of \$1,500. R. W. Carter was a real estate agent in the city of Seattle and the principal figure in the present controversy. He and his wife were made defendants in the cause, but no relief was granted as against them. The respondent was awarded a decree under which the appellants were required to turn over to her the contracts then held by them on the Seattle property upon the payment by respondent of the sum of \$1,668.30, which represented the amount of the mortgage which appellants had paid together with the other disbursements made by them on the properties.

Carter appears to have been the agent of both parties. The Pierce county property had been listed with him about July 10, and his relations, with the appellant husband, appear to have been quite intimate prior to the present deal. Carter was also acquainted with the respondent and rented rooms in an apartment house operated by her. Each of the parties was anxious to dispose of their properties and Carter undertook to arrange a deal. Respondent contends that she was to receive \$4,000 in cash for her properties, from which was to be deducted the mortgage of \$1,800, leaving a balance of about \$2,200; that Carter represented to her that the Pierce county property, which was about to be condemned, had been appraised at \$2,100 or \$2,200, which would insure the payment to her of the sum of \$1,500 still due upon the contract for that property, and that the necessary papers to protect her on the amount coming from the Tacoma property would be executed, and that she would receive the money from that source about September 1. The appellants contend that respondent was merely to take an assignment of the Pierce county contract along with a quitclaim deed, and that whatever amount she received from that source would be dependent upon what would be allowed in the condemnation suit.

The parties met on August 14 in the real estate office of Joseph E. Thomas & Co. in Seattle. The respondent executed the deed to her property and the appellant Hoard drew a check for \$800. There were a number of liens against the Seattle property aside from the mortgage which it was the duty of respondent to pay, and it was understood that these should be paid from the cash then furnished. The respondent contends that this

deed was executed and delivered to Carter to be held by him in trust to protect Hoard in the payment of the cash that he was then advancing and to protect her in receiving the full amount due her. It is undisputed that at this time no papers were prepared for the transfer of the interest of appellants in the Pierce county property or the contract for the sale of the same to Hudson, and these latter papers were not executed until several days later. The deed for the Seattle property in favor of Hoard was placed of record the same date. The check first drawn by Hoard was in favor of the respondent, but it was never received or indorsed by her, but was taken possession of by Carter, and the following day he went to appellants' residence, where appellant husband joined him, and they went to the bank and drew out \$800 in cash, which money was turned over to Carter, and the check in favor of the respondent was destroyed. The liens upon the property were paid off, and Carter delivered to the respondent \$229.41 on August 19. Carter claims to have given respondent a statement at that time showing an allowance to himself of \$100 commission and a balance due him in the way of overpayment of \$82.31. The statement shows one item under date of August 22.

A few days after the transaction in the real estate office, the respondent discovered that the deed had been placed of record. Soon afterwards Carter presented to respondent the abstract, quitclaim deed, and assignment of contract for the Pierce county property and, after leaving these papers in her possession for a few hours, retook the deed and assignment. The evidence does not show what became of the abstract. Respondent contends that she did not examine these papers, and it is undisputed that she never submitted them to an attorney.

It appears from the evidence that at the time the deal was made between appellants and Hudson in July, there was a conference in the office of William Laube, an attorney in Seattle, at which time Mr. Laube, the purchaser Hudson, and his brother, all testified Carter expressly stated in the presence of the Hoards that this Pierce county property had in fact been appraised at \$2,100 or \$2,200 and it was just simply a matter of getting the money from the court. This part of the conversation is denied by the appellants and by Carter. It further appears in the evidence that at an interview held in the office of Day Karr, another attorney in Seattle, some time after the deal between the parties hereto, Carter again made the same statements relative to the appraisal. It subsequently appeared that the property had not in fact been appraised at the time either deal was made and that it was subsequently appraised at something over \$500.

We have recited only so much of the testi-

mony as we deem determinative of the case. In our opinion the respondent sustained her burden of proof, and it fairly appears from the testimony that there was collusion between the real estate agent Carter and the appellant husband to overreach the respondent, and that she was defrauded substantially as alleged, and that the judgment of the lower court was fully justified.

[2] Appellants complain because the court in computing the amount to be paid by respondent refused to allow them credit for the sum of \$100 Carter had retained as commission and a few dollars additional for some expense money, and a motion was made that the judgment be corrected in that respect. In our opinion the respondent had a right to be made whole on the transaction, and the court did not err in this respect.

Judgment affirmed.

PARKER, C. J., and HOLCOMB, MAIN, and MACKINTOSH, JJ., concur,

FEDERAL MUT. LIABILITY INS. CO. v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (S. F. 9753.)

(Supreme Court of California. Nov. 4, 1921.)

Master and servant \Leftrightarrow 373—Injury by coemployee engaged in play held not one arising "out of and in course of employment."

Where employee of packing plant engaged in putting grapes into a machine threw grape at other employee, which hit and injured the eye of a third employee engaged in sweeping the floor, the injury to such third employee was not an injury arising "out of and in the course of the employment" within the Workmen's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

In Bank.

Proceedings under Workmen's Compensation Act (St. 1917, p. 831) by Gus Farsais for compensation for injuries. Opposed by the San Joaquin Packing Company, employer, and the Federal Mutual Liability Insurance Company, insurer. Award for employee by Industrial Accident Commission, and insurer brings certiorari. Award annulled.

Cooley, Crowley & Lachmund, of San Francisco, for petitioner.

A. E. Graupner, of San Francisco (Warren H. Pillsbury, of San Francisco, of counsel), for respondents.

PER CURIAM. This is a petition in certiorari to annul an award made by the Industrial Accident Commission in favor of Gus

Farsais and against the petitioner, who was the insurance carrier for the San Joaquin Packing Company, the employer of said Farsais.

At the time of the injury Farsais was working for the packing company, engaged in sweeping the floor of a part of the premises where other employees were putting grapes into a machine as a part of their duty. While Farsais was at work an employee threw some grapes at another employee, and, his aim being bad, he missed the other person, and one of the grapes hit Farsais in the eye, thereby causing his injury. Upon the evidence the Commission made a finding that—

The injury occurred "in the course of and arising out of his employment, as follows: One employee threw some grapes at another employee, and one of the grapes struck the defendant Gus Farsais in the left eye, resulting in the permanent disability hereinafter described."

There was nothing in the nature of the employment in which any workmen present were engaged which required any of them to throw grapes at another. The act was either a playful or malicious act of one employee toward another, having no connection whatever with the work in which he was engaged.

The case is not distinguishable from *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164, and *Fisher v. Pillsbury*, 172 Cal. 691, 158 Pac. 215. It comes within the general rule of the cases known as the "skylarking" cases or "horseplay" cases. The court did not issue this writ with any desire to overrule those cases. At the time the alternative writ was issued the court had ordered a writ issued in a case previously filed, entitled *General Accident F. & L. A. Co. v. Industrial Accident Commission* (S. F. No. 9633) 200 Pac. 419, in which an opinion was rendered on August 15, 1921, and it was desired to consider that case fully prior to a decision upon the present case. The line of demarcation between cases which come within the definition of an injury "arising out of and in the course of the employment" and those which do not is of necessity a narrow one, and it is not always easy to distinguish the exact point of division without careful consideration. In the case last referred to the employer became engaged in a controversy, amounting to a quarrel, arising immediately out of his business, and while so engaged and before the matter was concluded and because of such controversy he fired a shot at one of the men engaged therein, missing him, but which glanced and hit one of his own employees, thus causing the injury complained of. It is evident that the act which caused the injury was one which arose directly out of the business in which the injured person was employed. As the court said in the opinion in that case, the in-

jury "was received in the course of a series of incidents which had their initiative in a business transaction of his employer, and while the latter was actively and justifiably engaged in defending his business." This was held to be an injury arising out of his employment. In the present case the throwing of grapes had no connection whatever with the general business carried on in the establishment, nor with the particular work of any employee therein. The respondent concedes that the decision of the Commission is inconsistent with the decisions of this court first above cited. It is contended in its behalf that those cases should be overruled. The argument is that in every establishment where a number of workmen are required to be near to each other in the course of their employment for hours at a time "some frolicking is inevitable. It occurs in every plant. The industry, by bringing workmen together in numbers exposes its workmen to this hazard, which is just as much a hazard incident to the employment and 'arising out of the employment' as the danger of slipping upon floors, colliding with other workmen, falling down stairs," and the like.

Although this line of reasoning has support in the decisions of some of the other states, it is contrary to our own, and it seems to us to be an unwarranted extension of the meaning of the controlling language of the Constitution and of the statute defining the character of injuries that are to be compensated out of the earnings of the business in which they occur. In the Coronado Beach Co. Case we said:

"The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work, or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment."

And after a full review of many authorities on the subject it was held that the injury to the claimant caused by the act of a fellow servant in "tickling" him while he was at work did not "arise out of" his employment. Such injuries have no connection whatever with the work the employee is doing at the time, or with the work the mischievous employee was engaged to do, or with any business carried on in the place of employment, or with any peculiar construction or characteristics of the place of employment for which the employer could be held responsible and which creates "a risk reasonably incident to the employment." All this is true of the case at bar. It is therefore to be decided in accordance with the same rule.

The award is annulled.

SHAW, SHURTLEFF, WILBUR,
SLOANE, and LAWLOR, JJ., concur.

FRAZEE et al. v. RAILROAD COMMISSION OF CALIFORNIA et al.
(L. A. 6601.)

(Supreme Court of California. May 19, 1921.)

1. Certiorari \Leftrightarrow 82—Submission set aside where petition not sufficiently definite.

On certiorari to review an order of the railroad commission fixing rates to be charged by a water company, submitted on the petition and demurrers, where the petition positively alleges that the company is a private corporation and not a public utility, and that no part of the water has ever been dedicated to public use, but also contains matters of detail concerning the relation of the corporation to the owners of land supplied with water requiring further explanation, the submission will be set aside to permit an amendment.

2. Partition \Leftrightarrow 116(1)—Waters and water courses \Leftrightarrow 39—Partition did not affect ownership or character of ownership of water rights.

Where prior to partition an entire rancho was riparian to a stream which flowed into it, the riparian rights in the stream attached to every part of the rancho, and after the partition the proportional rights in the waters continued to be attached to the respective parcels of land set apart in severalty to the different owners, the rights being in their nature riparian rights after the partition the same as before, the character of the water right not changing from a riparian right to a right appurtenant even if the particular tract did not abut upon the stream, and such rights were covered by a subsequent conveyance of the land.

In Bank.

Petition for certiorari by Arthur W. Frazee and others against the Railroad Commission of the State of California and the Citizens' Water Company of San Jacinto to review an order of the Commission fixing water rates. Submission set aside, and 60 days given petitioners to amend.

Ray W. Bruce, of Los Angeles, for petitioners.

Williams & Williams, Goudge, Robinson & Hughes, and Hugh Gordon, all of Los Angeles, for respondents.

SHAW, J. This is a petition by 48 persons claiming to be entitled to receive water for irrigation and domestic use upon their lands from the Citizens' Water Company of San Jacinto, to review an order of the Railroad Commission purporting to fix the rates to be charged by said Citizens' Water Company for the delivery of the water to the respective petitioners and others.

The Commission found that the Citizens' Water Company of San Jacinto was engaged in the administration of a public use, being the delivery of water to the persons owning land under its canals and conduits. The petition alleges that the Citizens' Water Com-

pany is not a public utility; that the water it controls has never been dedicated to public use, but is attached to and a part of the respective tracts of land owned by the petitioners, and other persons who had theretofore been receiving said water. The main, if not the only, question presented is whether or not the said Citizens' Water Company is a public utility, and whether or not the water it controls is subject to public use. The court, upon the filing of the petition, instead of issuing an alternative writ of review requiring a return to the petition, issued an order to show cause why such writ should not be issued. The defendants have filed separate demurrers to the petition upon the ground that it does not state facts sufficient to entitle the petitioners to the relief prayed for.

[1] The petition contains the positive allegation that the Citizens' Water Company is a private corporation, and never has been a public utility, and that no part of the water in question has ever been dedicated to public use. If these allegations are to be given full effect, it would follow, as a matter of law, that the Railroad Commission would have no jurisdiction to interfere with the business of the Citizens' Water Company or with the rights of the petitioners to receive the water, or the rates to be paid therefor. The petition, however, contains some matters of detail which appear to us to require further explanation by averments in the petition, and, therefore, we deem it best to state our views on the subject, and thereupon to require the petitioners to file an amended petition before further proceedings are had in the case.

The petition alleges that the lands to which the Citizens' Water Company delivers the water are all included within a Mexican grant containing some 50,000 acres, known as the Rancho San Jacinto Viejo; that along and into said rancho there naturally flows a stream known as the San Jacinto river; that, in the year 1882, a partition of said rancho was made between the owners thereof, successors of the original grantee, in the superior court of the county of San Diego, and by the judgment of partition in said action the said rancho was divided into 17 parcels, each of which was set apart to a different party in said action, and it was adjudged that each owner of the respective parcels should have a right of way for a ditch or conduit across the land of any other owner lying between him and said stream, for the purpose of securing and using upon equal terms with the owners of allotments abutting upon the said stream, the waters thereof for irrigation and other uses upon the land so allotted to him, and that the petitioners, respectively, are owners of portions of the land so allotted in said partition and of the water rights allotted thereto by said judgment.

[2] It follows from the facts so alleged that, prior to said partition, the entire rancho San Jacinto Viejo was riparian to the stream, and that riparian rights in the stream attached to every part thereof, and that after said partition the proportional rights in the waters continued to be attached to the respective parcels of land set apart in severalty to the different owners. These water rights so attached to these several parcels of land were, in their nature, riparian rights after the partition the same as before. Such a partition "did not change the character of the water right belonging to such land from a riparian right to a right appurtenant," even if the particular tract did not abut upon the stream. The right to the water still remained a riparian right and "parcel of the land itself." The result would be that a subsequent conveyance of the land would carry with it the water right belonging to the particular tract conveyed. *Rose v. Mesmer*, 142 Cal. 328, 75 Pac. 905; *Verdugo, etc., Co. v. Verdugo*, 152 Cal. 683, 93 Pac. 1021; *Strong v. Baldwin*, 154 Cal. 157, 97 Pac. 178, 129 Am. St. Rep. 149; *Copeland v. Fairview, etc., Co.*, 165 Cal. 161, 131 Pac. 119. It will be seen that the petition by these allegations shows that the respective petitioners are the owners of parcels of the land so partitioned, and that by virtue of such ownership they are the owners of the water right in the said stream attached thereto by the judgment in partition, unless in some way their right to the water has been divested and the water right has been segregated and separated from the land. The petition contains nothing to show that such separation ever occurred, nor does it show that it did not occur. In order to bring about a positive issue, the petition should allege facts bearing upon this point.

The petition then proceeds to allege that, in 1890, a corporation under the name San Jacinto Water Company was organized, and that an agreement was made by the petitioners or their predecessors in interest whereby that corporation agreed to take water from said river, build the necessary diverting works and distributing system, and deliver the same to the petitioners or their predecessors in interest, upon payment by the said petitioners and predecessors of a sum of money for a so-called "water certificate contract" in sufficient numbers to supply the funds with which to build said works and system, and to pay thereafter a stated annual amount for the water so delivered; that this plan was carried out, the certificates were purchased and paid for as arranged, and with the money derived therefrom said corporation built the said works and distributing system, and thereafter furnished water under said arrangement to the petitioners and their predecessors in interest, until August, 1910. These certificates purported to be signed by the secretary and

president of the company, and each declared that the holder thereof was entitled to receive an amount of water equal to one-fifth of an inch to each acre of land mentioned in such certificate for seven months in the year, upon payment of \$3 per acre per year. It further declared that the interest represented by the certificate should—

“not become appurtenant to or pass by voluntary act or by operation of law with any land upon which the water represented may be used; transfer hereof shall only be made by surrender of this certificate to the company and reissuance of a new certificate.”

None of them was signed by any of the landowners. These allegations concerning the disposition and distribution of the water by said water company are uncertain as to the title to the water. It is obvious that the company could not become possessed of title to the water without a conveyance or a transfer in some manner from the landowners, since the title was vested in the latter by virtue of the partition decree aforesaid. There was apparently the not uncommon situation of a large number of landowners, each entitled to a small quantity of water from a common source, finding it necessary to devise some means by which distribution of their respective quantities of water could be made by some common system carried on at the joint expense of all the persons interested. Under these circumstances, there have been various methods devised for accomplishing this result, and different results upon the title to the water follow, depending upon the mode adopted for that purpose. In *Hildreth v. Montecito, etc., Co.*, 139 Cal. 29, 72 Pac. 398, the court said:

“Where a number of persons owning land are each entitled to take water from a common stream or source, for use upon their respective tracts of land, either by virtue of an appropriation under the Civil Code or by prescription, or as riparian owners, the water right of each is individual and several, and must be considered as private property, and not the subject of public use, although the persons so owning interests in the stream are very numerous and their lands include a large neighborhood. The owners of such water rights may make a joint diversion, and may carry the water from the point of diversion in a common conduit, made with common funds, and in such a case, in the absence of a special contract to the contrary, they will be the owners in common of the diversion works and conduits; but the respective water rights will remain several, and will remain private property. If the persons owning such rights see fit to form a corporation, and delegate to such corporation the work of making the diversion and distribution, and of constructing and keeping in repair the dams and conduits, reserving to themselves their rights in the water, * * * they do not thereby dedicate or appropriate to public use the water thus reserved and used by them. The corporation

becomes merely their agent for the purpose of serving their several interests, so far as they may be served by a common system of works, the water remaining the subject of individual ownership and private use as before.”

Examples of this method of serving a common use through a corporate agent may be found in several of our decisions. Descriptions of such systems are set forth in *Arroyo Ditch, etc., Co. v. Bequette*, 149 Cal. 546, 87 Pac. 10, and *Walnut I. D. v. Burke*, 158 Cal. 170, 110 Pac. 518. It has often been held that the water so distributed by such corporate means is not dedicated to public use, unless there is some express or implied declaration of such dedication emanating from the parties who own the land and the water. *Burr v. Maclay, etc., Co.*, 160 Cal. 280, 116 Pac. 715; *Garrison v. North Pasadena, etc., Co.*, 163 Cal. 239, 124 Pac. 1009; *Thayer v. Cal. Dev. Co.*, 164 Cal. 130, 128 Pac. 21; *Franscioni v. Soledad, etc., Co.*, 170 Cal. 225, 149 Pac. 161. In *Franscioni v. Soledad, etc., Co.* it was said that—

“A corporation owning a water supply and engaged in distributing it to persons to whose land it has agreed to deliver it for irrigation, upon a use which is private, and not public, or general,” could “with the consent of the owners of the rights to receive such water, change the use from a private and particular use to a public use, so as to make the service and terms of delivery subject to regulation and control by public authority,” and that, if this was done, “all the parties concerned and consenting thereto, including the corporation engaged in the distribution, will thereafter be bound to conform to such rates, rules, and regulations for the service as may be established by the public body thereunto duly authorized.”

The evidence in that case showed that the change suggested in the foregoing passage had been made, so far as the parties to the action were concerned, but it was said that the judgment in the action would be of no force with respect to other parties owning lands and receiving water from the company. The petition herein is bare of allegations with respect to the title of the water company aforesaid to the water. It does not allege any conveyance or transfer by the owners to the company, nor any submission by the company or the water users to the authority of any public body to fix rates, or anything indicating a change in the character of the use from a private use to a public use. The facts alleged are not inconsistent with an arrangement between the company and the landowners that the company should take charge of the water, build works with the money furnished by the landowners, and thereafter, as agent of the landowners, and as trustee in charge of their property, namely, the water, distributing the water to them annually, keeping the system in repair, and receiving from them the sums

mentioned in the certificates aforesaid as compensation for the service. They are inconsistent with the theory that the company was administering a public use, since it does not appear that it ever acquired title to the water, and it does appear that the water belonged to the respective owners of the land. In the *Franscioni Case*, it is to be noted the water company was the owner of the water in controversy; that it alone disputed the fact of the dedication to public use. The petition should more fully state the facts in regard to these propositions. It does not state or purport to set forth any of the powers of the said corporation, or the dealings between it and the petitioners with respect to the water and the title thereto, if any there were.

It further appears from the petition that, in August, 1910, another company was organized, namely, the Citizens' Water Company of San Jacinto, the defendant herein; that thereupon said San Jacinto Valley Water Company sold, conveyed, and delivered to the Citizens' Water Company of San Jacinto, defendant herein, all the property then owned by it, consisting of said water system, water, water rights, lands, rights of way, and personal property used in connection therewith, subject to all outstanding water certificate contracts, theretofore issued by said San Jacinto Valley Water Company; that thereafter said defendant company purchased a large body of land, all of which was riparian to said stream, and capable of being supplied with water therefrom, and from said system, by extending said system and taking out more water from the stream; that this purchase was made by means of and in the name of another corporation known as the San Jacinto Land Company, the stockholders of which were the same persons as those owning the stock of said Citizens' Water Company, and having the identical proportional interests in said stock; that the water company then issued to said land company sufficient water certificate contracts to cover the lands owned by the land company, and thereafter some of said lands and water certificates were sold together to the petitioners, and other parts of said land were sold to other persons, with water certificate contracts attached thereto, by said land company, and thereby enough money was realized to pay for the extensions of the system necessary to deliver the water to the additional land.

The water certificate contract issued by said defendant company states that the certificate entitled the person named therein to receive water from the system upon certain described land for a fixed period of each year, upon the payment of the dues and water rates prescribed in the certificate. There is no allegation in the petition that any conveyance was made by the landowners to the defendant water company transferring

the respective rights in the water pertaining to the several parcels of land to said defendant company. The certificate issued by the defendant company is set forth in full, but it is obvious that its recitals do not take the place of allegations of fact, particularly since it does not appear that the landowners, or any of them, ever signed such certificate or any other written agreement purporting to convey their respective water rights.

Thus, it will be seen that the condition of the title to the water rights is left altogether undetermined by the allegations of the petition. In view of the well-known scarcity of water in this state, especially in the region of San Jacinto, it seems unlikely that the owners of land having attached thereto riparian rights in a stream, the water from which they were actually using upon the land, would consent to an extension of the distributing system to nonriparian lands, or that they would transfer such water rights to a distributing corporation otherwise than in trust for their convenient use of the water. For the foregoing reasons, we consider it necessary to an intelligent consideration of the case that the petition should be amended so as to set forth the facts, whatever they may be, from which we can determine the question whether or not the water originally belonging to the land has ever become devoted to public use.

It appears from the petition that the defendant water company, in 1914, without the consent or acquiescence of any of the petitioners, applied to the Railroad Commission for an order fixing its rates for the service of the water which it had under its control; that such order had been made, and that thereafter it endeavored to charge the rates so fixed. All of the petitioners except three, namely, C. E. Borst, E. B. Easley, and L. B. Johnson, appeared before the Commission upon said application, and apparently were parties to the proceeding. The three persons named, however, were not parties thereto. The question whether this order of the Commission is an adjudication to the effect that the Citizens' Water Company is a public utility, that the water it controls is dedicated to public use, and that all persons receiving water from it were the recipients of water devoted to a public use, and not owners of private rights which were not subject to the jurisdiction of the Commission, will be an important question in this case, but in the present condition of the petition we do not believe it advisable that we should enter upon the consideration thereof.

It is ordered that the submission be set aside, and that the petitioners have leave to amend their petition, if they are so advised. Sixty days are allowed for that purpose.

We concur: ANGELLOTTI, C. J.; OLNEY, J.; WILBUR, J.; LENNON, J.; SLOANE, J.; LAWLOR, J.

CHESTER v. CARMICHAEL et al.
(San. 3199.)(Supreme Court of California. Nov. 4, 1921.
Rehearing Denied Dec. 1, 1921.)**Municipal corporations** §=864(1)—Acceptance of deed of land to city on condition of specified improvement as part created "liability."

Acceptance by a city of a deed of land "for and in consideration of the covenants and conditions" expressed therein, which were to the effect that the land should revert to the grantors unless the city should expend not less than \$5,000 each year in improving it as a park, total cost of improvements being estimated at \$50,000, created a "liability" to the grantors for the entire consideration of \$50,000 within the meaning of Const. art. 11, § 18, providing that no city shall incur any indebtedness or liability exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the qualified electors thereof.

[Ed. Note—For other definitions, see Words and Phrases, First and Second Series, Liability.]

In Bank.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Action by Theodore W. Chester, for himself and all other persons similarly situated, against D. W. Carmichael and others, as City Commissioners of the City of Sacramento, and others. Judgment for defendants, and the plaintiff appeals. Reversed.

Theodore W. Chester and Meredith, Landis & Chester, all of Sacramento, for appellants.

R. L. Shinn and White, Miller, Needham & Harber, all of Sacramento, for respondents.

ANGELLOTTI, C. J. Plaintiff, a taxpayer of the city of Sacramento, instituted this action on behalf of himself and all other taxpayers, seeking thereby an injunction prohibiting the city of Sacramento and various officers thereof from carrying out the provisions of a certain deed conveying real property to the city for park purposes, and to have such deed declared void; the theory of the action being that such action on the part of the city would be in violation of the provision of our Constitution which declares that—

"No county, city, town * * * shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof on or before maturity." Section 18, art. 11, Const.

Demurrers to the complaint were sustained, and judgment thereupon given for defendants. This is an appeal by plaintiff from the judgment.

The material facts shown by the complaint are as follows: On or about December 1, 1919, defendants George H. Cutter and Carrie M. Cutter, his wife, and defendant Hickman Investment Company, a corporation, executed and delivered to the city of Sacramento, which accepted the same, a conveyance of an oblong tract of land in Sacramento some 360 feet in width by from 2696 to 2772 feet in length, one-half of which was owned by the Cutters and one-half by the Hickman Investment Company. The conveyance was to the city, its successors and assigns forever, for park and recreation purposes. It was declared therein that it was executed "for and in consideration of the covenants and conditions" expressed therein. The conveyance was declared by its terms to be "subject to the following express conditions subsequent," nine such conditions being stated. These were that the premises shall be used and maintained by the city permanently as a public park or as a public park and playground, known and designated as "Wm. Curtis Park"; that the land shall be divided into three subdivisions as shown on a map attached, each subdivision to have a driveway extending through the same, open for public traffic, as indicated upon said map; that the city shall lay out and maintain a driveway at least 25 feet wide on the eastern outer edge of the property, from the northerly to the southerly portions thereof, and a like driveway on the western outer edge, the same to be public and open to the streets which may be constructed upon the adjoining property and extending to said property; each of the three subdivisions shall have next to the two outer or main driveways a border of forty feet in width to be improved by the city or its representatives "to lawns and shrubbery and to be used as a park," the remainder or interior of each subdivision "to be used as a park or for playground purposes, but playgrounds proper are not to extend on the 40-foot borders"; the permanent improvement within five years of said driveways, and the express provision that "the owners of property bordering or abutting on said park are not to pay for any such driveways, or for the curbs or gutters on either side of such driveways," and that, "in the event that any assessments should be levied against" such owners for any of such purposes, the same shall be paid by the city; that "there shall be expended by" the city "a minimum sum of five thousand dollars (\$5,000) per year for the improvement of the parks and playground in said park"; that "the first five thousand dollars (\$5,000) is to be expended during the year

beginning January 1, 1920, and a like sum is to be expended each year thereafter until the entire property has been improved as a park"; and that the taxes which became a lien on the first Monday of March, 1919, shall be paid by the city. It was then provided that, should the city "fail to conform to or comply with any of the above conditions," the grantors, their successors or assigns, "may, at any time thereafter, give written notice" to the city of such failure, and, if the same are not complied with within six months thereafter, "then said property shall revert to and become again the property of" the grantors, their successors or assigns. The cost of the work of construction and improvement required will exceed the sum of \$50,000, and the cost of maintenance will exceed \$5,000 per annum. Defendants have commenced the work of improvement, having already expended therein over \$1,000 from the income and revenue of the city for the fiscal year 1920, and unless restrained by the courts will carry out all the terms and provisions of the deed. All the funds of the city for the year 1919 were exhausted before December 31, 1919. All of the moneys incident to the proposed work will be paid out of revenue and income received during the year 1920 and each subsequent year. There has been no assent on the part of the qualified electors of the city, or any part thereof, to the carrying out of the proposed plan or any part thereof.

From the foregoing it is apparent that, in so far as the grantors are concerned, the city, in consideration of the conveyance, has agreed, among other things, to expend a minimum sum of \$5,000 annually in the work of improving the park site in a designated way and in constructing two driveways for public traffic through the same and also driveways at least 25 feet wide along the whole length on each side, "the same to be public and open to the streets which may be constructed upon the adjoining property," free of cost of any kind to any owner of property bordering or abutting on the park. This work in the aggregate will cost, it is alleged, \$50,000. Whether or not the performance of this obligation will benefit the city is an immaterial matter in this controversy. The obligation created by the contract is one in favor and for the benefit of the grantors, who have fully executed their part by the conveyance and delivery of the property, their successors and assigns. As matter of fact, the provisions of the conveyance indicate that the doing of the proposed work in the manner provided was deemed by the grantors to be of special value to the property adjoining on both sides, and the undertaking by the city to do such work was the real consideration for the transfer. This is especially true as to the driveways and the 40-foot strip of

garden on each side especially reserved from playground or recreational uses. Performance of the obligation would be, in substance and effect, payment to the grantors, in the way stipulated in the deed, for the property conveyed by them. By means of conditions subsequent expressed in the deed, the property conveyed was practically pledged to the grantors as security for the performance of the undertaking, the title to revert to them, their successors or assigns, in the event of nonperformance, if they so elect. It may be assumed that the city cannot be held liable in damages for failure to carry out this contract, or specifically compelled to perform, and that the only penalty for failure to perform is the reversion of the property to the grantors, their successors or assigns. This being the situation, the question is whether the transaction, the giving and acceptance by the city of the deed, involved the incurring by the city of "any indebtedness or liability in any manner or for any purpose" with relation to the grantors, their successors or assigns, within the meaning of section 18 of article 11 of our Constitution. If it did, admittedly, in the light of the facts alleged in the complaint, the liability exceeded the income and revenue provided for the year 1919, the year in which the transaction was had.

Assuming the validity of the transaction between the parties apart from any question as to the effect of the constitutional provision, it seems clear that an obligation was imposed thereby upon the city, in favor of the grantors, their successors and assigns, to expend in the specified work at least \$5,000 per annum for a period of years and until the completion thereof. To this extent the income and revenue of future years was attempted to be appropriated for the performance of this obligation in favor of the grantors, an obligation assumed by the city in consideration of the transfer to it of the property. Assuming the complete carrying out of its part of the agreement by the city, there will have been such an appropriation. The doing of this work, with a prescribed minimum expenditure therefor each year, was, as we have said, the purchase price for the land, payable in yearly installments, the grantors having fully performed their part by conveyance and delivery of the land. Notwithstanding the absence of any liability for damages for failure to perform, and the fact that the obligation could not be specifically enforced, there was an obligation in favor of and for the benefit of the grantors, involving the expenditure in a certain way, and for specified purposes, of future revenues of the city, accompanied by what was in substance a pledge of the property conveyed as security for its performance. That the matter was cast in the form of conditions subsequent is unimportant. In substance and

effect the transaction was as we have stated it.

So regarding the transaction, we are of opinion that it falls within the inhibition of section 18 of article 11 of the Constitution, which precludes any city from incurring "any indebtedness or liability in any manner or for any purpose" exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the qualified electors thereof. That there was a liability in favor of the grantors imposed on the city upon the acceptance by it of the conveyance seems clear. The ability of the creditor to enforce a claim by a judgment for money is not essential to a "liability" as that term is used in such constitutional provisions as ours. As the consideration of the executed conveyance to the city there was an obligation in favor of the grantors to expend \$5,000 yearly in the completion of the specified work, which, according to the complaint, would cost \$50,000, and the property that had been conveyed to the city was pledged for full performance of the obligation. The city must either expend all the money necessary to complete the work from its future revenues, or lose the property with all it may have paid to the time of loss in improving the same. Numerous cases cited holding that, where a city acquires property subject to a mortgage or trust deed with a stipulation that the city is not to be held liable in any way for the payment of the debt thereby secured other than by the enforcement of the lien on the property, such debt constitutes a part of the indebtedness of the city within the meaning of that word as contained in constitutional provisions confining the indebtedness of the city within a proscribed limit, illustrate how such an indebtedness may be incurred without any means of enforcement other than loss of the property. In *Browne v. City of Boston*, 179 Mass. 321, 60 N. E. 934, the court said of such a transaction:

"But the property, when conveyed, will be subject to the mortgages that have been placed upon it pursuant to the arrangement that has been made, and the city either will have to pay them, or submit to have the property taken from it by foreclosure proceedings. It will thus become indirectly liable for the amount secured by the mortgages, and the taxpayers will ultimately be obliged to pay it as contemplated. * * *

"The object of the statute is to protect the taxpayer by confining the indebtedness of a city within a proscribed limit. The manner in which the indebtedness is created is immaterial, if the result is to subject the city to a present liability, direct or indirect, which the taxpayers eventually will be called on to meet. It seems to us that such will be the result of the ingenious scheme that has been devised in the present case. We think that the statute cannot be evaded in the manner proposed."

See, also, *Voss v. Waterloo Water Co.*, 163 Ind. 69, 71 N. E. 208, 66 L. R. A. 93, 106 Am. St. Rep. 201, 2 Ann. Cas. 978; *Eddy Valve Co. v. Town of Crown Point*, 166 Ind. 613, 76 N. E. 536, 3 L. R. A. (N. S.) 684; *Fidelity Trust & Guaranty Co. v. Fowler Water Co.* (C. C.) 113 Fed. 560, 568; *Lesser v. Warren Borough*, 237 Pa. 501, 85 Atl. 839, 43 L. R. A. (N. S.) 839. We have here the obligation to expend certain specified sums annually, secured by the provision for reversion of the property in the event of nonperformance. The words "any * * * liability in any manner or for any purpose" in our constitutional provision are words of broad import, and we think that, fairly construed, they include such an obligation as the one here involved.

The facts of this case present what at first blush appears a rather novel application of the constitutional provision, but, when the real transaction between the parties is fully understood, the matter appears simple enough. We are not concerned here with the indebtedness to be created in favor of contractors, materialmen, and workmen when the city each year contracts for the doing of certain work, or buys material and employs labor for the doing of the same. We have here simply the liability to the grantors, created by the acceptance of the conveyance. As to them, the transaction was simply one of sale and purchase, completely executed by the grantors, the consideration being the future improvement by the city of the conveyed premises in a specified way for the benefit of the grantors, their successors and assigns, at an expenditure of at least \$5,000 per year. Learned counsel for respondents admit that—

"Where a purchase is made upon the installment plan, even though the only remedy for the enforcement by the seller of the payments is the right to declare a forfeiture, yet a debt has been created at the time the contract is entered into for all the sums subsequently to be paid."

Such, as we have said, was in substance this transaction. That the money was to be paid by the city to those actually doing the work deemed by the grantors to be of sufficient benefit to them to warrant them in making it the consideration for their conveyance, instead of to the grantors themselves, is immaterial. It was the construction of the improvement at the specified cost per year, presumably to the benefit of their property, that constituted the consideration for their conveyance. Likewise it is altogether immaterial, in so far as the liability to the grantors is concerned, that the city will own the improved park.

In the view we take of the nature of this transaction, it is obvious that such cases as *McBean v. Fresno*, 112 Cal. 160, 44 Pac. 358,

31 L. R. A. 794, 53 Am. St. Rep. 191, *Smilie v. Fresno*, 112 Cal. 311, 44 Pac. 556, and *Doland v. Clark*, 143 Cal. 176, 76 Pac. 958, are in no way in point. Here the full liability to the grantors was created upon the acceptance of the deed; the entire consideration therefor having been furnished. The cases cited involved contracts for the furnishing to a city in the future of service, materials, etc., and it is held that no indebtedness or liability within the meaning of the constitutional provision is incurred until the furnishing of the service, materials, etc., the consideration for the payment to be made. The distinction is clear, and is recognized by many decisions. It is concisely stated in *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 20, 19 Sup. Ct. 77, 43 L. Ed. 341, as follows:

"In the one case the indebtedness is not created until the consideration has been furnished; in the other [where the consideration on the other side is fully furnished at the time of the transaction] the debt is created at once, the time of payment being only postponed."

In support of the claim that the construction of the constitutional provision invoked by appellant is unreasonable in the light of its results, learned counsel for respondents say that to sustain it would mean that a city could not expend money on land granted on condition simply that it be maintained as a park or highway, etc.; in other words, that a city could not expend money on land conveyed solely for park or highway purposes. To our minds this result would not follow. That a city may accept land to be used by it for a specified purpose, and thereafter expend such money thereon as it, in the exercise of its discretion, deems proper in the use to which it is devoted, cannot be doubted. But that would be a very different case from this, wherein the doing of certain prescribed future work in a specified way and at a specified cost to the city per annum is made the consideration for the conveyance.

We are of opinion that the complaint stated a cause of action.

The judgment is reversed.

We concur: SHURTLEFF, J.; WILBUR, J.; SLOANE, J.; LAWLOR, J.; LENNON, J.; SHAW, J.

PEOPLE v. TROUTMAN. (Cr. 2366.)

(Supreme Court of California. Nov. 7, 1921.)

1. Criminal law §1159(2)—Conviction supported by evidence not reversible for insufficiency because of abnormality of crime.

Where conviction of an abnormal crime is supported by evidence, the court on appeal cannot reverse on the ground that the abnormality is so extreme as to be unbelievable.

2. Criminal law §13—Statute held not invalid as uncertain for clerical error.

That Pen. Code, § 288, relating to offenses not constituting other crimes provided for in part 2 of the Code, plainly meaning part 1, was not such an uncertainty as to render it invalid.

3. Criminal law §507(7)—Child of age protected by statute held not "accomplice" within rules of evidence.

Children under the age of 14 years of age protected against lewd acts by Pen. Code, § 288, are not accomplices within the meaning of rules of evidence requiring corroboration; they not being within section 1111, defining an "accomplice" as one liable to prosecution for the identical offense.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accomplish.]

4. Infants §20—Corroboration not necessary in prosecution for offense against.

No corroboration of testimony of an infant under 14 years of age protected against lewd acts by Pen. Code, § 288, is necessary.

5. Criminal law §510—Corroborating evidence of accomplice's testimony of other offenses held not necessary.

In a prosecution under Pen. Code, § 288, for lewd acts against a child under 14 years of age, testimony of the prosecuting witness as to other similar offenses after he became more than 14 years of age was receivable without corroboration; it not being necessary to prove any offense, except the one selected by the district attorney occurring before the age of 14.

6. Infants §20—Instruction to give letters to child innocent construction given by its mother held properly refused.

In a prosecution under Pen. Code, § 288, for a lewd act on or with an infant, a requested instruction that the jury should give the same innocent construction to certain letters written by the defendant to the infant prosecuting witness as was given such letters by the infant's mother was properly refused.

7. Criminal law §763, 764(17)—Instruction as to evidence of other offenses held not in effect a direction of verdict.

In a prosecution for lewd acts on or with a child, an instruction that testimony has been introduced tending to prove other acts of lewd conduct of defendant prior to and subsequent to the act relied on for conviction, that evidence was introduced to prove the lewd disposition and tendency of defendant to commit the acts, and not introduced to prove distinct offenses, but "as corroborative evidence tending to support the one specific offense," was not bad as positively asserting that the proof corroborated the main charge, and was not in effect the direction of a verdict against the defendant.

8. Criminal law §1186(4)—Defendant, not exhausting peremptory challenges, cannot complain that district attorney was permitted to pass his peremptory challenges.

That the district attorney was permitted to pass his peremptory challenges on certain ac-

casions and then permitted to exercise one, in violation of Pen. Code, § 1088, cannot be held reversible error in view of section 1404, providing that neither departure in form or mode of proceedings renders it invalid without actual prejudice to substantial rights, where no prejudice was shown, and where the defendant complaining had not exercised all his peremptory challenges.

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Holmes F. Troutman was convicted of a lewd act with a child under Penal Code, § 288, and appeals. Affirmed.

Ostrander & Carey, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioran, Deputy Atty. Gen., for the People.

LENNON, J. The order granting a rehearing of this case was prompted by the earnest and persuasive petition for a rehearing after decision by the District Court of Appeal. Here, as in the Court of Appeal, a reversal was sought primarily upon the contention that the evidence adduced in support of the people's case was so inherently improbable as to be unworthy of belief, and therefore insufficient to support the jury's verdict of guilty. Accordingly we have, in addition to giving due consideration to the remaining points made in support of the appeal, painstakingly reviewed and considered in every detail the evidence adduced upon the whole case, with the result that we are constrained to hold, as did the District Court of Appeal, that the evidence is sufficient to support the verdict and judgment.

[1] Conceding, as is contended, that at the time of the commission of the crime charged the physical condition of the boy, not necessary to be detailed here, upon whose person the crime charged was found by the jury to have been committed by the defendant, was so diseased as to be abhorrent, and therefore was calculated to repulse, rather than arouse the unnatural lascivious desires even of an extremely morally degenerate man, nevertheless we are not satisfied that the evidence upon which the conviction was had is so inherently improbable as to be altogether unworthy of belief. While the testimony of the complaining witness concerning the details of the commission of the crime is so out of the ordinary in its revelation of revolting details as to be startling in the extreme and difficult to believe, still it cannot be held to be unbelievable merely because it reveals an exceptional depth of moral degeneracy. To so hold would be "purely a speculative attempt to sound the depths of human depravity and to assign arbitrary rules beyond which desire and passion are held incapable of seducing or impelling human nature." People

v. Von Perhacs, 20 Cal. App. 48, 127 Pac. 1048; Stout v. State, 22 Tex. App. 339, 3 S. W. 231. It will be unnecessary to prolong a discussion of this phase of the case; for, apart from what we have said, we are satisfied that the case is adequately dealt with in so far as the sufficiency of the evidence is concerned and correctly decided from every point of view by the District Court of Appeal in the opinion of Mr. Presiding Justice Langdon, which we quote and adopt as follows:

"This is an appeal by the defendant from a judgment of conviction of violation of section 288 of the Penal Code. A motion for a new trial was denied, from which order an appeal is also taken.

"A discussion of the facts does not seem to us necessary, and, in view of the nature of the testimony, detailed consideration of the evidence will not be made in this opinion. It is sufficient to say that the evidence has been read with care, and that we cannot agree with the appellant that the testimony of the boy against whom the crime is alleged to have been committed presents such inherent improbabilities as to entitle it to no credence as a matter of law, and thus leave the record with no legal evidence to sustain the conviction. It is, of course, true that all offenses under this section, by their very abnormality, are improbable, measured by the standard of the normal; but the observation and experience of any court handling criminal records demonstrates that many such cases do occur, and their facts are therefore not inherently improbable, as that phrase is used in the law. As to the especially revolting facts in this case in connection with the alleged acts, which are urged by appellant as making the testimony of the boy unbelievable and inconceivable, it is sufficient to observe that once a man slips away from normal, once he enters the uncharted region of abnormality, the details and depths of degradation which his actions will show can no longer be measured. For the normal man we have a standard from human experience; but for the abnormal, there are no rules of conduct. The argument of inherent improbability was doubtless made to the jury, where it was a proper one, but these men and women believed the testimony of the boy, and even under the unusual conditions shown by the evidence did not find the facts unbelievable. We cannot, therefore, as a matter of law, say that the revolting conditions surrounding the abnormal acts in this case, render the commission of them by the defendant inherently improbable.

[2] "Objection is made by appellant that no crime is charged in the information against the defendant because section 288 of the Penal Code is unconstitutional upon the ground that it is vague, ambiguous, indefinite, and uncertain. The specific objection to the section is that the language, 'Any person who shall willfully and lewdly commit any lewd or lascivious act other than the acts constituting other crimes provided for in part two of this code,' etc., is unintelligible in that 'part two' of the Code referred to relates solely to criminal procedure and does not describe acts constituting other crimes. This precise objection was considered in the

case of *People v. Bradford*, 1 Cal. App. 42, 81 Pac. 712, where the court said that it was evident that either by legislative oversight or by clerical misprision the words 'part two' were inserted for the words 'part one' in such section, and that it should be so construed. Appellant refers to this case in his brief, but asks this court to overrule it. We see no justification for so doing, and we consider the question of the validity of this section against such an attack as settled in this state.

[3] "Appellant makes various objections to instructions given and refused by the trial court. His main objection is that the evidence shows the prosecuting witness to be an accomplice, regardless of his age, because of his intelligence, education, and understanding of moral questions, and that the refusal of the court to leave the question of whether or not the boy was an accomplice to the jury, and to instruct the jury that, if they so found, his testimony would require corroboration to sustain a conviction, was prejudicial error. Much argument is indulged in by the appellant regarding the law relating to accomplices and the responsibility of minors for crimes, etc. We are of the opinion that none of the rules discussed governing these matters are applicable to a case such as the present one. The inquiry here is not at all as to the guilt or moral responsibility of the child, and under the section of the Code under which the conviction here was had the minor is guilty of no legal offense, regardless of his mental capacity or moral insight and regardless of his acquiescence. A different situation might exist if the defendant here was of the age of 13 years and charged with any act included in section 288 against 'a child under the age of 14 years.' Then the question of the defendant's knowledge of right and wrong would be important. It would be a question of fact, and the disputable presumption regarding the responsibility of infants between the ages of 7 and 14 years for crimes might be rebutted by the evidence. But the gist of the offense under section 288 is the crime against a 'child under the age of 14 years', and in the present case the prosecuting witness, even if it were overwhelmingly proved that he had full knowledge of right and wrong and that he had innumerable vicious and criminal tendencies himself, and that he had suggested to the defendant (a man of 38 years of age) the commission of the act charged against said defendant, yet he would not be guilty of an offense under section 288, for the gist of that offense is that the act is committed with one under the age of 14 years.

"Section 1111 of the Penal Code, while requiring the testimony of an accomplice to be corroborated in order to sustain a conviction, expressly defines an accomplice as 'one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.'

[4] "However, in addition to the foregoing reasons, it has been expressly decided in this state, in the case of *People v. Raich*, 26 Cal. App. 286, 146 Pac. 807, that there is no statute or other rule of law which calls for the corroboration of the testimony of a complaining witness in a case of this character. Also in the case of *People v. Thourwald* (App.) 189 Pac.

124, it is said, in considering a conviction under this same section, 'Upon her testimony [the prosecutrix] alone a verdict of conviction may securely rest,' and it is then pointed out that no corroboration is required in cases of rape, and that the same rule applies to cases under section 288 of the Penal Code. Furthermore, there is some corroboration of the boy's testimony in the letters appearing in the record which were written to him by the defendant from time to time. The appellant contends that under certain cases in this state such corroborating evidence is insufficient. But, be that as it may in a case where corroboration is required, under the ruling in the cases of *People v. Raich* and *People v. Thourwald*, supra, corroboration of the testimony of the prosecuting witness is unnecessary in a case like the present one, and, therefore we are not concerned with whether or not the possible inference which the jury might draw from the letters would have sufficiently corroborated the boy's story.

[5] "A somewhat different, though a closely related, proposition to the one just discussed is involved in the further contention of counsel that testimony of the boy relating to the commission of similar acts by the defendant subsequent to the act charged, and after October 30, when the boy became 14 years of age, was improperly admitted to show the disposition of the defendant to commit the act charged. It is appellant's contention that, even though it be held that the boy was not an accomplice while he was under the age of 14 years and while he came within the scope of section 288, Penal Code, nevertheless, as to acts committed after he reached the age of 14 years, he would be an accomplice, and as to such acts, at least, the court should have instructed the jury that his testimony must be corroborated. There is no merit in this contention, as it was not necessary to prove any offense except the one selected by the district attorney as the charge upon which the state relied for a conviction. The instruction given by the court of which complaint is made did not refer to other 'crimes,' but referred to other 'acts' which it was stated were introduced to show the disposition of the defendant to commit the act charged, and as corroborative evidence of the main charge.

[6] "Reference has been made herein to certain letters written by the defendant to the prosecuting witness. These letters were introduced in evidence, and appellant contends that the jury should have been instructed specifically that they must give the letters an innocent construction for the reason that the mother of the boy saw these letters as they were received by him, and gave to them an entirely innocent construction. We do not see how the jury could be bound by the construction given to the letters by the mother before she was in possession of the information given by her son's testimony. The letters are not isolated from all other facts when being construed by the jury; they are interpreted in the light of all the other testimony in the case. It is perfectly clear from the record that, when the mother was informed by her son of the alleged acts, she no longer gave to the letters of the defendant an innocent construction, but that thereupon such letters became exceedingly significant to her. We

see no error in the action of the trial court in permitting the letters to go to the jury.

[7] "Complaint is made of the following instruction: 'Testimony has been introduced by the prosecution tending to prove other acts of lewd and lascivious conduct of the defendant toward Herbert Cramer prior to and subsequent to the acts relied upon for conviction. This evidence is introduced for the purpose of proving the lewd and lascivious disposition and tendency of the defendant to commit the lewd and lascivious acts. This evidence is not introduced to prove distinct offenses, but is corroborative evidence tending to support the one specific offense for which the defendant is being tried.' Appellant contends that this instruction positively asserts the existence of a fact, i. e., that the proof of similar offenses is corroborative of the main charge. Practically the same instruction was approved in the case of *People v. Gasser*, 34 Cal. App. 541, 544, 163 Pac. 157. Certainly it is well recognized that in cases of this character evidence of similar acts tending to prove a lewd and lascivious disposition and the tendency of the defendant to commit lewd and lascivious acts would be corroborative of the specific charge. There is nothing in this instruction, nor in the other instructions, which would prevent the jury from disbelieving the entire testimony of the prosecuting witness, both as to the main charge and the other offenses tending to show a lascivious disposition; and we think that appellant's contention that this instruction is, in effect, a direction to the jury to find the defendant guilty is without merit.

"Numerous objections are made with reference to other instructions of the trial court. It can serve no useful purpose to consider, specifically, each of these. The instructions as a whole must be read together, and after such reading we are convinced that no error prejudicial to the defendant was made. Under the instructions, taken as a whole, his rights were fully protected. The simple fact is that the jury believed the story of the boy and did not believe the story of the defendant. There is no other direct evidence upon the charge. We do not think it can be said that the evidence was such that reasonable men could not have reached the conclusion arrived at in this case.

[8] "It is further urged by the appellant that error was committed in selecting the jury in this case, and that the trial court should have required the district attorney to exercise his peremptory challenge before the defendant was called upon to exercise his challenge. The district attorney was permitted to pass his peremptory challenge on several occasions, and after passing his challenge more than five times was permitted to exercise one peremptory challenge. Appellant contends that this is a violation of section 1088, Penal Code, which provides that 'first the people and then the defendant shall take a peremptory challenge.' Section 1404 of the Penal Code provides that 'neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor any error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right.' If an error in procedure was committed by this practice of the

trial court, we fail to see how such an error tended to the prejudice of the defendant, and certainly there is no showing made of any actual prejudice suffered by him therefrom.

"Furthermore, it appears from the record that defendant exercised only nine of his peremptory challenges, thus leaving one unexercised. The state exercised only one such challenge. The record shows that after these challenges were exercised the attorney for the defendant stated, 'We are satisfied,' whereupon the district attorney stated, 'So are we.' It appears, therefore, that the defendant had an additional challenge unexercised which he did not desire to use because the jury as constituted was satisfactory to him. Under such circumstances, he cannot complain here of any irregularity, if irregularity there was, in allowing his peremptory challenge to the people. It was held in *Baird v. Duane*, 1 Cal. Unrep. 492, that error in refusing to allow a challenge for cause is not prejudicial if the party, although forced thereby to use a peremptory challenge, has a peremptory challenge to spare when the jury is completed. It was held in the case of *People v. Schafer*, 161 Cal. 573, 119 Pac. 920, that the disallowance of a challenge for cause on the ground of actual bias, interposed to a juror who was subsequently peremptorily challenged, will not be reviewed on appeal for error, where the record, while it shows that the defendant exhausted his ten peremptory challenges, including the one used on such juror, fails to show that he had occasion or desire to use an additional peremptory challenge, or that each and all of the 12 jurors finally accepted and sworn were not entirely satisfactory to him. The reason for the rule announced in the last-cited case, and the full discussion of the subject therein, apply with equal force in the present case. The defendant having expressly stated that the jury was satisfactory to him, and having one of his peremptory challenges unexercised at the time the jury was accepted, his objection here is without merit.

"We find no errors in the record which would warrant a reversal of this judgment under all the facts in evidence, and the same is affirmed."

We concur: ANGELLOTTI, C. J.; WILBUR, J.; SHURTLEFF, J.; LAWLOR, J.; SLOANE, J.; SHAW, J.

GREAT WESTERN POWER CO. OF CALIFORNIA v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 9758.)

(Supreme Court of California. Nov. 5, 1921.)

Master and servant §373—Employee's injury by fellow workmen wrestling held not one "arising out of employment" within Compensation Act.

Where a workman in the performance of his duties passed over a platform when two fellow workmen engaged in a friendly wrestling match accidentally fell on him and broke his leg, such injury did not arise out of his employ-

ment within Workmen's Compensation, Insurance, and Safety Act of 1917; no claim being made that the wrestling was habitual, or that the employer had any knowledge of the horseplay, or that it had any other characteristic which would make it a risk of the employment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Course of Employment.]

In Bank.

Proceedings under the Workmen's Compensation Act by E. S. Holbrook against the Great Western Power Company of California, Award allowed by the Industrial Accident Commission, and defendant brings certiorari. Award annulled.

Guy C. Earl and W. H. Spaulding, both of San Francisco, for petitioner.

A. E. Graupner, of San Francisco, for respondents.

LAWLOR, J. This is a proceeding in certiorari on a petition by the Great Western Power Company of California, a corporation, to review the action of the respondent Industrial Accident Commission allowing an award against petitioner in favor of respondent E. L. Holbrook for injuries received by him while employed by petitioner.

Respondent Holbrook was employed by petitioner in the capacity of pumpman at Belden, Cal. While in the performance of his duties, he was walking from the toolhouse to a shaft or tunnel in which he was working. On his way to the shaft he passed over a board platform on which two fellow workmen were engaged in a friendly wrestling match. The scuffling was not caused by any dispute or altercation over the work or over anything connected with the employment, and respondent was not participating in it. The wrestlers accidentally fell on him and broke his left leg. He was incapacitated for two months, and applied to the Industrial Accident Commission for compensation under the Workmen's Compensation, Insurance, and Safety Act. A hearing was had by that body, and it was found the respondent sustained injury occurring in the course of and arising out of his employment, and that he was entitled to a benefit of \$160.69. Petitioner applied for a rehearing before the Industrial Accident Commission, which was denied. This petition followed.

Petitioner contends:

That "said Commission in rendering said decision and entering said award acted without and in excess of its powers, and that the order and decision are unreasonable, and that the findings of fact of the said Commission in said proceeding do not support the order, decision, or award here sought to be reviewed."

It insists that—

"In the case at bar there are absolutely no facts or circumstances to take this case out of

the general rule uniformly followed both in England and in the United States that injuries resulting from 'horseplay' among employees, whether the injured party is a participant or not, do not 'arise out of the employment.'"

In support of this position are cited *Coronado Beach Co. v. Pillsbury*, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164; *Fishing v. Pillsbury*, 172 Cal. 690, 158 Pac. 215.

Respondents assert:

"We frankly concede that the decision of the Commission is inconsistent with the ruling of this court in *Coronado Beach Co. v. Pillsbury et al.*, 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F, 1164, and *Fishing v. Industrial Accident Commission*, 172 Cal. 690, 158 Pac. 215, both cases being decided the same day. In view of the fact that these cases were early decisions upon the question of horseplay rendered in 1916, and before the doctrine was well established in other states, and that since that time the leading states upon the doctrine have taken the opposite view, so we take the liberty of urging upon the court a reconsideration of the views therein expressed;" that, "where an employee is attending properly to his own work without diversion for purposes of horseplay, and is injured by the frolicking act of another employee, such injury, except in exceptional cases, may be said to arise out of the employment for the reason that the danger of ordinary frolicking by employees is a danger incident to every business which brings employees together in numbers;" and that "hazards due to the usual propensities of workmen being brought together in numbers for the purpose of employment should be the hazards insured against both to protect the individual and the community."

In support of this position respondents cite authorities from other jurisdictions decided since the above-mentioned cases. Petitioner, however, asserts that—

"These last-mentioned cases have been cited with approval in a very large number of decisions from the highest courts of many of the states of the land. In the decisions referred to by respondents herein, which do not follow the foregoing cases, the court has had great labor to create and point out circumstances differentiating the cases from these two leading cases."

The Workmen's Compensation, Insurance, and Safety Act of 1917 (St. 1917, p. 834) provides:

"Liability for the compensation provided by this act, in lieu of any other liability, whatever to any person, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment."
* * *

Coronado Beach Co. v. Pillsbury, supra, is a case where an employee, who was particularly susceptible to tickling, while in the course of his employment was going downstairs when he was tickled in the ribs by

another employee. As a result he fell down the stairs, sustaining injury. The court held he was not entitled to compensation, saying:

"The accidents arising out of the employment of the person injured are those in which it is possible to trace the injury to the nature of the employee's work or to the risks to which the employer's business exposes the employee. The accident must be one resulting from a risk reasonably incident to the employment. * * * In the matter at bar the employment of Flint exposed him to no greater danger from being tickled by a fellow servant than would a guest in the hotel of his employer have been so exposed."

In *Fishing v. Pillsbury*, supra, an employee, about 17 years of age, pointed a trick camera at another employee and caused a spring to be ejected from it. The spring struck the other in the eye, injuring him. The court held he was not entitled to compensation, on the authority of *Coronado Beach Co. v. Pillsbury*, supra.

Respondents rely chiefly upon two cases which follow the rule they ask us to adopt. One of these is *Leonbruno v. Champlain Silk Mills*, 229 N. Y. 470, 128 N. E. 711, 13 A. L. R. 522. In that case an employee, while engaged in the performance of his duties, was struck in the eye by an apple thrown by a fellow servant at another. The court, in upholding the award, said:

"Whatever men and boys will do, when gathered together in such surroundings, at all events, if it is something reasonably to be expected, was one of the perils of his service."

Another authority is *Willis v. State Industrial Accident Commission*, 78 Okl. 216, 190 Pac. 92, in which case an employee was, with several others warming himself by an open fire during an interval in his work, and was injured because of the explosion of a piece of dynamite which a fellow employee threw into the fire to see if it would explode. It was declared:

"We think the correct rule is, and so hold in these cases, that, if a workman is an active participant in what has been denominated 'horseplay,' he is not entitled to compensation, but if, while going about his duties, he is the victim of another's prank, to which he is not in the least a party, he should not be denied compensation."

An authority similar to these is *Verschleider v. Stern*, 229 N. Y. 192, 128 N. E. 128.

The other cases cited by respondents do not fully support the rule contended for by them. While in some of them compensation was awarded for injuries resulting from skylarking, in the cases where such compensation has been awarded special circumstances have appeared which made the skylarking peculiarly one of the risks of the employment. In other cases the compensation was awarded for injuries received by employees as the result of altercations or quarrels, but

in each of those cases the controversy had its origin in some misunderstanding or incident connected with the work. These cases decide that, while ordinarily compensation will not be allowed where injuries are caused by skylarking or are the result of a dispute between employees, yet an injury may be so caused and still be held to arise out of the employment. Thus, in the case of *In re Loper*, 64 Ind. App. 571, 116 N. E. 324, an employee, while going about his duties, was injured by another's sportive use of an air compressor. The injured employee was not participating in the horseplay. The evidence showed the compressor was habitually used in this way. The court declared:

"We are not dealing here with a sporadic, occasional, or unanticipated use of the air hose in play. * * * The employer, with knowledge of the facts, permitted such practice to continue. It was within his power to have prohibited it. By failing to do so, it became an element of the conditions under which the employee was required to work."

A similar case was *State v. District Court*, 140 Minn. 75, 167 N. W. 283, L. R. A. 1918E, 502. There an employee was struck in the eye by a sash pin thrown by a fellow employee at another, not the injured workman. The injured employee was not engaging in the horseplay. It was customary for the employees to throw things at each other, and it was found that the employer knew or should have known of the custom. The court said:

"The rule is well enough settled that, where workmen step aside from their employment and engage in horseplay or practical joking, or so engage while continuing their work, and accidental injury results, and in general where one in sport or mischief does some act resulting in injury to a fellow worker, the injury is not one arising out of the employment within the meaning of compensation acts. [Citing cases.] Here we conceive the situation to be different. Filas was exposed by his employment to the risk of injury from the throwing of sash pins in sport and mischief. He did not himself engage in the sport. His employer did not stop it. The risk continued. The accident was the natural result of the missile throwing proclivities of some of Filas' fellow workers and was a risk of the work as it was conducted."

In *Mueller v. Klingman* (Ind. App.) 125 N. E. 464, also cited by respondent, the deceased employee and a fellow employee were working together. The fellow worker became angered at a remark made by deceased concerning the doing of the work, and threw a hammer at him, striking him in the head. The injury inflicted caused his death. The court held that the injury arose out of the employment, basing the decision on *Pekin Cooperage Co. v. Industrial Commission*, 285 Ill. 31, 120 N. E. 530, and quoting from that case as follows:

"Where men are working together at the same work, disagreements may be expected to

arise about the work, the manner of doing it, as to the use of tools, interference with one another, and many other details which may be trifling or important. Infirmary of temper, or worse, may be expected, and occasionally blows and fighting. When the disagreement arises out of the employer's work in which two men are engaged, and as a result of it one injures the other, it may be inferred that the injury arose out of the employment."

Of the other cases cited by respondent, *Stuart v. Kansas City*, 103 Kan. 307, 563, 171 Pac. 913, *Marchiatello v. Lynch Realty Co.*, 94 Conn. 260, 108 Atl. 799, and *Colucci v. Edison Portland Cement Company*, 93 N. J. Law, 332, 108 Atl. 318, are similar to *In re Loper*, supra, and *State v. District Court*, supra. The others resemble *Mueller v. Klingman*, supra, and were decided on the theory that injury resulted from an altercation concerning the work. These cases are *Heitz v. Rupert*, 218 N. Y. 148, 112 N. E. 750, L. R. A. 1917A, 344, *American Steel Foundries v. Melink* (Ind. App.) 126 N. E. 33, *Polar Ice & Fuel Co. v. Mulray*, 67 Ind. App. 270, 119 N. E. 149, and *Pekin Cooperage Co. v. Industrial Commission*, supra. Another case, *Stasmos v. Industrial Commission*, 80 Okl. 221, 195 Pac. 762, although decided on the authority of *Leonbruno v. Champlain Silk Mills*, supra, was clearly a case where the injury was caused by an altercation concerning the employment, inasmuch as the employee was injured as the result of an altercation with his foreman over which of two lifts he should use in leaving the shaft in which he was working, the mine having been shut down suddenly and the employees ordered to the surface. The English cases of *Thom v. Sinclair* [1917] App. Cas. 127, and *Dennis v. White and Company* [1917] App. Cas. 479, contain valuable discussion of the phrase "arising out of the employment," but the facts are dissimilar, and they do not assist in a decision of the case at bar.

While the authorities cited above from New York and Oklahoma lay down the rule contended for by respondents, we are not prepared to concede that they represent the general trend of authority on the subject. We do not think, therefore, that these authorities would justify us in overruling the settled law of this state as laid down in *Coronado Beach Co. v. Pillsbury*, supra, and *Fishing v. Pillsbury*, supra, approved in the late case of *Federal Mutual Liability Insurance Company v. Industrial Accident Commission*, 201 Pac. 920, on the subject of injuries received by an employee through horseplay. It cannot be held that all injuries so received in the course of the employment arise out of the employment. It may be remarked that the recent case of *General Accident, Fire & Life Insurance Corporation v. Industrial Accident Commission*, 200 Pac. 419, is in har-

mony with the rule expressed in *Mueller v. Klingman*, supra, and the similar cases. In that case the injured employee was repairing a tire in a garage a short distance from where his employer and a stranger became engaged in a quarrel over the purchase of gasoline by the latter. The employer shot at the stranger, and the bullet glanced and struck the injured employee, who had not participated in the quarrel. The question presented in that case was whether the injury arose out of the employment. Mr. Justice Shurtleff, in writing the opinion of the court, said:

"In the present case the injury is largely, if not wholly, traceable to the acts of the employer. The controversy in which it was received arose out of an incident which concerned his business, namely, an application to purchase gasoline. That it ultimately resulted in a personal difference or that the accident was an unusual one, not likely to occur, does not deprive it of its business character or establish that it did not arise out of the employment. * * * What are termed the 'horseplay' cases, and the rule in them announced, have no application here. The injury sustained by Shrout was not due to skylarking or a frolic, but was received in the course of a series of incidents which had their initiative in a business transaction of his employer and while the latter was actively and justifiably engaged in defending his business."

In the case at bar it is not claimed or shown that the scuffling was habitual, that the employer had any knowledge of the horseplay, or that it had any other characteristic which would make it a risk of the employment. The injury was an unfortunate accident which had no connection with the employment, and did not arise out of it. The employer should not be held liable.

The award is annulled.

We concur: WILBUR, J.; SLOANE, J.; SHURTLEFF, J.; SHAW, J.

SARGENT v. ULLSPERGER. (Civ. 3448.)

(District Court of Appeal, Second District, Division 1, California. Sept. 27, 1921.)

Brokers §56(3)—Negotiations before employment of broker held to preclude recovery of commissions.

Though plaintiff broker suggested to defendant that a third person might be willing to trade other property for that listed by defendant with plaintiff for a sale for cash, and also suggested to such third person that defendant might make the trade, plaintiff was not entitled to a commission where the trade was actually consummated between defendant and such third person, where the latter and

defendant had negotiated for such a trade before plaintiff was employed.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by L. P. Sargent against Anton Ullsperger. Judgment for plaintiff, and defendant appeals. Reversed.

Patrick J. Cooney and J. T. Reed, both of Calexico, for appellant.

E. R. Simon, of El Centro, for respondent.

CONREY, P. J. On July 24, 1918, the defendant executed and delivered to the plaintiff an agreement in the terms following:

"L. P. Sargent, El Centro, Calif.: In consideration of \$1.00, receipt whereof is hereby acknowledged. You are authorized to sell for me the following described property and if sold by you I agree to pay you a commission of 5 per cent. on any deal I may accept for the same. Said commission to be paid out of the first money received on sale. You are hereby authorized to contract sale for me as shown herein. Price \$21,600. Terms \$7,400.00 down and balance. Balance ——. I will give possession when sold 191—. List for 90 days and thereafter until notified in writing of the withdrawal from the market. I will exchange for ———subject to my approval."

Here followed a description of defendant's property and the signature of defendant.

Plaintiff brought this action to recover a commission claimed to have been earned by performance of the foregoing contract, in that the plaintiff procured and brought about an exchange of properties between the defendant and one John Zenos, wherein and whereby defendant transferred to Zenos the property described in said agreement and in consideration thereof received from Zenos other property of the alleged value of \$21,600. The court made findings in favor of the plaintiff, except that the value of the property received by defendant from Zenos was fixed at \$12,000, and the commission allowed to plaintiff was based on that valuation instead of the valuation stated in the complaint.

Defendant contends that the contract, under the circumstances surrounding its execution, was limited to sale only, and did not authorize the broker to make or effect an exchange. It is not necessary to discuss this question, which no doubt is debatable. Assuming that the contract did authorize an exchange, and that defendant agreed to pay a commission on any exchange procured by appellant of defendant's property, nevertheless we are of the opinion that the service contracted for was not rendered by plaintiff.

To entitle an agent to recover commissions, the fact must be established that the

efforts of the agent were the procuring cause of the sale or exchange, and that through his agency the parties to the transaction of sale or exchange were brought into communication with each other, although those parties themselves negotiated the transaction. *Briggs v. Hall*, 24 Cal. App. 586, 141 Pac. 1067; *Justy v. Erro*, 16 Cal. App. 519, 117 Pac. 575; *Zeimer v. Antisell*, 75 Cal. 509, 17 Pac. 642; *Brown v. Mason*, 155 Cal. 155, 158, 99 Pac. 867, 21 L. R. A. (N. S.) 328; *Roth v. Thomson*, 40 Cal. App. 208, 215, 180 Pac. 656.

It was found by the court that on the 5th day of August, 1918, the plaintiff informed Zenos that he had listed for sale or exchange the said real property of the defendant, and suggested and proposed to Zenos that he trade his property (being the property afterwards exchanged with defendant) to the defendant for the described real property of the defendant; that the plaintiff then and there informed Zenos that defendant was the owner of the described real property and stated that he believed that the defendant would trade his said property for the real property of Zenos; "that thereafter, and a few days following, the said plaintiff informed the said Anton Ullsperger, the defendant, that he had proposed to the said John Zenos that the defendant Anton Ullsperger would trade the real property hereinafter described to the said John Zenos for the real property owned by the said John Zenos;" that thereafter the defendant and Zenos proceeded to deal together and consummated an exchange of their said properties. These findings give a chronological order of events, but they do not declare that the two principals in the trade were introduced or brought together, or that the transaction between them was initiated by reason of anything said or done by appellant. It appears by the uncontradicted testimony of defendant and his son, John Ullsperger, and of John Zenos, that during several months before defendant listed his property with the plaintiff, the defendant and John Zenos, in numerous interviews, had been discussing an exchange of those properties. Zenos was seeking to acquire defendant's property by exchange, but Ullsperger was trying to make a sale. It was not by reason of the plaintiff's efforts that they continued their negotiations and made the exchange.

The answer of the defendant squarely raised the issue by alleging that the plaintiff had nothing whatever to do with the bringing about or the consummation of said exchange of properties, and that said exchange was entirely arrived at and completed by said Zenos and defendant only. The findings do not cover this issue except in the manner hereinabove stated. Perhaps they are sufficient under the rule that findings are to be construed favorably, in support of a

judgment. But if so, these findings are not sustained by the evidence.

The judgment is reversed.

We concur: SHAW, J.; JAMES, J.

CAINE et al. v. POLKINGHORN. (Civ. 3510.)

(District Court of Appeal, Second District, Division 1, California. Sept. 27, 1921.)

1. Appeal and error §1071(4)—Clerical error in findings disregarded on appeal.

In broker's action for commission, a finding that "defendants" procured purchaser will be considered a clerical error on appeal, where shown to be such by other statements in the findings, and where there is no doubt under the evidence but that the brokers procured the purchaser.

2. Appeal and error §204(3)—Plaintiffs could not complain of parol evidence not objected to.

Brokers seeking to hold administratrix personally liable on contract, signed individually, on court's refusal to approve sale by administratrix to purchaser procured by brokers, could not complain of parol testimony that administratrix signed contract in her representative capacity, where such evidence was received without question and was given in contradiction of testimony given by brokers themselves.

3. Executors and administrators §97—Administratrix who signed brokerage contract individually did not waive statute relieving her from personal liability on court's refusal to confirm sale.

Where administratrix signed brokerage contract for sale of intestate's land, individually and not as administratrix, but signed receipt on purchaser's deposit in her capacity as administratrix, she was not personally liable to brokers for commission on court's refusal to approve sale, not having waived protection of Code Civ. Proc. § 1559.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by C. L. Caine and E. F. Loescher, doing business under the firm name and style of Caine & Loescher, against Mrs. W. A. Polkinghorn, also known as Alice E. Polkinghorn. Judgment for defendant, and plaintiffs appeal. Affirmed.

N. Lindsay South, of Fresno, and Hugh M. Bole, of Los Angeles, for appellants.

L. M. Chapman and Ward Chapman, both of Los Angeles, for respondent.

CONREY, P. J. This is an action to recover upon an alleged contract to pay a commission to the plaintiffs as agents for the sale of real property. The defendant, against whom

personally the plaintiffs seek to obtain judgment, was administratrix of the estate of W. A. Polkinghorn, deceased, to which estate the land belonged. Under date August 7, 1919, the defendant signed an agreement authorizing the plaintiffs to sell the land for the sum of \$20,000, or any less amount thereafter authorized by her, on terms therein stated, and agreed that if the plaintiffs should sell such property, or be instrumental in selling the same, she would pay them 5 per cent. commission on the selling price. Defendant signed the contract individually, without any indication of her representative capacity. The contract contained no reference to the fact that the land was property of the estate. Nevertheless, the court found that at the time of signing said contract the plaintiffs were informed by defendant that the property belonged to the estate of W. A. Polkinghorn, deceased, and knew that she was administratrix thereof; that prior to the execution of the agreement of date October 29, 1919, next hereafter mentioned, and before the plaintiffs had secured and presented a purchaser of the property, the plaintiffs were informed by the defendant that the sale thereof must be confirmed by the court, and that she was offering the property for sale as administratrix of said estate. This finding is supported by the testimony of the defendant, introduced without objection. In fact, the first oral evidence on these matters was that of Mr. Caine, and was presented on behalf of the plaintiffs. Mr. Caine testified that on August 7 Mrs. Polkinghorn stated that the land was her property and did not mention an estate. Mrs. Polkinghorn, on the contrary, testified that she told them that she was administratrix, and was selling the property in order to close the estate.

On October 29, 1919, plaintiffs received from one Otto Loescher the sum of \$1,000 as deposit and partial payment on sale to him of said land for the full purchase price of \$19,000, remainder to be paid upon execution of deed, together with abstract or certificate of title "showing title in said property to be in the said owner." The owner was not named in this receipt, but the defendant signed an acceptance thereof, wherein she further stated that she agreed to pay the plaintiffs \$1,000 "as their commission for negotiating said sale, to be paid from the first money received on the purchase price." Her signature to this acceptance was "Alice E. Polkinghorn, Adm."

At that time the defendant told the plaintiffs that it was necessary for her to get an order from the court and that she would go right ahead with it. Before anything further was done, the administratrix received from another party a bid of \$20,000 for this property, which she accepted and reported to the court for confirmation. When the mat-

ter came before the court, Otto Loescher appeared and made an offer to the court in the sum of \$22,000, which by order of the court was accepted, and the land officially sold to him for that sum. In the proceedings before the court no order was made for the allowance or payment of any agency commission.

[1, 2] The findings in this action state that the "defendants" procured Otto Loescher to make said agreement of October 29th. Other statements in the findings indicate that this was a clerical error and that the court intended to find that this was done by the plaintiffs. Under the evidence there is no doubt that the plaintiffs did procure Loescher to make that agreement. Assuming this to be the fact, we have to consider whether or not the judgment should be affirmed. Section 1559, Code of Civil Procedure, as then in force, read as follows:

"Any executor or administrator may enter into a contract with any bona fide real estate agent to secure a purchaser for any real property belonging to an estate, which contract shall provide for payment to such agent out of the proceeds of sale to any purchaser secured by him of a commission, the amount of which must be fixed and allowed by the court upon confirmation of the sale. If a sale to a purchaser obtained by such agent is returned to the court for confirmation and said sale be confirmed to such purchaser, such contract shall be binding and valid as against the estate for the amount so fixed and allowed by the court. By the execution of any such contract no personal liability shall attach to the executor or administrator, and no liability of any kind shall be incurred by the estate unless an actual sale is made and confirmed."

In view of these provisions of the Code, it is clear that the defendant did not become personally liable to pay commissions to the plaintiffs, unless the words of the contract, together with the attendant circumstances, established beyond successful denial that the administratrix intended to waive the benefit of the protection thus afforded to her by the statute, and intended to and did contract to become personally liable to the plaintiffs for commissions on the sale if made through their instrumentality. It is contended by appellants that she did make such an agreement and that the defendant should not have been permitted to show by parol evidence contrary to the terms of the contract as written that personal responsibility of the defendant was not intended. But, as we have seen, that evidence was received without objection, and was given in contradiction of testimony given by the plaintiffs. Therefore appellants cannot now be heard to say that the court erred in receiving such evidence. In addition to the testimony of the defendant, we have the further fact that in the agreement of October 29th, when the deposit was made by Otto Loescher, the plaintiffs took the signature of the defendant with words of

addition showing that she was administratrix. This agreement differed from the written agreement of August 7th in three particulars—viz., in changing the proposed sale price, in the form of signature of the defendant, and in the measure of compensation to be received by the plaintiffs.

[3] Under the facts thus proved, the defendant is entitled to claim the benefit of the provisions of the Code, hereinbefore quoted, to the effect that no personal liability shall attach to an administrator upon a contract entered into by the administrator, to pay an agent's commission for securing a purchaser for property belonging to the estate.

In *Hay v. McDonald*, 33 Cal. App. 572, 185 Pac. 1030, this court reviewed the authorities bearing upon the subject of liability upon a contract made by an agent in his own name, and held that for the purpose of establishing the liability of the principal where an agent contracts in terms not fully expressing his representative capacity, parol evidence is admissible to show that it was understood by the parties that another person was intended to be bound. But it was further stated that—

"While parol evidence in such a case as this is competent, it is not competent for the purpose of exonerating the signer from personal liability, but is competent for the purpose of extending the liability to other parties for whom the signer may have intended to contract and for whom he had authority to contract."

A rehearing in that case was denied by the Supreme Court. It must be admitted, however, that that decision, as quoted, must be limited in its application, or else it will not be consistent with some prior expressions of opinion by the Supreme Court. We have in mind the case of *Bean v. Pioneer Mining Co. et al.*, 66 Cal. 451, 6 Pac. 86, 56 Am. Rep. 106, wherein the action was upon a promissory note signed "Pioneer Mining Company, John E. Mason, Sup't," and it was sought to charge the defendant Mason personally. The court held that where the contract bears on its face no suggestion of agency, parol evidence is not competent for the purpose of exonerating the signer from personal liability if the other party to the instrument chooses to hold him personally liable, "unless there was evidence that the signer was duly authorized to contract for the corporation, and that credit was actually given to the corporation alone." The court further said:

"Even if it could be said that there were no indications suggestive of agency on the face of the note herein sued, evidence was admissible tending to prove that the consideration for the note was received by the Pioneer Company, and the credit extended to the company alone. The absence of proof of the other circumstance—his actual power to act for the corporation—would not render Mason personally liable, under the decisions in this

state. If it was known to the payee that the note was given by Mason as superintendent of the company, and in recognition of an indebtedness of the company, Mason is not bound on the note, even if he had no power to execute the instrument for the company. *Blanchard v. Kaull*, 44 Cal. 440; *Lander v. Castro*, 43 Cal. 497; *Hall v. Crandall*, 29 Cal. 568."

In the present action it must be conceded that the defendant had authority to sell the land, subject only to the approval of the court; likewise, under the section of the Code hereinabove quoted, she had authority to employ an agent and to agree to pay a commission, the amount of which, however, must be fixed and allowed by the court. Since the Code section further exempted the executrix from personal liability on such contract, that provision of the Code must be read into the contract in connection with the evidence that the plaintiffs knew that they were dealing with an administratrix. Since it does not appear from the evidence, or the findings of the court, that the conduct of the defendant in contracting with the plaintiffs was other than the ordinary conduct of an administrator in dealing with the property of an estate, our conclusion is that personal liability of the defendant has not been established.

The judgment is affirmed.

We concur: SHAW, J.; JAMES, J.

BUELL v. BUELL. (Civ. 3970.)

(District Court of Appeal, First District, Division 2, California. Sept. 29, 1921.)

1. Quieting title — 44(4) — Findings for plaintiff held unsupported.

Evidence in suit to quiet title to real estate standing in the name of defendant's intestate held not to support findings that deceased had no interest in the property, that plaintiff and deceased had agreed that the equity in other property, standing in plaintiff's name and traded for the property in suit, should be the property of plaintiff alone, and that deceased had put no more than \$300 of his money into the property so traded.

2. Appeal and error — 173(2) — Claim of fraud not pleaded and asserted for first time on appeal, not available.

A claim of fraud, not pleaded and asserted for the first time in respondent's brief, is not open to consideration.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by E. E. Buell against R. L. Buell, as administratrix of E. S. Buell, deceased, and individually. Judgment for plaintiff, and defendant appeals. Reversed.

Everts, Ewing & Wild and J. R. Fitch, all of Fresno, for appellant.

L. N. Barber and W. N. Gilliam, both of Fresno, for respondent.

NOURSE, J. Plaintiff commenced this action to quiet title to an undivided one-third interest in a certain piece of real property and improvements situated in the city of Reedley, the title standing in the name of E. S. Buell, the deceased husband of defendant. The theory of the complaint was that the property was purchased by the transfer to the vendors of plaintiff's equity in a contract for the purchase of a certain piece of property located in Columbia Colony No. 2, which contract stood in the name of plaintiff, and was assigned to the vendors of the property in suit at the request of the deceased. The value of the plaintiff's equity in the contract was \$2,800, and the value of the property in suit was about \$4,000. The defendant, who was sued both as administratrix of her husband's estate and as an individual, alleged in her answer that the contract for the Columbia Colony property was acquired by the transfer of property belonging to her deceased husband, which was taken in the name of plaintiff at the request of deceased solely for the purpose of protecting and securing plaintiff for the repayment to her of a loan of \$1,250, money borrowed by the deceased. This indebtedness was evidenced by a promissory note in the sum of \$1,250, executed by defendant and her deceased husband, and dated February 26, 1917. Prior to the filing of the amended complaint upon which the suit is based plaintiff presented her claim, based upon this note, to the defendant as administratrix of said estate, and the same was duly approved. The trial court found that on December 20, 1918, the plaintiff, as purchaser, entered into a contract for the purchase of the Columbia Colony property, agreeing to pay the sum of \$8,000 therefor; that in pursuance of said contract the sum of \$2,800 was paid to the vendors thereof by plaintiff; that neither the deceased nor his estate had any right, title, or interest therein or thereto; that on the 27th day of February, 1919, the deceased at the request of plaintiff negotiated the transfer of her equity in said contract for an undivided one-third interest in the Reedley property, and against the will of defendant and without her knowledge obtained from the vendors thereof title to said property in the name of said deceased; that the deceased paid to the vendors thereof the sum of \$2,800, received by them as first payment under the said contract of purchase, but that the same was so paid for the use and benefit of the plaintiff, and under and in pursuance of an agreement between plaintiff and deceased that the property so purchased should be her property, and

that the said sum was so paid for the purpose of effecting a settlement between plaintiff and deceased. The court also found that the property so conveyed by deceased to the vendors of the Columbia Colony property was obtained by him through a series of exchanges for which the original consideration was property acquired from plaintiff and the sum of \$300 of the funds of said deceased. Judgment was entered upon the findings, decreeing that plaintiff was the owner of the property in suit, that the defendant was barred from asserting or claiming any title or interest therein, that a deed thereof be executed, conveying the property to plaintiff, and that the defendant be required to account to plaintiff for the rents and profits received from said property from the date of the transfer to the date of said deed. Defendant appealed from the judgment, basing her attack upon the ground that the findings of fact are not supported by the evidence.

The portions of the findings which are made the basis of appellant's attack are that the estate of deceased has no right, title, or interest in the property in suit; that the contract for the purchase of the Columbia Colony property was taken in the name of plaintiff in pursuance of an agreement between plaintiff and the deceased that the property purchased should be her property, and that the property conveyed to the vendors thereof, by deceased as consideration for the equity which plaintiff received from that contract was obtained by deceased through a series of exchanges into which deceased put \$300 of his own funds.

Counsel for respondent has made no effort to sustain the findings by citation of evidence supporting them, and as the appeal has been taken under section 953a, Code of Civil Procedure, a complete examination of the typewritten transcript has been made necessary. From this examination it appears that each one of the findings under attack is unsupported by the evidence.

The story of the case as disclosed by the evidence, which is not conflicting, is that in the year 1908 respondent acquired a piece of property in the county of Fresno with an original investment of \$900. This was exchanged for other property through the efforts of deceased, and through a series of exchanges respondent acquired what is known as the Jensen property and the property referred to as her home site. Through the exchange of the Jensen property respondent acquired the piece of property designated as the Le Grand property. About this time an agreement was drawn between respondent and deceased whereby he was given an interest in the Le Grand property or in the stock and farming implements thereon, but this agreement was canceled, and respondent entered into a contract disposing of the Le Grand property and taking in exchange

therefor a piece of property in Maricopa and \$8,000 on the contract of purchase, while the son obtained an interest in a rooming house in Fresno, some 40 acres of land in Texas, a lot in Seattle, and two lots in what is designated the Robinson tract. Respondent testified that at the time of this exchange she knew that deceased had acquired the rooming house and the Texas property, but that she did not know about the lots in Seattle or in the Robinson tract. Though the contract drawn by respondent and deceased recognized an interest of deceased in the Le Grand property of the value of \$4,000, the value of what was then conveyed to him has not been shown. Respondent testified that the lot in Seattle was worth about \$50, and it appears from the abstract included in the transcript that the Robinson deal was merely a contract of sale, with an equity of about \$150. The burden of respondent's argument is that the deceased, being the son of respondent and her confidential agent, had thus obtained an unfair advantage over her, and that the Le Grand transaction was a fraud upon her, and from this it is argued that all the subsequent transactions were tainted with fraud, and that all property thereafter acquired by the son was acquired and held by him in trust for his mother. This is merely mentioned in passing, and will be the subject of further discussion.

Returning to the story of the case, it appears that after this exchange was made (on February 16, 1916), the son continued to act for his mother in other exchanges through which she acquired a large amount of property; that at the same time he was making exchanges on his own behalf, some of which grew out of the property which he acquired in the Le Grand deal. These transactions were carried on until the death of the son on March 10, 1919. On March 21, 1918, respondent conveyed to deceased a piece of property designated as Long Bros. addition. She testified that this deed was made at the request of deceased solely for the purpose of enabling him to make an easy transfer, and with the understanding that he would deed to her the property procured in exchange therefor. Other testimony was given that it was in the nature of a settlement of a long-standing dispute which the son had with his mother as to their respective interests. However, the son taking this property and other property which he had acquired from the Le Grand exchanges, and an automobile which he owned in his own right, made various exchanges until he acquired in his own name all the property which was transferred to the vendors of the Columbia Colony property for their equity in the contract of purchase thereof. This contract, as has been said, was taken in the name of respondent; but that her son had some interest therein cannot be denied, and, in fact, this was ex-

pressly admitted by the mother on numerous occasions, both before and after his death, as well as when a witness upon the stand. Before this action was commenced she frequently stated that the Columbia Colony property, which was in her name, was owned by her son, but that she held the title for the purpose of securing payment of her promissory note. In this connection respondent testified as follows:

"Well, the only thing I ever did say was that if the property [at Reedley, the property in suit], was in my name, that I would take out what was coming to me for interest and principal and settle the boy's affair all up, and then I would divide the rest of the money between the two children. I thought the little boy, as it was his father's estate, that he was getting from me, that he ought to have his share as well as the little girl."

And again:

"Q. You stated you wanted to see the two children of your son get equal shares in his estate, did you not? A. Yes, sir. Q. And you recognized that he had an estate at that time? A. The estate—it was mine, but when he took this land over I told him if he never returned it that that would be all he would get of my estate, and I didn't intend to take any of it to myself; I intended to divide it equally, what was over after paying his debts, to divide it equally between the two children. Q. You didn't think or want to take any of this property as your own? A. Nothing only what he owed me."

And further:

"Q. Didn't care about any of it for yourself at all? A. No, sir; I had told him it should go to his children and nothing else, he should get no more from the estate."

In explanation of this testimony it should be added that the deceased had a son by a former marriage and a daughter by his second wife, who is the appellant in this case. After separation from his first wife the son was adopted outside of the family, and immediately after the death of deceased respondent made inquiries as to the right of that child to participate in the estate of her son, and when advised that by reason of the adoption he could not participate, she then, for the first time, asserted that the property here in suit was in fact her property, and insisted upon the right to sell it, take from the proceeds thereof the amount of her claim of \$1,250, and divide the remainder thereof equally between the two grandchildren. On numerous occasions before this suit was filed she admitted that her interest in the property was to the extent of her loan only, and that she desired the remainder to be equally divided between these grandchildren, and it appears from the entire record that this desire was the real cause of this litigation.

[1] From a full examination of the entire

record it appears that there is no evidence to support the finding that the deceased had no interest in the property; that there was any agreement between deceased and respondent that the equity in the Columbia Colony property should be the property of respondent alone, or that deceased did not put more than \$300 of his funds into the property thus taken in the name of his mother.

[2] As to the claim of fraud or breach of trust, which respondent asserts in her brief for the first time, it is sufficient to say that neither were pleaded nor proved. The claim is based upon the transactions which grew out of the exchange of the Le Grand property on February 16, 1916, full knowledge of which respondent testified she received within a month thereafter. If, therefore, fraud had been pleaded, it is reasonable to assume that the appellant would have interposed the plea of the statute of limitations. However, not having pleaded it, it is not open to consideration at this time.

Judgment reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

STEFANICH v. PAYNE, Presidential Agent.
(Civ. 3851; S. F. 10025.)

(District Court of Appeal, First District, Division 1, California. Sept. 14, 1921. Opinion of Supreme Court in Bank Denying Hearing Nov. 10, 1921.)

1. Railroads \Leftrightarrow 308—Violation of ordinance requiring flagman negligence.

Railroad was guilty of negligence where it violated a city ordinance requiring flagman at crossing, and burden was on it to explain absence of flagman at time of accident.

2. Railroads \Leftrightarrow 335(5) — Contributory negligence proximately causing injury bars recovery.

One injured at a railroad crossing cannot recover though the railroad was negligent, if his own contributory negligence was the proximate cause of the accident.

3. Railroads \Leftrightarrow 329—Auto truck driver, knowing danger, must use reasonable care.

An auto truck driver, knowing that cars are being shunted over a net of tracks crossing the street, is bound to use reasonable care in crossing, and is not absolved from such care by the railroad's negligence in not having its flagman in place, as required by ordinance, and in not giving the signals required by Civ. Code, § 486.

4. Railroads \Leftrightarrow 350(6)—Negligence in shunting cars question of fact.

Whether it was negligence to shunt cars over tracks at a crossing in a certain manner was a question of fact for the court, sitting as a jury, to determine.

5. Railroads — 350(13)—Negligence of truck driver held question of fact.

In action for damages to motor truck at street crossing, contributory negligence of the driver of truck *held* properly submitted to the trial court sitting as a jury.

On Hearing in the Supreme Court.

6. Appeal and error — 1011(1) — Finding of contributory negligence on conflicting evidence sustained.

Finding by trial court of contributory negligence as the proximate cause of a collision at a railroad crossing must be sustained on appeal, if there is substantial evidence to support it, even where there is also substantial evidence to contradict it.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Frank Stefanich against John Barton Payne, as Presidential Agent under Transportation Act 1920, § 206 (41 Stat. 456). Judgment for defendant and plaintiff appeals. Affirmed in District Court of Appeal and hearing denied in Supreme Court.

M. K. Harris and Harris & Hayhurst, all of Fresno, for appellant.

L. L. Cory, of Fresno, for respondent.

WASTE, P. J. This is an action for damages caused by a freight car of the defendant running into and damaging an auto truck belonging to the plaintiff. The case was tried by the court without a jury. It found that the accident was caused solely and alone by the contributory negligence and want of care of the driver of the truck; that he carelessly and negligently attempted to cross the tracks without looking or listening for approaching cars, which were in plain view, and that if he had looked he would and could have seen the approaching cars in ample time to have stopped the truck and prevented the accident. Judgment was entered in favor of the defendant, from which this appeal is taken.

The facts are not disputed. The accident happened at a point where some 16 main line and side tracks of the defendant railroad company cross Eldorado street in the city of Fresno. By ordinance of the city the railroad was required to keep a flagman at this crossing, but at the time of the accident the flagman was absent from his place of duty. In the evening of the 10th of May, 1919, a loaded auto truck belonging to the plaintiff was driven by one Jack Walton along Eldorado street, going east. He reached the railroad crossing, noticed the absence of the flagman, but drove slowly across several tracks, looking, as he testified, in all directions. When he had reached and was on or about the sixth track from the west, he saw some freight cars being shunted, or kicked, in a southerly direction along

several of the railroad tracks immediately in front of him. On seeing these cars he stopped his truck in order that they might pass. Five other cars had been shunted down the track upon which Walton stopped, by the locomotive, which was some 500 feet away from and to Walton's left. These cars moved slowly, at the rate of about three or four miles an hour, and bore down directly on the truck. Walton testified that he did not notice their approach until they were within about 40 feet of him, when his attention was called to them by a passer-by. When he saw the approaching cars Walton attempted to move his truck from off the track in front of them, but in his hurry and excitement he killed his engine, and, to save himself from injury, leaped from the truck, which was demolished by the collision.

There was no brakeman or other person upon the cars as they neared the place where Walton's truck stood. No bell was rung or whistle sounded to give warning of their approach. A switchman of the defendant had dropped off the train of cars which was being switched for the purpose of protecting the Eldorado street crossing. He saw Walton about 200 feet away, and signaled to him and called to him to stop. Walton stopped his auto truck in front of the approaching cars at a point where there was nothing to obstruct his view, and the moving cars were in plain sight. Walton himself said in a statement taken down immediately after the occurrence that if he had looked north along the railroad tracks he would have seen the cars coming, and the accident might have been avoided, but that he was watching the cars approaching in front and to his left, and for this reason he kept the truck going, as everything seemed clear ahead of him. At the trial he testified that he must have seen the cars on the track on which the automobile was standing; that the cars were undoubtedly there; and that he evidently saw them, but he did not know, until they were pointed out by the passer-by, that they were moving.

[1-3] Plaintiff lays great stress upon the fact that the flagman was not at his usual post at the time of the accident. The ordinance of the city required the defendant to keep a flagman at the crossing. None was there, and no explanation or reason was given by the defendant to account for his absence. The failure of the defendant to perform the duty imposed upon it by the ordinance was negligence of itself. But the fact that the usual precautions were omitted, and that the defendant was negligent, does not require a reversal of the judgment if the other circumstances indicate, as a matter of law, that from the most favorable view of the facts the trial court must have concluded that the negligence of the driver, Walton,

was the proximate cause of the injury. *Chrissinger v. Southern Pacific Co.*, 160 Cal. 619, 620, 149 Pac. 175. Walton was familiar with the crossing. He knew the tracks were there, and that cars were being shunted over the network of tracks and across Eldorado street at that particular moment. He was therefore bound to use reasonable care, and was not absolved from such care by the negligence of the defendant in not having the flagman in his place at that moment. *Davis v. California Street Cable Co.*, 105 Cal. 131, 138, 38 Pac. 647.

The plaintiff places some reliance on the alleged violation by the defendant of section 486 of the Civil Code, which provides that the bell of a locomotive must be rung, or its whistle sounded (except in cities), at a distance of at least 80 rods from the place where the railroad crosses any street, and be kept ringing, or sounding, until the locomotive has crossed the same. But in such cases, as in the matter of the violation of the city ordinance, the situation is governed by the principles of law we have just stated.

[4] Whether it was negligence or not for the servants of the railroad company to shunt the cars over the various tracks at the crossing of Eldorado street in the manner in which they did was a question of fact for the court to determine, sitting as it did without a jury. *Dunne v. Hines*, 195 Pac. 276; *Carraher v. S. F. Bridge Co.*, 81 Cal. 98, 102, 22 Pac. 480. The attending circumstances in *Chung Sing v. Southern Pacific Co.*, 59 Cal. Dec. 439, render the holding in that case on that point inapplicable here.

[5] The question of contributory negligence of the driver, Walton, was properly submitted to the trial court. *Zibbell v. Southern Pacific Co.*, 160 Cal. 237, 116 Pac. 513. With all the facts and circumstances before it, and with the nearby scene of the accident placed clearly in its view, it has determined that Walton was guilty of contributory negligence which proximately caused the accident. The case is not one in which that conclusion may be rejected by the appellate court.

The judgment is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [6] In the statement in the opinion of the District Court of Appeal that "the fact that the usual precautions were omitted, and that the defendant was negligent, does not require a reversal of the judgment if the other circumstances indicate, as a matter of law, that from the most favorable view of the facts the trial court must have concluded that the negligence of the

driver, Walton, was the proximate cause of the injury," the phrase "as a matter of law" should have been omitted. It implies that a finding of contributory negligence must be sustained on appeal unless the facts prove establish such negligence beyond controversy and "as a matter of law." The true rule is that such finding must be sustained if there is substantial evidence to support it, and that is so, even where there is also substantial evidence to contradict it; a mere conflict of evidence not being sufficient on appeal to overthrow a finding of the court. This appears from other passages in the opinion, and the insertion of the above-quoted phrase at that place was doubtless an inadvertence.

The petition for a rehearing in this court is denied.

All concur.

HALLENSLEBEN v. HEINE PIANO CO. (Civ. 3877.)

(District Court of Appeal, First District, Division 1, California. Sept. 23, 1921. Hearing Denied by Supreme Court Nov. 21, 1921.)

1. Novation ⇐4—Deposit of checks for balance due contractor for delivery when defects were remedied held not a "novation."

Where defendant, by agreement with a contractor, deposited checks for an amount due him with a third party for delivery to the contractor, when certain alleged defects in the work were remedied and the contractor regarded the deposit of the checks as the method adopted by defendant for discharging its obligation, and agreed to remedy the defects merely for the purpose of securing payment, there was no novation under Civ. Code, §§ 1530, 1531, as there was neither a substitution of a new obligation nor a waiver of the original obligation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Novation.]

2. Contracts ⇐295(1)—Where checks were to be delivered to contractor when defects were remedied, substantial compliance was sufficient.

Where by agreement with a contractor defendant deposited checks for the amount due the contractor with a third person, to be delivered when certain defects were remedied, a substantial compliance with the conditions upon which the checks were to be delivered was sufficient.

3. Accord and satisfaction ⇐1—Deposit of checks for delivery to contractor when defects remedied not an "accord and satisfaction."

Where by agreement with a contractor defendant deposited checks with a third person, to be delivered to the contractor when certain defects in the work were remedied, and the checks were for the amount claimed by the contractor, and were subsequently re-

turned to defendant by the depository, there was no accord and satisfaction under Civ. Code, § 1521, defining accord, and section 1523, defining satisfaction.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Accord and Satisfaction.]

Appeal from Superior Court, City and County of San Francisco; W. M. Finch, Judge.

Action by Hermann Hallensleben against the Heine Piano Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Werner V. Olschewski, of San Francisco, for appellant.

G. R. Perkins, of San Francisco, for respondent.

RICHARDS, J. This is an appeal by the defendant from a money judgment in favor of the plaintiff. The parties had entered into a written contract by which the plaintiff undertook to perform certain work in connection with the installation of the elevators in a building being erected by the defendant. The plaintiff, as he claimed, completed the work and had received certain payments thereon, leaving a balance due of \$385.77. There were also due him two small items of \$7 and \$4.50 for extra work. The defendant refused to pay these sums until the plaintiff had remedied certain claimed defects in the work, but on condition that he do so offered to deposit with a third party certified checks for the several amounts claimed by the plaintiff, to be turned over to him upon such compliance. The plaintiff agreed to the course suggested. Thereupon the defendant wrote and delivered to the Pacific Elevator & Equipment Company the following letter:

"April 22, 1920.

"Gentlemen: We inclose you herewith three checks for the sum of \$397.27, payable to Herman Hallensleben. Will you please upon the following conditions being performed deliver said checks to Herman Hallensleben and require him to sign a receipt which is also inclosed herewith:

"Conditions.

"[Here follow seven specifications of defects claimed to exist in plaintiff's work.]

"(8) Upon said work being properly done and done in a good workmanlike manner, and upon said work being done to the satisfaction of Shea & Lofquist, architects for said building, and upon the same being pronounced as properly done by the Pacific Elevator & Equipment Company. * * *

"If Mr. Hallensleben does not perform the conditions herein set forth you are to return the hereinbefore mentioned checks to the Heine Piano Company without delay."

Thereafter the plaintiff, having, as he claimed, complied with the conditions of this

letter, demanded of the Pacific Elevator & Equipment Company that it deliver said checks to him; but the additional work not being entirely satisfactory to the persons named under condition numbered 8 of said writing, the said company refused such demand, and returned the certified checks to the defendant.

Upon the trial the court found that the plaintiff had, with one trifling exception, fulfilled the so-called conditions to the letter, and rendered its judgment in plaintiff's favor for the aggregate amount of said certified checks, less the sum of \$10, which latter sum it found to be the reasonable cost of bringing the work to the desired state of perfection.

[1] In support of its appeal the defendant contends first that the letter of April 22, 1920, written by it to the Pacific Elevator & Equipment Company, to the terms of which the plaintiff had orally agreed, constitutes a novation of the original contract between the parties, and that it was error on the part of the trial court to found its judgment upon the original contract, if in fact it did so.

With this contention we are not able to agree. Novation is the substitution of a new obligation for an existing one; and such substitution must be with intent to extinguish the old obligation. Civ. Code, §§ 1530, 1531; *Young v. Benton*, 21 Cal. App. 382, 131 Pac. 1051; 29 Cyc. 1130. The evidence in this case contains nothing to show that the plaintiff ever agreed to waive the defendant's original obligation to him. Indeed, it is quite plain that he regarded the deposit by the defendant with the Pacific Elevator & Equipment Company of the three certified checks as the method adopted by it for the discharge of that obligation; and it is also plain from the evidence that the plaintiff's oral agreement to remedy the defects in his work claimed by the defendant to exist was simply for the purpose of securing payment of the amount claimed by him to be due under his original contract.

We think also there was no substitution of a new obligation for an existing one. The defendant's obligation under the original agreement was to pay to the plaintiff \$397.27 upon the completion of the work specified in its contract, including the trifling amount of extra work, and this is precisely what it purported to do by its written instructions to its depository. Nor was the plaintiff's obligation changed, since the so-called conditions referred merely to matters which the defendant itself claimed were defects in the performance of the written contract between the parties. The essentials of a novation are entirely lacking in the present transaction.

[2] It is also contended by the appellant in the same connection that the evidence shows that the plaintiff did not comply with the conditions of the letter of April 22, 1920, so as to entitle him to be paid the amount of

the certified checks. The court, as we have seen, found a substantial compliance, which finding is abundantly supported by the evidence. A substantial compliance was sufficient. *Connell v. Higgins*, 170 Cal. 556, 150 Pac. 769; *Rischard v. Miller*, 182 Cal. 351, 188 Pac. 50; *Collins v. Ramish*, 182 Cal. 360, 188 Pac. 550.

The appellant's next contention that, having deposited the certified checks, it had done all that it was required to do, and hence that it was not a proper party defendant, depends upon the establishment of the appellant's first proposition, which having fallen, this must fall with it.

[3] Finally the appellant urges that the letter of April, 1920, written by it to the Pacific Elevator & Equipment Company outlining the conditions under which the certified checks were to be delivered to the plaintiff, and the plaintiff's verbal acquiescence in those conditions, constituted an accord and satisfaction.

We think this contention even wider of the mark than that of novation.

"An accord is an agreement to accept in extinction of an obligation something different from or less than that to which the person agreeing to accept is entitled." Civ. Code, § 1521.

And satisfaction is the acceptance by the creditor of the consideration specified in the accord. Civ. Code, § 1523. Here there was no agreement by the plaintiff to accept anything different or less than the amount claimed to be due to him; and the element of satisfaction is entirely lacking, since the certified checks were not turned over to the plaintiff, but were returned by the depositor to the defendant.

We find no merit in the appeal.
Judgment affirmed.

We concur: WASTE, P. J.; KERRIGAN, J.

In re JONES. (Cr. 840.)

(District Court of Appeal, Second District, Division 1, California. Oct. 3, 1921.)

1. Habeas corpus §85(2)—Evidence held insufficient to show conspiracy to have prisoner brought illegally from Mexico to United States.

In habeas corpus proceeding pending extradition of petitioner following his arrest for felony committed in other state, after deportation from Mexico, in which petitioner claimed that he had not been found within the state in view of illegal deportation, evidence that United States officials presented proof to Mexican officials that person living in Mexico had been convicted of a felony in the United States and was a fugitive from justice at the time of his

entry into Mexico, without requesting Mexican officials to illegally deport such person, held insufficient to justify a finding that United States officials conspired with Mexican officials to have such person illegally brought from Mexico to the United States.

2. Extradition §28½—Prisoner arrested immediately after illegal deportation from Mexico not "found within this state" within statutes and federal Constitution.

If person convicted of felony in another state who had escaped and was living in Mexico was brought into California pursuant to an unlawful conspiracy between United States officials and Mexican officials to have him brought into the United States without compliance with Mexican law relating to deportation, and was arrested immediately after being placed across boundary, he was not "found within this state," within the statutes and the federal Constitution relating to extradition.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Within the State.]

3. Extradition §28½—Prisoner arrested immediately after being placed across Mexican boundary "found within this state," regardless of irregularities of foreign officials in deportation.

Person convicted of felony in other state arrested in this state immediately after being placed across Mexican boundary line by Mexican officials with authority to deport him, after having escaped into Mexico, was "found within this state" within provisions of the statute and the federal Constitution relating to extradition, regardless of irregularities committed by Mexican officials in deporting him, in the absence of conspiracy between United States officials and Mexican officials to have him illegally brought into United States from Mexico.

4. Evidence §81—Mexican authority assumed to have had authority to deport fugitive from justice.

In habeas corpus proceeding pending extradition in which petitioner claimed to have been illegally deported from Mexico, into which he had escaped after conviction of a felony in the United States, within three years prior to deportation, it will be assumed, in the absence of evidence as to the law of Mexico, that the Mexican authorities had authority to deport him, in view of Immigration Law (U. S. Comp. St. § 4242 et seq.).

Application for writ of habeas corpus by Xenophon Jones against the Sheriff of San Diego County. Writ discharged, and petitioner remanded to custody.

Dana R. Weller, of Los Angeles, and Sample & Harden, of San Diego, for petitioner.

Lawler & Degnan, of Los Angeles, for respondent.

JAMES, J. Petitioner herein is held in custody as a fugitive from justice. Upon the demand of the Governor of the State of Oklahoma, the Governor of California has is-

sued his warrant of rendition and the state officer of Oklahoma is ready to execute the process. There is no dispute as to the preliminary facts involved, nor any question as to the regularity in form and substance of the warrant issued by the Governor of California, except that it is insisted that petitioner was not, at the time of the issuance of said warrant, within the state of California, and that his presence herein was fraudulently and forcibly obtained without his consent. Petitioner was convicted of the crime of manslaughter in the state of Oklahoma and, without satisfying the judgment rendered upon his conviction, fled from that state and went to Tia Juana, in the republic of Mexico. He continued to reside at the place mentioned until officers of the Mexican government arrested him and forcibly placed him across the line and to a place within the state of California. An officer of the immigration department and another (Gershon) attached to the Department of Justice of the United States then took charge of petitioner, kept him under arrest, and he shortly was received into the custody of respondent here. It appears that one of the military officers in command and on duty at the international line informed Gershon that he had been called upon by the Mexican immigration officials to assist in the deportation of petitioner, and that he had ordered the arrest of petitioner and would deport him the same evening from Mexicali. The Mexican immigration office at Tia Juana, several days in advance of the day when petitioner was placed across the international boundary line, advised the witness Hanna, who was the United States immigration official to whom we have referred, that petitioner was to be deported from Mexico. Petitioner was in fact placed under arrest by Mexican soldiers, and taken with his automobile to a point some miles outside the town of Mexicali. The two United States officials mentioned, by agreement, were waiting across the line and petitioner was delivered by the Mexican soldiers over a bridge and upon United States territory. There was no interval of freedom allowed him from custody, for he was immediately taken under arrest to a nearby California town and placed in jail. He protested both to the Mexican soldiers against being transported from the country and to the American officials against being subjected to arrest by them. The evidence further showed that some time prior to the deportation of petitioner from Mexico an officer from the state of Oklahoma had exhibited to Gershon, the department of justice agent, a warrant and proof of the fact that Jones had been convicted of manslaughter in Oklahoma and was wanted there as a fugitive from justice. Gershon had exhibited this documentary evidence to Mexican officials at Tia Juana. There was no evidence that any request was

made by Gershon or the Oklahoma officer that the Mexican officials should deport petitioner or illegally or in any wise cause him to be placed across the boundary line so that he might be subjected to arrest in the United States.

[1,2] Petitioner's contention is that there was an unlawful conspiracy entered into between the officers of the separate governments with the purpose of causing him to be kidnapped and illegally brought within the United States. Under such a state of facts, he insists that he could not be deemed to have been "found within this state," as that term is used both in the federal Constitution and the statute of California. Assuming that the facts sufficiently show the case contended for, we would readily agree with the conclusion drawn. However, we think that the evidence does not justify a finding of an unlawful conspiracy formed and executed with the purpose of bringing petitioner within the limits of the United States. So far as appears, the federal officers went no further than to present to Mexican officials proof of the fact that at the time of petitioner's entry into Mexico he was a fugitive from justice, having been convicted of a felony. The evidence fell short of showing in the least particular or degree any importunities or solicitations on the part of the American officials to induce the Mexican authorities to commit any improper act in the case of this petitioner.

[3] Passing for a moment the question argued as to the authority of the Mexican officials to deport petitioner, we are quite clear that, assuming that such authority existed, the moment petitioner reached American soil he became subject to the extradition law as a fugitive from justice, and as having been "found" within the state of California. It is earnestly contended that the officials of Mexico acted without authority in ejecting petitioner from their territory.

[4] As the law of Mexico governing such matters was not produced or shown in evidence, petitioner relies upon the presumption that that law will be deemed to be the same as that of the United States. He contends that there is no authority under that law to deport a person except upon due warrant issued and hearing had. He admitted that under the law of this country convicts may be excluded and also deported within three years from date of their entry into the country. Immigration Law, Fed. Stat. Ann. (2d Ed.) vol. 3, p. 637; U. S. Comp. St. § 4242 et seq. We must assume then that ample authority existed, for the cause shown, to support an order that petitioner be deported from Mexico. For ought that appears, an order and warrant in due form may have been made authorizing the action taken, notwithstanding that petitioner says that none was exhibited to him. He further testified

that he was allowed no hearing, and that may be conceded to be the fact, for want of any contradicting evidence. The matters of which he complains, as to the course of conduct on the part of Mexican officials, amount to irregularities in the administration of the law of Mexico and the question as to whether the acts of the Mexican officials, in placing the person of petitioner outside the confines of their country, were sanctioned by that law, we think must be considered as immaterial here. Instances are not wanting, and a number are cited in text-books on extradition, where, outside of treaty obligations and in the absence of them, foreign governments have acceded to a simple request made upon them to deliver up or return to the requesting government persons charged with heinous crimes committed within the jurisdiction of the last-mentioned governments. The proposition is fully established by the authorities that in such cases, and assuming that the acts of the surrendering governments were irregular under their own law and procedure, the person surrendered could not question the regularity of such acts in the courts of the country having jurisdiction of the crime committed and to which such person may have been returned. This rule has been extended far enough to cover cases where citizens of the United States have by artifice caused a person who has fled from our jurisdiction to cross the line and come within reach of state process. The law so established is in emphasis of the doctrine that there is given to no fugitive from justice the right to claim an asylum in a foreign country. In the case of *Ker v. Illinois*, 119 U. S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421, this law is given full exposition, and we here cite, as pertinent to the questions just discussed, the further decisions: *Ex parte Brown* (D. C.) 28 Fed. 653; *Ex parte Wilson*, 63 Tex. Cr. R. 281, 140 S. W. 98, 36 L. R. A. (N. S.) 243.

As already stated, had it appeared that the agent representing the state of Oklahoma had gone into Mexican territory, seized the petitioner, and brought him into the state of California, we would then conclude that a warrant of rendition issued by the Governor of this state would be inoperative, because the condition of the law that such warrant may be issued only where a fugitive is "found" within the state would not be satisfied. We have already determined that the evidence did not establish such a state of facts. The power under which petitioner was removed from Mexican territory was that of Mexican officials claiming to act under the right of the immigration laws of that country. Whether they did in fact act regularly under such laws remains to be questioned only by that government. When petitioner was delivered upon California soil he

was then subject to arrest as a fugitive from justice, and a warrant of rendition issued by the Governor of California became operative and effective for the purpose of authorizing the Oklahoma officer to remove him from the state.

The writ is discharged, and petitioner remanded to the custody in which he was at the time of the return made herein.

I concur: CONREY, P. J.

I concur in the judgment: SHAW, J.

EPHRAIM et al. v. OAKLAND TITLE INS. & GUARANTY CO. (Civ. 3806.)

(District Court of Appeal, First District, Division 1, California. Sept 27, 1921. Hearing Denied by Supreme Court Nov. 25, 1921.)

1. Escrows ⇨10—When depositary recorded deeds and sent purchaser's check to vendor, transaction could not be reopened because of doubt as to title.

Where a grantor deposited a deed with a title insurance company for delivery to the grantee on payment of the price and the grantee deposited a check to be paid to the grantor when the company could guarantee the title, and the company recorded the deeds and sent the check to the grantor, there was a delivery of the deed, and the transaction was closed, and it was too late to reopen it by stopping payment on the check because of a doubt as to the grantor's title or because a third person subsequently commenced suit to quiet her title.

2. Escrows ⇨10—Proof of recording held sufficient proof of delivery to sustain verdict.

Proof that a title insurance company, with which a deed and check for the purchase price had been deposited, placed the deed of record as agent for the purchaser, established the delivery of the deed so as to support a verdict for the grantor in a suit to recover the price after payment on the check had been stopped in view of Code Civ. Proc. § 2061, subd. 2, providing that the jury need not decide in conformity with the declarations of any number of witnesses as against a presumption, there being a presumption of delivery when the deed is executed, acknowledged, and recorded.

3. Appeal and error ⇨1066—Instruction as to execution of deed saying nothing of delivery harmless where there was no issue as to delivery.

In a grantor's suit to compel payment of the price by defendant with, which it had been left by the grantee, an instruction that, if the deed to the grantor from a third person was duly signed or acknowledged, it vested title when thereafter recorded, though ignoring the necessity of a delivery, was not misleading, and did not affect defendants' substantial rights where the only issue was as to execution, and not concerning delivery.

4. Deeds \Leftrightarrow 194(2)—Possession by grantee sufficient to establish delivery in absence of contradictory evidence.

The possession of a deed by the grantee is some evidence of its delivery, and sufficient in the absence of any contradictory evidence to establish it.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Action by W. K. Ephraim and wife against The Oakland Title Insurance & Guaranty Company and another. From a judgment for plaintiffs, the defendant named appeals. Affirmed.

Wilson & Wilson, R. Porter Ashe, and Arnold C. Lackenbach, all of San Francisco, for appellant.

Keyes & Erskine, of San Francisco, for respondents.

KERRIGAN, J. This is an appeal by the defendant from a judgment in favor of plaintiffs for the sum of \$1,800.

In the latter part of May, 1919, the plaintiff, Mrs. A. F. Ephraim, authorized one S. M. Sample to sell the parcel of land described in the complaint for the sum of \$1,800, Sample's compensation to be 5 per cent. of said amount. Said agent sold said land to Lionel Wachs at the price thus fixed, who directed that the title thereto be placed in the name of Milton Mazor. Accordingly Mrs. Ephraim executed a deed to Mazor, and on May 28, 1919, she and the purchaser visited the office of the defendant, Oakland Title Insurance & Guaranty Company, and gave instructions as to the completion of the transaction, which took the common form of the deposit of the deed in escrow to be delivered to the grantee upon payment of the purchase price. At this time Mrs. Ephraim produced an unrecorded deed to the property to herself from Marie Uhl, dated November 22, 1918. Apparently the plaintiff made a satisfactory explanation to the secretary and manager of the title company, Ira Abraham, as to why her deed had not been recorded. In any event she deposited the two deeds with the defendant, receiving from it a receipt which provided that the deed from Mrs. Ephraim to Mazor was to be delivered to Mazor upon payment of \$1,800, less \$95, the commission payable to the agent. On the following day Wachs notified Sample that he had decided to take the title in his own name, instead of in the name of his friend Mazor. Accordingly a deed conveying the property to Wachs was executed by Mazor. On May 28th this deed was sent by Wachs to the title company, together with a check for \$1,800, with instructions to pay the amount thereof to the plaintiff, A. F. Ephraim, when the title company could issue its policy showing

record title to the lot in himself. On the afternoon of the same day the title company filed for record all three deeds, and handed Mrs. Ephraim a check for \$1,705, and to Sample a check for \$95.

Shortly thereafter Mrs. Ephraim telephoned to the defendant's secretary requesting him to return to her when recorded, and to no one else, the deed from Marie Uhl to herself. He replied that the transaction was closed, that she had no interest in the deed nor in anything except the money, check for which had been given to her. This communication aroused the suspicion of Mr. Abraham, and he requested Mrs. Ephraim not to cash the check, but to call at the office of the title company the following morning. He stopped payment of both checks and directed the county recorder not to let the deeds out of his possession. The next morning, at a meeting in the office of the title company which was attended by Marie Uhl, the plaintiff's purported grantor, she declared that she had not conveyed the property to Mrs. Ephraim, and about a week later commenced an action against Mrs. Ephraim and others to quiet title to the lot, and to have her alleged deed declared void. A lis pendens was immediately recorded. Thereupon the plaintiffs commenced this action against the title company, and Marie Uhl, alleging in their complaint, in part, the facts above narrated as to the deposit in escrow of the deeds, the receipt by the title company of the purchase price of the property for her use and benefit, and its refusal to pay over said money. The defendants filed separate answers, in both of which it is alleged that the plaintiff, intending to cheat and defraud Milton Mazor, falsely and fraudulently represented that she was the owner of the lot of land described in the pleadings, whereas said lot was the property of Marie Uhl, who had not executed any conveyance thereof to the plaintiff, A. F. Ephraim, and consequently said plaintiff was not entitled to receive the money lodged with the title company by the purchaser of said lot.

[1] Under the issues thus framed the principal question before the trial court was whether or not Marie Uhl had in fact executed this deed to the plaintiff, A. F. Ephraim. The jury found affirmatively upon this question, and we are of the opinion that the evidence abundantly supports the verdict of the jury. Indeed, the sufficiency of the evidence upon this point is not attacked, the only serious contention made upon this appeal being that there is no evidence of a delivery of the plaintiff's deed to her grantee, or his successor—the actual purchaser, Wachs. The instructions of Mrs. Ephraim, the grantor, were that her deed should be delivered upon receipt from the purchaser of \$1,800.

The instructions to the title company given by the purchaser were that the \$1,800 should be paid over to Mrs. Ephraim when that company could issue its policy of title insurance guaranteeing title to stand in Wachs. When the depository recorded the deeds and sent its check for the purchase price of the lot to the grantor, the transaction was concluded, and similarly, when it was in receipt of the purchase money, and placed the deeds upon the record, there was in effect a delivery of the plaintiff's deed to her grantee, and the title company was in a position to insure the record title as being in Wachs. It was then too late, upon the suspicion of the secretary of the company being aroused as to the genuineness of the title in Mrs. Ephraim, to prevent the consummation of the transaction, for, as stated by that gentleman, it was already closed. Nor does it appear that Wachs desired to rescind the purchase; and the title company, acting for Wachs, refused upon demand to return to Mrs. Ephraim the deeds or to pay her the purchase price. It is true, as claimed by the defendants, that the action commenced by Marie Uhl cast a cloud upon the title to the lot, but this was after the delivery of the deed to Wachs and after the plaintiff was entitled to receive the purchase money, and hence too late to be available to the title company as a defense to this action if, as was determined by the jury, the deed from Uhl to Ephraim was valid.

[2] Proof that the title company, as the agent of the purchaser, placed the deeds of record, sufficiently established the delivery of the plaintiff's deed to Wachs or his nominee. A presumption of delivery arises where a deed is shown to have been executed, acknowledged, and recorded. In 8 R. C. L. § 68, p. 1004, speaking of the effect of a recordation of a deed, it is said:

"Likewise, the fact that a deed is on record is prima facie evidence of delivery, or, as otherwise stated, warrants a presumption of delivery and acceptance, so that whoever makes assertion to the contrary has the burden of proving it. Moreover, since recording takes the place of the solemn ceremonies accompanying delivery of seisin at common law, it has been called evidence of delivery of the most cogent character, requiring the countervailing proof to be clear and persuasive."

And in section 87 of the same work, at page 1006, the author says:

"Delivery of the deed by the grantor, with the grantee's consent, to the proper officer, with the intention that thereby it shall pass the title, constitutes an effective delivery, the officer being deemed in such case the grantee's agent, as where a corrected deed was delivered to the register for record by the grantor to whom the original deed had been returned by the grantee for correction, the officer's possession after recording being regarded as that of the grantee."

While there was other evidence tending to show a delivery of the deed, this presumption alone was sufficient to sustain the verdict of the jury. Code Civ. Proc. § 2061, subd. 2; *Moore v. Gould*, 151 Cal. 723, 91 Pac. 616; *Keating v. Morrissey*, 6 Cal. App. 163, 91 Pac. 677.

[3, 4] Defendant company complains of one of the instructions to the jury, which was to the effect that, if the deed to the plaintiff was duly signed or duly acknowledged by Marie Uhl, when it was thereafter recorded it vested title to the property in the plaintiff, A. F. Ephraim, pointing out that this instruction completely ignores the necessity of a delivery of the deed. This instruction, it must be admitted, would have been highly prejudicial to the defendant if there had been any question before the jury as to such delivery. In fact, there was not, the issue, so far as the evidence is concerned, being confined to the due execution of that instrument. The possession of the deed by the plaintiff was some evidence of its delivery, and was sufficient in the absence of any contradictory evidence to establish it. The instruction complained of, therefore, while erroneous in form, did not mislead the jury or affect the substantial rights of the defendants.

Judgment affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

NAPA UNION HIGH SCHOOL DIST. OF NAPA COUNTY v. BOARD OF SUPERVISORS et al. (Civ. 2353.)

(District Court of Appeal, Third District, California. Sept. 24, 1921.)

1. Mandamus ¶7—Not writ of right, but of discretion.

The writ of mandamus is not a writ of right granted as of course, but is allowed only in the sound discretion of the court, not to be exercised unless some just or useful purpose is subserved.

2. Mandamus ¶3(9), 172—Equitable action to prevent sale of school bonds, and not defense to mandamus to compel issuance, held proper remedy to raise all issues affecting validity of bonds.

Since it is the duty of the board of supervisors of a high school district to issue bonds on a regular return on an election therefor, the scope of inquiry on mandamus to compel the issuance of the bonds by the board is limited to the regularity of the returns; hence parties seeking to question the validity of the election for reasons not appearing from the record should proceed by an equitable action to prevent sale of the bonds, wherein all issues that may affect the integrity of the declared result may be tried.

3. Schools and school districts § 97(4)—High school board must issue bonds if election returns are regular on their face.

Under Pol. Code, § 1748, it is the duty of the Board of Supervisors of a high school district to issue bonds therefor if the returns of the election for that purpose, as certified to them, are regular on their face.

4. Schools and school districts § 97(4)—Notice of election on bond issue need not state time of payment of interest.

The statutes relative to elections for issuance of bonds of high school districts do not require that the proposition as printed on the ballots should show the times for payment of interest, whether annual or semiannual, though such fact should appear in the notices of election to be posted and published.

5. Schools and school districts § 97(4)—High school board properly required officers in election on bond issue to complete returns.

The action of the high school board in requiring the officers of election on the question of issuance of bonds to complete their returns held proper, this being authorized by Pol. Code, § 1281a, applicable to high school elections.

Application by the Napa Union High School District of Napa County for mandamus against the Board of Supervisors and others. Writ granted.

Clarence N. Riggins, of Napa, for petitioners.

Henry C. Gesford, of Napa, for respondents.

BURNETT, J. An application was made in the first instance to this court for a writ of mandate to require respondents to issue the bonds of said high school district in the sum of \$300,000, "for the purpose of purchasing a suitable high school lot, building thereon a new high school building, supplying said high school building with furniture and necessary apparatus, and improving the high school grounds." In response to the alternative writ respondents have filed herein a demurrer to the petition, and an answer in which is challenged on various grounds the legality of the bond election, and in further justification of their course in declining to issue said bonds respondents allege that they were advised by the district attorney of said county to sustain the objection to any action on their part made by certain taxpayers who appeared before them, and "to proceed no further in the matter of said high school bonds at that time." In support of this last allegation, they attach a transcript of the notes taken by the official reporter, from which we quote the suggestion of the district attorney to the supervisors as follows:

"We have no desire to issue bonds that are illegal, or which were not legally voted upon.

We believe the election was legal, and, in order to get quick determination, I have a plan to suggest. We want the case decided, and if it is perfectly agreeable to you now to indicate how the board of trustees of the Napa school district and myself feel about this proposition, I will say that it will be perfectly agreeable to us if the board of supervisors will sustain Judge Gesford's objection, and refuse to pass or issue the bonds. We are not consenting now that the election was held in an illegal manner, but just simply suggesting this as a simple way of expediting matters. Then I will mandamus the board, and the District Court of Appeal or the Supreme Court will compel the issuance of these bonds and will pass upon the validity of these proceedings. By that method I can get the matter quickly disposed of."

This was agreed to, and by consent the board of supervisors sustained the objection and declined to proceed further. By reason of this agreement we might be justified in refusing the writ, as the courts will not ordinarily hear a party when he asks to have undone an act which he advised to be done. We are satisfied, however that the parties acted in good faith with a laudable desire to have the validity of the bond election determined as speedily and economically as possible, and we are not disposed to dismiss them without considering other points made in the briefs.

[1] It is conceded that the writ of mandamus is not a writ of right, granted as of course, but is allowed only in the sound discretion of the court. This discretion will never be exercised in favor of a party unless some just or useful purpose will be answered thereby, and it must not only serve some just and useful purpose, but it must be necessary to secure the ends of justice. Many decisions in support of the foregoing propositions are cited by respondents, but the question is hardly open to dispute.

[2, 3] With this general statement of the rule, indeed, the authorities are practically unanimous, but it is sometimes difficult to determine the scope of the proper inquiry as to the regularity of the proceedings which are sought to be reviewed in the application for the writ. However, in a case like this, the duty of the supervisors being purely ministerial, if the returns of the high school board are regular and no vital infirmity appears upon the face of the proceedings, the bonds must be issued, and the party who desires to question the validity of the election for reasons which do not appear from the record must seek his remedy in an equitable action to prevent the sale of the bonds, wherein all issues that may affect the integrity of the declared result may be tried and determined. *Gibson v. Board of Supervisors*, 80 Cal. 359, 22 Pac. 225. If the inquiry of the board of supervisors can ex-

tend no farther than we have indicated, and it thereby appears to be their duty to issue the bonds, it necessarily follows that the court's inquiry upon an application for a writ to compel them to proceed must be confined to the same limits; that is, to an inspection of the record. Otherwise, the court might determine that it is not the duty of the board to do what the law plainly requires of them. Necessarily the board exercises some discretion, and their judgment is called into play in the determination of whether the prior proceedings have been regular, but, properly speaking, that does not involve a judicial function. The particular record upon which the action of the supervisors is based is the certificate of the high school board, and when that is presented to them in proper form, "thereupon said board of supervisors shall be and it is hereby authorized and directed to issue the bonds of such high school district." Section 1746, Pol. Code. The duty of the supervisors is similar to that of a canvassing board, and it is well settled that the latter is bound by the returns. 15 Cyc. 379, 381, 384, 386, 387; 9 R. C. L. 1110-1113; 20 C. J. 200. It is sufficient to quote from the first of these as follows:

"County canvassers have the quasi judicial power to determine whether the papers transmitted to them are genuine election returns, signed by the duly appointed officers in the various precincts; but beyond this their duties are purely ministerial, involving simply the labor of counting the votes returned to them and determining the number of votes received by each candidate or proposition. They are governed by the returns made by the inspectors of the several precincts as to the number of votes cast and for whom cast, and if these returns be in due form they have not the power to go behind them and ascertain the qualification of voters or otherwise to inquire into the regularity of the election. They must simply add together the votes of the several precincts cast for each candidate as the same are shown in the certified returns and declare the result. * * * And if they attempt to travel beyond the limit of their ministerial duties, and enter upon a judicial investigation of the regularity of the election, they may be compelled by mandamus to canvass the returns as they have them before them."

It is further stated by these authorities that, if the canvassers neglect or refuse to canvass the returns sent to them, mandamus will lie to compel them to do so, but that upon an application for a writ of mandate the court is not authorized to go beyond the returns and consider questions touching the legality of the election. A multitude of cases could be cited to the same effect, but we refer only to *Leary v. Jones*, 51 Colo. 185, 116 Pac. 130, and *Pacheco v. Beck*, 52 Cal. 3. In the former the subject received careful consideration by the Supreme Court

of Colorado. Therein pertinent comment is made as to *State ex rel. v. Stevens*, 23 Kan. 456, 33 Am. Rep. 175, upon which respondents relied. In the *Kansas Case*, indeed, the invalidity of the election appeared upon the face of the returns, since it was a matter of common knowledge that "a monstrous fraud had been perpetrated" in the return of a total vote of 2,947, when there were only about 800 legal voters in the county.

In the *Pacheco Case*, supra, the writ was directed to the secretary of state to compel him to estimate the votes given for members of Congress, as shown in the records of the counties transmitted to him by the clerks, and to issue a certificate to the person having the highest number of votes. Therein it was said:

"The law does not vest him with authority to inquire whether the board of supervisors correctly canvassed the returns from the several precincts, or whether the record correctly states the result of the canvass, as made or declared, or whether the record was properly made up; nor to investigate any question relating to the proceedings which were had prior to the making of the certified abstract. That document, being in the form prescribed by law, is the only one upon which he is required or authorized to act in his official capacity in estimating the vote of the district."

We conclude that in this proceeding the questions of fraud and illegal voting that are presented by the answer of respondents cannot be considered, and that our attention must be limited to those matters that appear upon the face of the returns.

[4] It is claimed that, within this limitation, we should hold that the election was invalid, for the reason "that the proposition as printed on the ballot does not show that the interest was to be paid semiannually." The argument is that thereby the voter may have been misled into thinking that the interest was not to be paid until the maturity of the bonds, and hence would be more inclined to vote for them. We do not attach such importance to this circumstance. It is only a summary of the provisions, as is customary, that was printed on the ballot, and the voters are presumed to have understood the practice in that respect. The law does not require the time for the payment of the interest to be printed upon the ballot, but it does provide that it shall appear in the notices of the election to be posted and published. The law was observed in giving such notices, and we must assume that the voters were apprised of their contents. It appears, also, that this detail appeared in the resolution calling the election. The case of *Hollywood Union High School District v. Keyes*, 12 Cal. App. 172, 107 Pac. 129, is not in point, as therein the time of payment was not stated in the notice, as is required by section 1745 of the Political Code.

This objection, as suggested by petitioner, should not prevail unless unavoidable, for the reason that it would invalidate millions of dollars worth of bonds that have been sold in the various counties of the state. However, we do not consider the objection as serious, although, manifestly, it would be the better practice to publish on the ballot the time of payment of the interest.

[5] Likewise, we see no particular merit in the objection to the action of the high school board in requiring the election offices to complete their returns. This was authorized by section 1281a of the Political Code, which is applicable to high school elections. *Bernardo v. Rue*, 26 Cal. App. 108, 146 Pac. 79. Respondents are apparently in error in the statement that—

"The tally list and poll list of every precinct in the high school district was changed, corrected and reauthenticated."

The petition shows:

"Said election officers thereupon made and signed amended certificates to the poll lists and amended certificates to the tally list of the returns of said election in their respective precincts already filed by them with the board, thereby correcting and completing their returns and the authentication thereof so as to truly show the votes that were cast in their respective precincts at such election for and against each proposition voted upon thereat."

We think, also, that the record shows a sufficient compliance by the high school board with the law requiring them to cause an entry in their minutes of the fact that two-thirds of the votes were cast in favor of the bonds and to certify to the board of supervisors "all the proceedings had in the premises." Section 1746, Pol. Code.

Indeed, without further specification we may state that by an inspection of the record we discover nothing to justify the supervisors in declining to issue the bonds.

We may add that it seems to us that none of the special defenses set up in the answer possesses substantial merit except the allegations of fraud and illegal voting contained in the seventh, eighth, and ninth counts. In other words, the other objections do not appear material. Still, we do not desire to foreclose inquiry as to any of them in a proper proceeding.

As far as any delay is concerned in the final determination of the merits of the controversy, it would probably be as great if the issues were tried in this proceeding as in the usual and regular course. As we view the matter, it would be of no advantage for Mr. Graves, a taxpayer, to intervene herein. He will have an opportunity to be heard if a proper suit is brought to test the validity of the election.

We think the demurrer to the petition should be overruled, the demurrer to the answer sustained, and a peremptory writ issue requiring the supervisors to issue said bonds. It is so ordered.

We concur: FINCH, P. J.; HART, J.

CADY v. SANFORD. (Civ. 3670.)

(District Court of Appeal, Second District, Division 2, California. Aug. 16, 1921.)

Appeal and error \S 622—Transcript is not overdue before notice of denial of new trial.

Under Code Civ. Proc. \S 650, allowing 10 days after notice of denial of new trial to settle exceptions taken at the trial, and rule 2 of the Rules of the Supreme and District Courts of Appeal, providing that the time for filing a transcript shall not begin to run until the bill of exceptions has been filed or the time has expired for such proceeding, an appeal cannot be dismissed for failure to file the transcript, where the record shows that the only bill of exceptions filed was that relating to proceedings on a motion to vacate judgment, and that no notice of the denial of new trial was in the clerk's office.

Appeal from Superior Court, Los Angeles County.

Action by William H. Cady against G. A. Sanford. Judgment for plaintiff, and defendant appeals. On motion to dismiss the appeal. Motion denied.

Henry T. Gage and Ingall W. Bull, both of Los Angeles, for appellant.

E. E. Kirk, of Los Angeles, for respondent.

WORKS, J. This is a motion to dismiss an appeal on the ground that no printed transcript of the record, nor any transcript prepared under the provisions of section 953a, Code of Civil Procedure, was filed within the time required by law. Our records show that no printed transcript of the record has ever been filed. A certificate of the clerk of the trial court shows, among other things, that a notice of appeal from the judgment was filed in time, the form or contents of the notice, however, not being disclosed; that a bill of exceptions was settled and filed, that a motion for a new trial was denied on April 7, 1921, and that no steps have been taken to procure a transcript under section 953a, Code of Civil Procedure. A supplemental certificate of the clerk, procured to be filed by appellant, shows that the bill of exceptions mentioned in the earlier certificate was not a bill of the exceptions taken during the trial of the cause, but a bill of exceptions on an order denying a motion to vacate judgment. The supplemental certificate also

shows that there is on file in the office of the clerk of the trial court no notice of the ruling denying the motion for a new trial.

Section 650, Code of Civil Procedure, provides that a party may have settled, within 10 days after notice of decision denying his motion for a new trial, exceptions taken at a trial. Rule 2 of the Rules of the Supreme Court (176 Pac. vii) and of the District Courts of Appeal provides that if a proceeding for the settlement of a bill of exceptions which may be used in support of an appeal is pending, or may still be instituted, the time for filing a transcript shall not begin to run until the bill has been filed, or the time in which a proceeding for a bill may be instituted has expired, or such proceeding, if instituted, has been dismissed by the trial court. The supplemental certificate of the clerk of the trial court brings the present case directly within these provisions of section 650 and of rule 2. The time within which a proceeding for a bill of exceptions may be instituted has not yet expired, nor, perforce, has the time for the filing of the transcript.

Motion to dismiss appeal denied.

We concur: FINLAYSON, P. J.;
CRAIG, J.

BOARD OF TRUSTEES OF LELAND STANFORD, JR., UNIVERSITY v. MILLER et al. (Civ. 2308.)

(District Court of Appeal, Third District, California, Aug. 26, 1921. Hearing Denied by Supreme Court, Oct. 24, 1921.)

1. Boundaries §37(5)—Evidence held sufficient to sustain finding of establishment by mutual agreement.

In action to quiet title to land, where defendants claimed to a fence 660 feet west of the true boundary, which fence had been acquiesced in as the boundary for 40 years, evidence held to sustain a finding that the boundary claimed by defendant was established by mutual agreement.

2. Boundaries §46(1)—Doctrine of agreed boundary held not to mean that inference of agreement as to boundary from acquiescence does not support added inference that it was based on questioned boundary.

The doctrine of an agreed boundary line and its valid effect on coterminous owners rests on the fact that there is believed by the parties to be an uncertainty as to the location of the true line, but this does not mean that the inference of an agreement arising from acquiescence does not support the added inference that the inferred agreement was based on a questioned boundary.

3. Boundaries §46(3)—Agreed boundary inures to benefit of subsequent owners.

An agreed boundary line inured to the benefit of subsequent owners, regardless of

whether or not they purchased with the understanding that the fence on such line marked the true boundary.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by the Board of Trustees of the Leland Stanford, Jr., University against W. H. Miller and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Wilson & Wilson, of San Francisco, and McCoy & Gans, of Red Bluff, for appellant. Guy R. Kennedy, of Chico, and George F. Jones, of Oroville, for respondents.

FINCH, P. J. The defendants were given judgment quieting their title to 89.85 acres of land in Butte county, and the plaintiff appeals.

[1] The plaintiff holds the record title to the southeast quarter of section 23, and the defendants have the record title to 150 acres of land in the southwest quarter of section 24 in the same township, including all of the west half thereof. The land in dispute is approximately the east half of the east half of said southeast quarter. The trial court found in favor of the defendants on the issues of adverse possession and agreed boundary. Since the defendants have paid taxes in accordance with their record title only, it is conceded that the finding in favor of adverse possession cannot stand unless that of an agreed boundary is upheld. The question, therefore, is whether there is evidence to support the finding that the predecessors in title of the parties established such boundary line by mutual agreement. There is no direct evidence of such an agreement, and the question must, therefore, be determined from the conduct of the respective owners of the lands, viewed in the light of the surrounding circumstances.

It appears that the plaintiff's lands, as well as those of the defendants, originally were a part of the Bosquejo rancho. When this rancho was subdivided does not appear. As early as 1876 Wm. Howard and P. B. Fox had acquired the south half of section 24, and in the year 1881 Leland Stanford acquired some 4000 acres of the rancho, including the southeast quarter of section 23; that quarter being in the extreme southerly end of the tract.

The court found that about the year 1878 the predecessors in interest of the parties, being uncertain as to the boundary line between their respective lands, mutually agreed upon the location thereof, constructed a substantial fence upon such agreed line, and that the respective owners of said parcels of land have ever since jointly maintained and repaired such fence, and recognized it as marking the true boundary line between their lands. The evidence shows without

conflict that the fence stood in its present location as early as 1886, and that it then had the appearance of being 10 or 12 years old; that as far back as any witness knew the plaintiff and its predecessors have occupied the lands to the west of the fence, and the defendants and their grantors those to the east; that many years ago the latter cleared the lands on the east side up to the fence, and have thereafter cultivated the same, at one time having about half of the disputed strip in alfalfa; and that they have never been disturbed in their possession and use of such lands, nor have their rights thereto been questioned prior to the commencement of this action. At all times the respective parcels of land have been assessed, and the owners thereof have paid taxes thereon according to their record titles. In the year 1904 the plaintiff made a written lease to Geo. W. and Chas. Dicus, grantors of defendants, of the southeast quarter of section 23, and therein recited that the lands leased contained 100 acres, more or less. This lease was renewed from year to year up to 1913. The actual area west of the line claimed by the defendants is about 112 acres. A growth of timber covers the lands to the west of the fence, and such lands have at all times been used for pasture. By actual survey it was ascertained that the fence is 10 chains west of the section line as established by the original survey of the rancho.

Is acquiescence for 40 years, under the circumstances stated, sufficient evidence to sustain the finding of the court? The evidence is not so conclusive in its nature as to compel the trial court to find in favor of an agreed boundary. The fact that the line alleged to have been established by agreement is 660 feet west of the surveyed section line is a strong circumstance against the defendants' claim. In the absence of that circumstance the evidence would seem to be conclusive in favor of the defendants. Whether that circumstance is sufficient to overcome the justifiable inference from long acquiescence under other circumstances shown involves the weighing of conflicting evidence, a function exclusively of the trial court, and is not a question of law within the province of the court of appeal.

"An agreement fixing a boundary line need not be shown by direct evidence, but may be inferred from conduct, and especially from long acquiescence." 9 C. J. 232; 5 Cyc. 933. The "agreement must be express or implied from the acts of the parties and acquiesced

in for the period fixed by the statute of limitations." *Wheatley v. San Pedro, etc., R. R. Co.*, 169 Cal. 514, 147 Pac. 138.

"A presumption that an agreement formerly was made as to the location of a boundary line may arise from the fact that one or both of the adjoining owners have definitely defined such line by erecting a fence or other monument on it, and that both have treated the same as fixing the boundary between them for such length of time that neither ought to be allowed to deny the correctness of its location." 4 R. C. L. 129.

[2] Appellant urges that there is no proof that there ever was any uncertainty as to the location of the true boundary line. There is no direct evidence to that effect, but, as stated, the facts found to exist justify the inference that the adjoining owners had agreed upon the location of the boundary. This inference is of a valid agreement, and necessarily implies that there was an uncertainty as to the true line. "The doctrine of an agreed boundary line and its binding effects upon the coterminous owners rests fundamentally upon the fact that there is, or is believed by all parties to be, an uncertainty as to the location of the true line. * * * This does not mean that the inference of an agreement arising from acquiescence does not support the added inference that the inferred agreement was based on a questioned boundary. The primary inference is of a valid pre-existing agreement, and to be valid that agreement must have been based on a doubtful boundary line." *Clapp v. Churchill*, 164 Cal. 745, 130 Pac. 1062.

It is contended that the court erred in the admission in evidence of the lease referred to. While not entitled to great weight the recital of the lease as to the acreage embraced within the southeast quarter of section 23 is inconsistent with appellant's present claim of title, and the instrument was admissible as a declaration against interest.

[3] It is argued that there is no evidence to support the finding that the defendants purchased with the understanding that the fence marked the true boundary. The finding, however, is not necessary to the conclusion reached. The defendants acquired title in the year 1914. If the boundary line was established by agreement as found by the court, that agreement inured to the benefit of the defendants. *Young v. Blakeman*, 153 Cal. 477, 95 Pac. 888.

The judgment appealed from is affirmed.

We concur: BURNETT, J.; HART, J.

JENSEN et al. v. FISH et al. (Civ. 3964.)

(District Court of Appeal, First District, Division 2, California. Sept. 23, 1921.)

1. Appeal and error §1002—General verdict for injury on highway sustained by evidence and special verdicts.

In action for personal injury caused by defendants' bus forcing plaintiffs' Ford off the highway, a general verdict for plaintiff will not be disturbed where the evidence was conflicting, and the general verdict is supported by special verdicts.

2. Trial §359(1)—General verdict sustained by some of the answers to special issues upheld.

A general verdict sustained by answers to two special issues must stand, though answer to another special issue is not sustained by evidence.

3. Highways §176—Mistake in judgment in emergency not contributory negligence.

In an action for injury caused by defendants' bus forcing plaintiffs' car off the highway, plaintiff cannot be charged with contributory negligence in that his action at the time of the collision was such that a careful calculation afterward would show that he could have avoided the collision.

4. Highways §184(4) — Instructions as to probative elements of negligence pleaded in general terms are not erroneous.

In action for injury, the complaint charging that defendants so negligently drove their bus that it forced plaintiffs' car off the highway, instructions regarding the duty of the driver of a vehicle to give suitable signals when about to pass another and regarding the legal rate of speed at the time and place of the accident were not error, since they concerned the probative elements of the negligence charged.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

Action by Alma A. Jensen and another against Fred W. Fish and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Dunn, White & Aiken, of Oakland, for appellants.

T. J. Ledwich and Peter J. Crosby, both of Oakland, for respondents.

STURTEVANT, J. The plaintiffs, as husband and wife, brought an action against the defendants to recover damages for personal injuries sustained by the plaintiff wife in an automobile accident. The plaintiffs recovered a judgment, and the defendants have appealed under the new method.

In the charging part of their complaint, the plaintiffs aver that at the time of the accident they were traveling in a Ford sedan in the public road leading from San Jose to

Oakland; that the defendants were operating a certain automobile bus; that at the time of the accident the defendants so carelessly, negligently, and unskillfully drove, operated, and ran said automobile bus that said bus collided with and struck the Ford sedan, and forced, crowded, and knocked it and the occupants thereof off the road. In support of their pleading evidence was introduced by the plaintiffs to the effect that the defendants' bus approached from the rear at a speed estimated by different witnesses at from 30 to 37 miles an hour; that the driver gave no signal of warning; that on meeting up with the Ford sedan the driver of the bus turned to the left, and, when immediately ahead of the Ford sedan, swerved the bus to the right at an angle estimated at from 60 to 70 degrees, and that the Ford sedan, although at that time traveling with its left wheels on the roadbed proper and its right wheels on the right-hand shoulder, swerved still more to the right and later turned over in a ditch on the right-hand side.

[1, 2] The jury returned a general verdict and certain special verdicts. The general verdict was in favor of the plaintiffs, and the special verdicts were as follows: (1) The defendants' stage did not actually strike and knock plaintiffs' automobile from the highway; (2) it did strike or come in contact with the plaintiffs' car; (3) it did force plaintiffs' automobile off the highway; and (4) it did crowd plaintiffs' automobile off the highway. In their first point the appellants strenuously insist that the automobile bus did not touch the Ford sedan. However, there was evidence both ways, and the jury, in its special verdict No. 2, found against the defendants on that issue. There was such a reasonable conflict in the testimony that we are not at all inclined to take the view that this case, in this respect, does not fall within the rule so often repeated that appellate courts have no right to disturb the verdict of the jury when the evidence is conflicting. Furthermore, if we should hold that the second special verdict is not sustained by the evidence, nevertheless the judgment must stand, for it is supported by the general verdict, and special verdicts 3 and 4.

[3] The appellants contend that the driver of plaintiffs' automobile was guilty of contributory negligence. This contention rests on the argument that the driver of the Ford sedan did not use the very best of judgment at the time he saw the automobile bus attempting to cross in front of him. The Supreme Court said, in *Karr v. Parks*, 40 Cal. 188, 193:

" * * * It would be absurd to hold that even an adult person, in time of imminent danger, is negligent, unless he takes every precaution that a careful calculation afterward will show he might have taken."

That case was recently cited with approval in *Shupe v. Rodolph* (Sup.) 197 Pac. 57. Moreover, looking at the record at this time, many months after the accident, we are unable to see that the driver of the Ford sedan did anything he should not have done, or omitted to do anything he should have done.

[4] The trial court gave an instruction to the jury regarding the duty of the driver of the vehicle to give a suitable and audible signal when he is about to pass another vehicle on the public highway. It also gave an instruction regarding the rate of speed which was legal at the time and place of the accident. It is conceded that both instructions were, in the abstract, correct statements of law; however, it is contended that the subject of each of the instructions was not involved in the issues made by the pleadings. In passing it may be said that much evidence was introduced at the time of the trial on both subjects by both parties, without any objection. The record does not show whether the instructions in question were tendered by the plaintiff or by the defendant, or were given by the court of its own motion. The appellants claim that the complaint, which we quoted above, charges specific negligence, and that it does not charge excessive speed or failure to give a signal. This contention may be conceded, and yet the contention does not lead to the conclusion which the appellants contend for. Whatever else may be charged in the complaint, it is patent that the complaint charges that the defendants so negligently drove their bus that it forced the Ford sedan off the highway. The probative elements of that negligent act are, among other things, the size, the speed, the want of signal, and the close proximity in which the bus attempted to pass at an angle of 60 or 70 degrees across the path of the Ford sedan. Instructions on each and every one of these probative elements were pertinent to the rights and liabilities of the litigants. There was no error in giving either of the instructions.

We find no error whatsoever in the record. The judgment is affirmed.

We concur: LANDGON, P. J.; NOURSE, J.

PEOPLE v. ZARATE. (Cr. 791.)

(District Court of Appeal, Second District, Division 2, California. Sept. 26, 1921.)

1. Criminal law §1130(5)—Points held insufficiently presented for consideration.

Points that "court erred in overruling defendant's objection," followed by a reference to the transcript without argument or citation in support of the points, and that the

court erred in the refusal to give instructions, followed by reference to the transcript for the text of the requested instructions, with citation of cases, but without statement as to what principle or rule the cases enunciate, will not be considered.

2. Criminal law §1130(5)—Points not supported by argument not considered.

Points, though fully stated, will not be considered, where not supported by the slightest argument.

3. Criminal law §1172(2)—Instruction, giving insufficient definition of a confession, held harmless in view of the evidence.

Instruction, giving incomplete definition of what constitutes a confession, held harmless in view of defendant's plain and direct statement in written confession that he committed the crime.

4. Criminal law §822(4)—Instruction as to confession of defendant held not misleading.

In prosecution for forgery, instruction as to defendant's confession held not to lead jurors to think that the court had passed upon the question of the free and voluntary character of the confession, in view of instructions as a whole.

5. Criminal law §736(2)—Court required to pass on voluntary character of confession in first instance to determine whether it is admissible.

It is the duty of the trial court to determine in the first instance whether a confession was free and voluntarily made as a basis for a determination of the question of its admissibility in evidence.

6. Forgery §42—Evidence that person who had name similar to that forged was not a resident of particular town held admissible.

In prosecution for forgery, testimony of residents of small town, of which person whose name defendant was alleged to have forged was represented to be a resident, as to whether there was such person in such town, held admissible to show fictitious character of name alleged to have been forged.

7. Criminal law §1186(4)—Judgment not reversed for technical error.

Under Const. art. 6, § 4½, judgment will not be reversed for an error which has not resulted in a miscarriage of justice.

Appeal from Superior Court, San Diego County; E. A. Luce, Judge.

P. S. Zarate was convicted of forgery, and he appeals. Affirmed.

Edward J. Kelly, of San Diego, for appellant.

U. S. Webb, Atty. Gen., Arthur Keetch, Deputy Atty. Gen., and John W. Maltman, of Los Angeles, for the People.

WORKS, J. This is an appeal from a judgment of conviction of the crime of forgery. Joseph L. Thing and Charles E. Thing

conducted a mercantile business under the name of Thing Bros., in the little town of Tecate, part of which place is in San Diego county and part in the republic of Mexico. On account of the lack of banking facilities in the village, it was the custom of Thing Bros. to issue their checks on a San Diego bank to the people of the place in exchange for cash, the paper then being used in the transaction of business with the outside world. The checks were always drawn by the brothers themselves, one being accustomed to write them by hand, while the other used a typewriter for the purpose. The typewritten paper was drawn from a red and a black ribbon, each of the colors being used, invariably, on a certain and definite portion of each check. Appellant procured one of these typewritten checks in the sum of \$5, through a third person, paying that amount for it. Next, through a conductor on the railroad running from Tecate to San Diego, he procured both a black and a red typewriter ribbon from the latter place, and also a pad of blank checks upon the bank on which Thing Bros. were accustomed to draw their paper. Appellant then wrote a letter, purporting to be signed by one E. E. Snyder, to another bank in San Diego, inclosing two checks and asking the bank to make collection of them. The checks were, respectively, for the sums of \$1,010 and \$902, were drawn on the bank with which Thing Bros. did business, were payable to E. E. Snyder, were signed "Thing Bros., by J. L. Thing," and were typewritten in two colors, in exact accord with the custom followed by Joseph L. Thing, the brother whose practice it was to draw the typewritten paper issued by the firm. The bank was instructed, after collecting the proceeds of the checks, to send \$1,700 in currency to the alleged Snyder at Tecate by the railway conductor above mentioned. It was stated in the letter that the money was to be used for the purpose of paying Snyder's men. The remaining \$302 was directed to be deposited in the bank to which the letter was addressed, in the name of Snyder. The currency was sent to Tecate, not by the conductor, however, but by registered mail, and was delivered to appellant, who receipted for it in Snyder's name, by himself as agent. The balance of the proceeds of the two checks, \$302, was placed on deposit in the bank as directed, and \$300 of it was later withdrawn on a check bearing the signature of the alleged Snyder, but the money was, as before, delivered to appellant as Snyder's agent. It was shown at the trial that neither of the two checks sent to the San Diego bank was signed by either of the brothers Thing, and appellant made written confession that the signature was appended to each of them by him. No such person as E. E. Snyder appeared at the trial, and several witnesses from Tecate testified that

they knew of no such person. Some days after procuring the original check for \$5 from Thing Bros., which paper the prosecution, of course, claims appellant used as an exemplar, he endeavored to sell it to one Blanco for \$4, but Blanco did not buy it. This check must have been finally destroyed, as it was never presented for payment. The charge against appellant was for forging the check for \$1,010.

[1] Appellant makes at least eight points upon rulings during the trial, each of them stated in this manner, "The court erred in overruling defendant's objection," followed by a reference to the transcript. Not only, in each instance, does counsel fail to state the question to which objection is made, or the objection itself, but none of the points is argued and no authority is cited in support of any of them. Such a casual presentation of points, if followed up, would impose upon us a labor which is within the peculiar province of counsel, and which does not come within the range of our duty. We are not called upon to consider points so presented. *Gray v. Walker*, 157 Cal. 381, 108 Pac. 278.

In more than a half dozen instances appellant charges error in the refusal of the trial court to give instructions, contenting himself with a reference to the transcript for the text of the requested instructions, and citing cases in each place without giving us any information as to what principle or rule the cases enunciate. Points so presented will not be considered. In a case in which counsel referred to instructions in a similar manner and cited sections of the Code by number in support of his claim that they should have been given, the Supreme Court said:

"If counsel will not take the time to point out the particular instruction or instructions upon which he predicates error, and the law which he invokes, we will not do so." *People v. Chutnacut*, 141 Cal. 682, 75 Pac. 340.

[2] There are other questions which are stated in appellant's brief by mere reference to the transcript, without attempt to acquaint us with their nature by anything whatever shown upon the face of the brief; and there are still others which, even though they are more fully stated, are not supported by the slightest argument. Under the authorities already cited, we are bound to consider none of these.

[3] It is contended that the trial court erred in instructing the jury that a "confession, in criminal law, is a voluntary declaration made by a person who has committed a crime, to another one." This definition is, indeed, fragmentary and incomplete, but it does not appear to us that its presentation to the jury could have prejudiced appellant. In his written confession, after acknowledging the authorship of the letter to the San

Diego bank with which the two checks were enclosed, appellant says:

"I also forged the signature of Thing Brothers, by J. L. Thing, to the two checks mentioned in said letter, aggregating 2002."

With this plain and direct statement before the jury, it made little difference whether any instruction was given upon the meaning of the word "confession." It must have been obvious to them, without definition from the court, that a positive confession of the commission of the crime, not to be misunderstood by an intelligent mind, was before them. Appellant could have suffered no substantial injury from the instruction given.

[4] The next claim made by appellant is that the trial court erred in stating to the jury that the court had passed upon the question of the free and voluntary character of the confession of appellant. In order that this point may be intelligently considered, it is necessary to set forth the entire instruction to the jury concerning the confession, as it is in that instruction that the alleged erroneous statement occurs. The instruction follows:

"You are further instructed that part of the evidence relied upon in this case by the prosecution is what is termed a confession, or what is claimed by the prosecution to be a confession by the defendant, and a confession, in criminal law, is a voluntary declaration made by a person who has committed a crime, to another one, and the law of this state requires that before the confession may be admitted in evidence and considered by you that it be a free and voluntary confession; that is, that it be not induced by either a promise of reward or by a threat, or by any duress. It must be, in other words, what is stated, a free and voluntary statement on his part, before that confession is admitted in evidence in this case and brought to your attention and permitted to examine it. The court has passed upon that question, and has ruled that the confession is evidence by reason of the fact that it was free and voluntarily made, and that it is legally admissible and legally and properly to be considered by you. Therefore, if you after having heard the evidence in the case and believe that there is a conflict of evidence as to whether or not that confession was freely and voluntarily made, you have the right and privilege of passing upon that question of fact yourselves, as to whether or not it was freely and voluntarily made, and to reject the confession from your consideration if you believe that it was not freely or voluntarily made; or, perhaps stating it more correctly, unless you do believe beyond a reasonable doubt that it was freely and voluntarily made."

It is to be observed that in the course of the instruction the court remarked that—

"The court has passed upon that question, and has ruled that the confession is evidence by reason of the fact that it was free [sic]

and voluntarily made, and that it is legally admissible and legally and properly to be considered by you."

It is this statement that appellant assails as objectionable. While it were better that the condemned matter had not been included in the instruction, it does not appear to us that its use operated to the prejudice of appellant, considering it in connection with what followed it. The statement itself, while it did contain the assertion that the court had passed upon the question, was softened by the expressions to the effect that the court "has ruled that the confession is evidence," "that it is legally admissible," and that it is "legally and properly to be considered" by the jury. Following these statements, immediately, the jury was told:

"Therefore, if * * * you believe that there is a conflict of evidence as to whether or not that confession was freely and voluntarily made, you have the right and privilege of passing on that question of fact yourselves, as to whether or not it was freely and voluntarily made, and to reject the confession from your consideration * * * unless you * * * believe beyond a reasonable doubt that it was freely and voluntarily made."

[5] In the last analysis, and considering the entire instruction together, it appears to us that it amounts to nothing more than a statement that the court had passed upon the question only for the purpose of determining whether the confession was admissible in evidence, that it had been admitted, and that the members of the jury, as judges of the facts, were finally to pass upon the question whether it was freely and voluntarily made. Thus understood, the instruction was proper, for it is the duty of a trial court to consider, in the first instance, whether a confession was freely and voluntarily made, as a basis for a determination of the question of its admissibility in evidence. *People v. Jim Ti*, 32 Cal. 60; *People v. Oliveria*, 127 Cal. 376, 59 Pac. 772.

[6] Several of the witnesses at the trial were asked by the prosecution whether they knew such a person as E. E. Snyder, and in each instance the question was met by an objection, which was overruled. It is contended that these rulings were erroneous. While a forger, naturally, might employ the name of a known person in the commission of the crime of which he is guilty, in the manner in which Snyder's name was used here, there is, perhaps, a greater likelihood that he will employ a fictitious name. At any rate, the fact that one charged with the crime has used a fictitious name in his work would be a circumstance to be considered, in connection with others, in determining his guilt or innocence. The question whether Snyder was known as an actual person was addressed to three residents of Tecate, which the evidence shows was a very small place.

Under these circumstances the question was entirely proper.

[7] On account of the great number of errors claimed by appellant to have been committed by the trial court, principally, however, in the very general manner upon which we have passed comment, we have made examination of the entire cause, including the evidence. Const. art. 6, § 4½. From such examination we are abundantly satisfied that if any error was committed by the trial court, which we are far from deciding, such error has not resulted in a miscarriage of justice.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

ROBERTS v. SOUTHERN PAC. CO. et al.
(Civ. 3926.)

(District Court of Appeal, First District, Division 1, California. Sept. 24, 1921. Hearing Denied by Supreme Court Nov. 21, 1921.)

1. Appeal and error ⇨977(3)—Order granting new trial reversed only where discretion abused.

Only when the discretion of the trial court has been abused will the appellate court reverse an order granting a new trial.

2. Appeal and error ⇨854(6)—Order granting new trial, general in its terms, affirmed if properly granted on any of grounds assigned.

Where the motion for new trial was based on all the statutory grounds, and the order granting the new trial was made before the amendment of 1919 (St. 1919, p. 141) to section 857 of Code Civ. Proc., and was general in its terms, it must be affirmed if it could properly have been granted on any of the grounds assigned.

3. New trial ⇨65—If the court was not satisfied with the verdict, its duty was to grant motion for new trial.

If the trial court was not satisfied with the verdict, it was its duty to grant the motion for a new trial.

4. Negligence ⇨136(26)—Contributory negligence for jury.

Question of contributory negligence is one of fact for the jury, except in those cases in which, judged in light of common knowledge and experience, there is a standard of prudence to which all persons similarly situated must conform, and in these cases failure to reach that standard is contributory negligence as a matter of law.

5. Appeal and error ⇨1015(2)—On conflicting evidence or when the question of probative force of the evidence arises, grant of new trial is not reviewable.

Where there is appreciable conflict in the evidence or where the question as to probative

force or evidentiary value of the testimony arises, the action of the trial court in granting a new trial is not reviewable on appeal.

6. Appeal and error ⇨933(1)—Presumption is in favor of correctness of an order granting a new trial.

In considering the question of the correctness of an order granting a new trial, the presumption on appeal is in favor of the order.

7. Appeal and error ⇨933(4)—Presumed that new trial was granted because verdict was against the weight of the evidence.

In an action for causing the death of a brakeman, an experienced railroad man, who placed himself between two cars while they were in motion, in view of conduct of deceased, on an appeal from an order granting a new trial, it will be assumed that the trial court was satisfied that the verdict was contrary to the weight of the evidence.

8. Appeal and error ⇨977(3)—Grant of new trial not set aside where case shows a reasonable or debatable justification for it.

Where the case shows a reasonable, or even a fairly debatable justification, for the action taken, an order of the trial court granting a motion for a new trial will not be set aside on appeal.

9. Railroads ⇨262—Not liable for injury by defective car under control of connecting road.

A railway company delivering a defective freight car to a connecting carrier, which accepts it with knowledge of the defect, is not liable to employees of the connecting carrier for injuries caused by the defect.

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Action by Geno P. Roberts against the Southern Pacific Company and another. From an order granting a motion for new trial, plaintiff appeals. Affirmed.

Theodore A. Bell, of San Francisco (O. A. Linn, of Napa, of counsel), for appellant.

Ford & Johnson, of San Francisco, for respondents.

WASTE, P. J. The plaintiff brought this action to recover damages for the death of his son, alleged to have been caused by the negligence of the defendant. He now appeals from the order granting the defendant a new trial, after verdict and judgment in his favor.

Plaintiff's decedent, his son, William Reilly Roberts, was a switchman in the employ of the California State Belt Railway, which is operated along the San Francisco water front, receiving freight cars from various transportation companies for delivery to the piers and docks. It is connected with the tracks of the respondent at a point known as the King street transfer. On the evening of October 9, 1914, two cars were placed on the transfer track by employees

of the respondent. One of these cars was in bad order. The drawhead and everything pertaining to the coupling was missing. This car was fastened to another by means of a chain wound around its axle, and connected with the drawhead of the other car with from $2\frac{1}{2}$ to 3 feet of slack between the two cars. Later in the day these cars were taken off the transfer track by the belt line railway, with full knowledge of their defective condition, to be delivered at pier 32. On the afternoon of the next day the two cars, still chained together, were placed at the end of a train, to be redelivered by the belt line to the respondent. While being thus transported, the car with the defective coupler was derailed, but after running off the track for about 250 feet, it railed itself. Roberts, the deceased, who was then acting as a switchman on the belt line, gave the engineer a signal to stop the train while he went to investigate the trouble, and to remove an amount of debris which had collected on the axle of the car while running derailed. When the train stopped the absence of the coupling permitted the two end cars to come together. Roberts then gave the engineer a signal to back the train in order to separate the cars and enable him to look underneath them and discover the cause of the accident. As the train backed and the cars separated, he leaned forward and placed his head between the two cars. With the backing of the train, the rear car, which was the one with the defective coupler, continued to back until it took up the slack in the chain, when it suddenly rebounded, the two cars coming together, crushing Roberts' skull and causing his death. The absence of the coupling was a defect which was readily noticeable. It was known to the employees of the belt line, and its foreman told Roberts two cars were in bad order. Roberts, himself, was an experienced railroad man.

On these facts the case went to the jury, which rendered a verdict in favor of plaintiff in the sum of \$5,000. Defendants moved for a new trial, which was granted. From the order granting the motion for a new trial, this appeal is prosecuted.

The appellant takes the position that the order granting the motion for a new trial must be reversed upon two grounds. His first contention is that the evidence so conclusively establishes that the plaintiff's intestate was not guilty of any contributory negligence, as to preclude the court from setting aside the verdict upon the ground of the insufficiency of the evidence to support its finding to that effect. He next contends that the respondent was guilty of negligence, as a matter of law, in delivering the cars with the defective coupling to the belt line railway, and that that negligence proximately caused the death of Roberts, and was not excused by the act of the belt line company

in accepting the cars with notice of their faulty condition.

[1, 2] The rule is well settled by a long line of decisions in this state that the granting or refusing of a new trial is a matter largely within the discretion of the trial court, and it is only when this discretion has been abused that the appellate court will reverse the order. *Merralls v. Southern Pacific Co.*, 182 Cal. 19, 22, 186 Pac. 778. In the instant case the motion was based on all the statutory grounds, and the order granting the new trial, made before the amendment of 1919 (St. 1919, p. 141) to section 657 of the Code of Civil Procedure, is general in its terms. It must therefore be affirmed if it could properly have been granted on any of the grounds assigned. *Gordon v. Roberts*, 162 Cal. 506, 508, 123 Pac. 288.

[3-8] Disposing of appellant's first contention, we think we may safely assume that the question of the insufficiency of the evidence to support the finding of the jury that the decedent, Roberts, was free from contributory negligence, had much to do with the trial court's action in granting the motion for a new trial. No motion for a nonsuit was made, and the question of the contributory negligence of the decedent was submitted to the jury. But if the trial court was not satisfied with the verdict, it was its duty to grant the motion for a new trial. *Marr v. Whistler*, 193 Pac. 519; *Condee v. Gyger*, 128 Cal. 546, 547, 59 Pac. 26. True it is that the question of contributory negligence is one of fact for the jury, under proper instructions, and not one of law, save in those cases in which, judged in the light of common knowledge and experience, there is a standard of prudence to which all persons similarly situated must conform. In such cases failure to reach that standard is contributory negligence as a matter of law. *Williams v. Pacific Electric Co.*, 177 Cal. 235, 238, 170 Pac. 423. If there be any appreciable conflict in the evidence, the action of the trial court in granting a new trial is not open to review. Even in those cases where there may not appear to be a conflict in the evidence, and where all the proofs seem to be favorable to one or the other of the parties litigant, the question as to the probative force, or evidentiary value of the testimony, is one the determination of which is with the trial court in a proceeding on a motion for a new trial, where, as here, one of the grounds is the insufficiency of the evidence to justify the verdict. *Otten v. Spreckles*, 24 Cal. App. 251, 257, 141 Pac. 224. In considering the question of the correctness of an order granting a new trial, the presumption on appeal is in favor of the order and against the verdict. *Marr v. Whistler*, supra. In the light of the wide discretion permitted to the trial court in such matters, and in view of the conduct of the decedent, an experienced railroad man,

in placing himself between the two cars as he did, we must assume that the trial court was satisfied that the verdict of the jury rendered in favor of the plaintiff was contrary to the weight of the evidence. *Shilling v. Dodge*, 22 Cal. App. 517, 518, 135 Pac. 299. Where the court, in the exercise of its wide discretion, has granted a new trial, and the case shows a reasonable, or even a fairly debatable justification under the law, for the action taken, the order will not be set aside on appeal. *Preluzsky v. Rittigstein*, 196 Pac. 917.

[8] For another reason the order granting a new trial in this case must be affirmed. On of the defenses sought to be established by the respondent was that it had given notice to the belt line railway that the car was in a defective condition, and that the respondent proposed to repair it before delivery, but that with knowledge of these facts the belt line, desiring haste in the matter so that the ship for which the contents of the car were destined might be loaded without delay, directed and accepted the delivery of the car in its known defective condition. The trial court would not permit the introduction of any evidence in support of this defense. It also refused to give an instruction requested by the respondent in keeping with its proposed separate defense, but did instruct the jury to the effect that the respondent was guilty of negligence in delivering the defective car to the belt line railway, and that such negligence could not be justified or excused by showing that the connecting line was equally or more careless in the premises. This action of the trial court was error.

The appellant seeks to recover in this action upon the theory that the injury and death of Roberts was the natural and probable consequence of the delivery by the respondent of the defective car to the belt line and such a consequence as should have been foreseen in the light of the attendant circumstances; and, further, that the delivery of such defective car was the primary and proximate cause of Roberts' death. The trial court accepted this view, and confined the issues strictly within the lines of appellant's contention, as indicated by the rulings just referred to. There are cases holding, as contended by the appellant, that where there is an arrangement between the connecting roads for the interchange of cars, it is the duty of each, on transferring the car to the other, to see that it is in a safe and suitable condition for the use for which it is intended, which duty extends not only to the receiving company as such, but to its employees who are to handle the car, and such employees may recover from the company delivering the car for injuries due to its defective condition, notwithstanding the company employing them was also negligent in regard to inspecting and receiving the car.

An examination of these decisions, however, discloses that some of them were directly overruled by the same court in later decisions, and others may be distinguished to the extent that they have little or no application here. They are in conflict with the weight of authority.

What seems to be the generally accepted doctrine—contrary to that contended for by the appellant—is well established by a number of leading cases. *Lellis v. Michigan Central Railway*, 124 Mich. 37, 82 N. W. 828, 70 L. R. A. 598; *Glynn v. Central Ry. Co.*, 175 Mass. 510, 56 N. E. 698, 78 Am. St. Rep. 507. The Supreme Court of Missouri had occasion to consider the precise question we have now before us, both before and after the rendition of the two decisions last cited. In its first opinion in the case it held exactly as appellant would have us hold. See *Missouri, K. & T. Ry. Co. v. Merrill*, 61 Kan. 671, 675, 60 Pac. 819, which is one of the decisions given as authority by the author of the work relied on by this appellant. But upon rehearing (65 Kan. 436, 70 Pac. 358, 59 L. R. A. 711, 93 Am. St. Rep. 287) the court said:

"We are now fully convinced that the doctrine announced in our former decision on the subject in hand runs counter to an unbroken current of authorities, and fails to stand the test of reason."

It then proceeded to make a critical examination of the cases cited by it in its former opinion to sustain the view then taken by it, and showed that they were to be distinguished from the case at its bar. Some of the cases there reviewed and distinguished are relied upon by the appellant here. After such full and comprehensive study of the question, the court reached and laid down the rule that a railway company which delivers a defective freight car to a connecting line is not liable in damages to an employee of the latter, who is injured after the car has been inspected by the company receiving it. The loss of control over the car, and over the servants having it in charge, relieves the furnishing company from responsibility to the employees of the receiving company. *Missouri, K. & T. Ry. Co. v. Merrill*, 65 Kan. 436, 70 Pac. 358, 59 L. R. A. 711, 93 Am. St. Rep. 287. The basis of the decision seems so sound, and the reasoning so clear, that we think it useless to attempt to go over the same ground here, but refer to it as a complete answer to appellant's contention. It, and the others cases cited above, have been followed or quoted approvingly in *McCaillon v. Missouri Pacific Ry.*, 74 Kan. 785, 88 Pac. 50; *Schneider v. Little Co.*, 184 Mich. 315, 151 N. W. 587, 589; *Luck Const. Co. v. Chicago & A. Ry. Co.*, 200 Mo. App. 450, 452, 207 S. W. 840, 841; *McNamara v. Boston & M. R. Co.*, 202 Mass. 491, 500, 89 N. E. 131, 135; *Continental Fruit Express v. Leas*, 50 Tex. Civ. App. 584, 110 S. W. 129, 132; *West Jersey & S. R. Co. v. Cochran*

(C. C. A.) 266 Fed. 609, 611. Under the rule laid down in these cases, it seems clear that the plaintiff would have no cause of action against the respondent railway company under the facts attempted to be shown by it in its separate defense, which was ruled out by the trial court. The defective condition of the car was neither secret nor hidden. We think, therefore, the causal connection between the act of the respondent and the injury to plaintiff's intestate was severed by the interposition of an independent agency, the belt line railway, if the facts urged by respondent in its separate defense were proved. Several of the cases above cited so hold. See particularly *Missouri, K. & T. Ry. Co. v. Merrill*, supra, and *McCaillon v. Missouri Pacific Ry. Co.*, supra.

The order granting the motion for a new trial is affirmed.

We concur: RICHARDS, J.; KERRIGAN, J.

LEVIN et al. v. SAROFF et al. (Civ. 3922.)

(District Court of Appeal, First District, Division 2, California. Sept. 22, 1921. Hearing Denied by Supreme Court Nov. 21, 1921.)

1. Landlord and tenant §24(1)—Essentials of valid lease stated.

It is only essential to the creation of a valid lease that it contain a definite agreement as to the extent and boundary of the property leased, a definite and agreed term, a definite and agreed price of rental, and the time and manner of payment.

2. Landlord and tenant §22(2)—Whether instrument is lease or agreement to make lease is largely question of intention.

Whether an instrument is a present lease or an agreement to execute a lease in future is largely a question of the intention of the parties.

3. Contracts §32—Agreement on essential facts is binding contract, though formal contract is to be prepared.

Where parties have agreed upon all essential facts, there is a binding contract, notwithstanding the fact that a more formal contract is to be prepared and signed later.

4. Landlord and tenant §22(1)—Agreement to make lease is binding, notwithstanding intent to make formal lease, and may be relied upon when party will not execute lease.

Where an agreement to make a lease contained all the essentials of a valid lease, the mere fact that a written lease was in contemplation did not relieve either party from responsibility on the contract already made, and, when the lessor refused to execute a lease according to the contract, the lessee had a right to fall back on the written propositions as originally made, and the absence of the formal agreement was immaterial.

5. Landlord and tenant §22(1)—Failure of agreement to specify city and state did not render it unenforceable where lessee had taken possession.

An agreement for a lease was not too vague and uncertain to be enforced because of the failure to specify the city and state in which the property was located, where the agreement had been acted upon and the lessee had gone into possession, so that there could be no dispute about the location of the property.

6. Landlord and tenant §22(3)—Refusal to execute lease containing provisions not in agreement not violation of agreement.

An agreement to make a lease was not violated by the lessee by his refusal to execute a lease submitted by the lessor containing provisions not in the agreement, and such refusal gave the lessor no right to rescind and cancel the agreement, to change the tenancy to one from month to month, or to increase the rent.

7. Appeal and error §158(2)—Payment of judgment to prevent execution sale does not prevent appeal.

Where defendant, on a hearing in supplementary proceedings, to save his property from a forced sale under execution, and on the assurance of his attorney that he could recover his money in the event of a reversal, satisfied the money judgment against him, the payment was not voluntary so as to prevent an appeal by him.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Joseph Levin and others, doing business as M. Levin & Sons, against M. Saroff and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Marcus D. Wolff and A. H. Crook, both of San Francisco, for appellants.

Edgar C. Levey, of San Francisco, for respondents.

LANGDON, P. J. This is an appeal by the defendants from a judgment against them in an action of unlawful detainer.

The plaintiffs' predecessor in interest made and executed the following contract with the defendant Saroff:

"This agreement made and entered into this 29th day of October, 1919, between M. Saroff, the party of the first part, and M. Levin & Sons, the parties of the second part, witnesseth:

"That whereas the parties of the second part are the owners of the certain buildings located on the north side of Folsom street between Sixth and Seventh streets, formerly occupied by them as 'junk dealers' and whereas the party of the first part is desirous of leasing said premises, it is hereby agreed as follows:

"The party of the first part agrees to lease said premises for a term of five (5) years at a monthly rental of \$250.00 and further agrees to pay the first four months' rent of said lease in advance.

"The party of the second part agrees to lease said premises to the party of the first part for the said term of five (5) years at the said monthly rental of \$250.00, and further agrees that the said party of the first part has the option of releasing said property for an additional term of five years at the same monthly rental.

"The party of the second part further agrees to whitewash the entire interior of both the brick and corrugated iron buildings; inclose with sheet metal, or other material, the lower portion of the corrugated iron buildings; place openings for windows and doors where requested by said party of the first part; also to place windows in the second story of said corrugated iron building where requested by the party of the first part; also to place two toilets on second floor and 1 toilet on third floor of the brick building; the ground floor of the corrugated iron building to have cement floor with wood covering; 1 sink to be placed in second and third floors of brick building.

"It is further agreed and understood that the party of the second part will keep roof in repair and should corrugated iron rust said party of the second part will repair same, put elevator in condition that will be passed by the elevator inspector and do any and all work required by the board of health, board of public works, or other authorities, in connection with building; but not with business of the party of the first part.

"It is further agreed and understood that the lot facing Russ St., running back to building will be included in the lease and any improvements placed thereon by said party of the first part will be removed at the termination of the lease.

"Said party of the first part is permitted to sublet any portion or all of said buildings for any purpose excepting the same shall not be leased for a junk business.

"Rent to commence fifteen (15) days after buildings are repaired and ready for occupancy. Party of the second part will notify party of the first part when buildings are ready for occupancy.

"Party of the first part agrees to pay for all water, gas or electricity used in said buildings during the term of said lease or any extension thereof.

"Party of the second part reserves right to remove wagon scales at any time during lease and party of second part agrees to keep same in good order. Party of the first part agrees to keep in order and maintain buildings and elevator in repair during entire term of lease."

In accordance with this agreement, the plaintiffs made the repairs and alterations required thereby, and the defendant Saroff took possession of the premises and paid four months' rent in advance to the plaintiffs. The other defendant is a subtenant of Saroff. The defendants continued to occupy the premises, and Saroff paid rent therefor, in advance, at the rate of \$250 a month from about January 1, 1920, until July of the same year. During this period of time, the parties had some negotiations for the execution of a more formal lease in accordance with the terms of the agreement

above quoted. The plaintiffs insisted upon defendant Saroff signing a formal lease embodying terms and conditions not contained in the more informal agreement, and which would not have been implied by law. Among such terms was one to the effect that the lessee waived his right to make repairs under the provisions of section 1942, Civil Code; that the premises should be sublet only to a responsible person; that the lessor is entitled to enter the premises personally or by representative for the purpose of viewing the same or of making alterations thereon; that the lessee will save the lessor harmless from any liability whatsoever by reason of any damage occurring to himself, his employees, servants or any person or persons in or about the said property from any cause or act whatsoever; that any increase in insurance rates upon the building due to the character of the lessee's business should be borne by the lessee. Also the lease submitted for defendant to sign did not contain a provision granting him an option to renew the lease for an additional five-year period. In compliance with this portion of the informal agreement, plaintiffs tendered to defendant a separate writing stating that such option was granted to the defendant, provided that written notice of his intention to avail himself of the option be given by registered letter duly mailed 90 days prior to the date of the expiration of said lease.

Defendant Saroff refused to sign this lease submitted to him by the plaintiffs, insisting that it did not conform to his agreement. On July 19, 1920, plaintiffs notified the said defendant that because of his refusal to execute the lease submitted to him by plaintiffs' attorney, the agreement of October 29, 1919, herein set out, was rescinded and canceled, and that his tenancy would thereafter be considered as one from month to month. On July 29, 1920, by written notice the monthly rental of said premises was raised to \$500, commencing September 1, 1920. Defendant Saroff disregarded these notices, and on September 1, 1920, offered to pay to plaintiffs the rental of \$250 reserved in his agreement. This offer was refused. On September 2, 1920, plaintiffs served notice upon defendant to pay the rent within three days or vacate the premises. Upon his failure to comply therewith, this action was brought to recover possession of the premises and to recover rental at the rate of \$500 a month from September 1, 1920. Plaintiffs recovered judgment for \$1,500, representing rental for three months at \$500 a month, and for possession of the premises.

[1-4] Plaintiffs' theory of the case is that the agreement herein set out was an agreement to make a lease in the future and not a lease. It appears to us that the agree-

ment contains all the essentials of a valid lease. To create a valid lease, but few points of mutual agreement are necessary: First, there must be a definite agreement as to the extent and boundary of the property leased; second, a definite and agreed term; and, third, a definite and agreed price of rental, and the time and manner of payment. These appear to be the only essentials. Jones on Landlord and Tenant, p. 170, § 137a; Cochrane v. Justice Min. Co., 16 Colo. 415, 26 Pac. 780; Boston Clothing Co. v. Solberg, 28 Wash. 262, 68 Pac. 715. However, plaintiffs' contention is based upon testimony of an understanding between the parties that they were later to execute a more formal contract. Whether an instrument is a lease in presenti or an agreement to execute a lease in future is largely a question of the intention of the parties. Jackson v. Kisselbrook, 10 Johns. (N. Y.) 386, 6 Am. Dec. 341; Pac. Imp. Co. v. Jones, 164 Cal. 260, 128 Pac. 404. Nevertheless, where the parties have agreed upon all essential facts there is a binding contract, notwithstanding the fact that a more formal contract is to be prepared and signed later. Jones on Landlord and Tenant, supra; Marcus v. Collins Bldg. & Const. Co., 27 Misc. Rep. 784, 57 N. Y. Supp. 737. The mere fact that a written lease was in contemplation does not relieve either of the contracting parties from the responsibility of a contract which was already expressed in writing. When one party refuses to execute the lease according to the contract thus made, the other has a right to fall back on the written propositions as originally made, and the absence of the formal agreement contemplated is not material. Post v. Davis, 7 Kan. App. 217, 52 Pac. 903; Bonnewell v. Jenkins, L. R. 8 Ch. Div. 70, 74. The evidence discloses that this is precisely what was done in the present case. The parties acted upon the agreement of October 29, 1919; the plaintiffs surrendering possession and making the repairs called for thereby, and the defendants taking possession and paying four months' rent in advance and the subsequent rent in advance each month as provided in the agreement. Later, the plaintiffs asked the defendant to execute a formal lease. He stated that he was willing to do so if plaintiffs would repair the elevator as provided in the agreement. This was done, and the negotiations regarding the formal lease were commenced. When the plaintiffs would not furnish a lease in accordance with the written agreement, the defendant submitted to them a lease of the premises drawn by his attorney, which contained all the provisions of the informal agreement and also most of the additional provisions embodied in the lease submitted by the plaintiffs. Plaintiffs, however, rejected this lease, and the defendant then took the position that he would

stand upon the agreement in writing which he had, and that such agreement was sufficient. He continued to offer to perform what was required of him thereunder.

In the case of Cheney v. Newberry & Co., 67 Cal. 125, 7 Pac. 444, it is said:

"The entry under the written contract for a lease for a stated term and at a stated rent, and the payment and receipt of the rent, constituted a valid lease between the parties for the term and at the rental specified. * * * Neither party could subsequently cancel the contract without the consent of the other."

The situation in the present case is well stated in the language of Pacific Improvement Co. v. Jones, 164 Cal. 260 at page 264, 128 Pac. 404 at page 406, where it is said:

"Moreover, while the testimony tends to prove that the parties contemplated substituting for this instrument a more formal lease, nevertheless the execution of the document, as shown by the uncontradicted testimony, * * * was intended to conclude the lease between the parties, so that Mr. Jones could take immediate possession of the property, the contemplated execution of the formal lease being deemed a matter of mere convenience."

[5] Respondents argue that the agreement for a lease is too vague and uncertain to be specifically performed or to constitute an agreement of the parties. This is urged because the agreement does not specify the city and state in which the property is located. This precise objection has been considered in the case of Boston Clothing Co. v. Solberg, supra, and at page 716 of the opinion (68 Pac.) the point is decided adversely to the contention of respondents. In the present case the agreement has been acted upon and the defendant has gone into the possession of the property and there can be no dispute about the location of the property involved.

[6] We reach the conclusion, therefore, that the defendant was not violating the written agreement between the parties when he refused to execute the lease submitted to him by the plaintiffs which contained other provisions. An agreement to execute a lease for a given period at a stated rental, payable in specific installments, is not broken by a refusal to execute a lease which imposes terms and conditions not imposed by law and of which no mention was made in the instrument. 24 Cyc. 899; Sanders v. Pottlitzer Co., 144 N. Y. 209, 39 N. E. 75, 29 L. R. A. 431, 43 Am. St. Rep. 757. It is clear, then, that the plaintiffs had no right to rescind and cancel the agreement under which the defendant was holding the premises; that such agreement was in full force and effect until superseded by a formal writing in accordance therewith. The notices served by plaintiffs changing the tenancy to one from month to month and increasing the rent from \$250 to \$500 a month were un-

availing and gave to plaintiffs no new rights, and the judgment in their favor for the added rental and for the possession of the premises was erroneous.

[7] One further matter requires a brief discussion. The record before us shows that the money judgment has been paid and satisfied. Respondents sought to avail themselves of this fact upon a motion to dismiss this appeal upon the ground that the judgment had been satisfied. Upon the hearing of the motion in this court a showing was made by respondents that appellants had voluntarily surrendered up possession of the premises. Whether the portion of the judgment relating to the possession of the premises was voluntarily complied with by appellants or not does not concern us here, because we are of the opinion that as to the money judgment, the payment and satisfaction thereof by the appellant Saroff was not such a one as to deprive him of his right of appeal with reference to that item, at least. *Kenney v. Parks*, 120 Cal. 24, 52 Pac. 40; *Warner Bros. v. Freud*, 131 Cal. 646, 63 Pac. 1017, 82 Am. St. Rep. 400. The showing made by appellants in resisting the motion to dismiss the appeal was to the effect that after the entry of the judgment herein, supplementary proceedings were had and an order of examination issued. Upon the hearing thereof, Saroff appeared in court. In his desire to save his property from a forced sale under execution and upon the assurance by his attorney that he could recover his money in the event of a reversal of the judgment upon appeal, Saroff then and there satisfied the money judgment. Such a payment is not a voluntary payment and will not militate against appellant's privilege to have his rights determined upon appeal (*Warner Bros. v. Freud*, supra), and this court so determined in denying the respondents' motion to dismiss the appeal.

The judgment is reversed.

We concur: NOURSE, J.; STURTEVANT, J.

In re CATE. (Civ. 3660.)

(District Court of Appeal, Second District, Division 1. California. Sept. 29, 1921.)

Attorney and client §61—Attorney disbarred for serious violation of law not reinstated after lapse of only three years.

An attorney, disbarred for serious misconduct in violation of Code Civ. Proc. § 287, subd. 5, relative to the commission of any act involving moral turpitude, dishonesty, or corruption, *held* not to be reinstated after being deprived of his license for only three years, though the application was supported

by testimonials of numerous persons to his conduct and present good character.

Original application by Clyde E. Cate, a disbarred attorney, for reinstatement. Petition denied.

Vincent B. Vaughan, of Los Angeles, for petitioner.

G. R. Crump, of Los Angeles, for Los Angeles Bar Ass'n.

PER CURIAM. Petitioner, an attorney at law, licensed to practice in the state of California, was disbarred by judgment entered in the superior court of the county of Los Angeles on the 27th day of May, 1918. The offenses of which he was found guilty were of the character described in subdivision 5 of section 287 of the Code of Civil Procedure. He now applies for reinstatement, claiming that he is now and for a long time has been repentant for the wrongs committed by him, and has lived an upright life since the time of his disbarment. The application is supported by the request of numerous persons who attest his good conduct and their confidence in his present good character. Without depreciating the value of these testimonials and without intimating that petitioner may not be reinstated at some future time, the court is satisfied that this petition should not be granted. The misconduct of the petitioner on account of which he has been disbarred was of a very serious nature. And we do not agree with the opinion of his friends that he has been sufficiently punished for his acts of wrongdoing merely by being deprived of his license for a period of only three years.

The petition is denied.

MUNRO et al. v. WHITLOW et al.
(Civ. 3966.)

(District Court of Appeal, First District, Division 2, California. Oct. 5, 1921. Hearing Denied by Supreme Court Dec. 1, 1921.)

1. Appeal and error §704(2), 758(2)—Finding deemed sufficient when not questioned in brief and evidence bearing thereon not printed.

A finding of the trial court as to the validity of a tax deed will be deemed sufficient, though attacked in the oral argument, where the point was not raised in the briefs, and none of the evidence bearing on that phase of the case had been printed or referred to by appellants.

2. Trial §37—Defendants held to have waived deralgment of title from paramount source.

In ejectment against defendants claiming under a tax deed, where a deed under which plaintiffs had peaceful and uninterrupted possession for over 12 years was admitted in evidence without objection after plaintiffs' coun-

sel had asked defendants' counsel if he would insist on deraignment of title, plaintiffs were entitled to assume that the point was waived.

3. Life estates ¶8—Tenant holds adversely to others than remaindermen.

One claiming only a life estate and recognizing the claim of the remainderman makes such a claim of ownership as will support title by prescription as against all other parties.

4. Taxation ¶796(1)—In ejectment with cross-complaint to quiet title, plaintiffs' attack on tax deed not collateral.

Where defendants, in an action of ejectment by answer and cross-complaint, set up title under a tax deed, and prayed that their title be quieted, and offered the deed in evidence, plaintiffs' attack on the validity of the deed was direct and not collateral.

5. Appeal and error ¶704(2)—Record held not to show error in finding that tax deed was void.

Under Pol. Code, § 3786, providing that tax deeds are primary evidence of certain facts, and section 3787, providing that they are conclusive evidence of all other proceedings from the assessment to the execution of the deed, no error is shown in the court's finding that a tax deed was void, where it is not shown in the record on what grounds it was attacked.

Appeal from Superior Court, Alameda County; A. F. St. Sure, Judge.

Action of ejectment by Barbara California Munro, a minor, by Roy J. Young, guardian of her estate, and another, against M. W. Whitlow and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

Milton Shephardson, of San Francisco, and L. A. Kottinger, of Oakland, for appellants.

Elston, Clark & Nichols, of Berkeley, for respondents.

NOURSE, J. Plaintiffs sued in ejectment to recover possession of certain real property situated in the city of Berkeley, county of Alameda. The complaint was in the ordinary form, alleging that the plaintiffs were the owners by title in fee simple absolute; that, on or about July 22, 1919, the defendants wrongfully and without right entered into the possession and occupancy of said premises and excluded plaintiffs therefrom; and that the value of the use and occupation thereof was \$75 a month. Prayer followed that plaintiffs be put in possession, and that they recover the value of the use and occupation from the date of the ouster.

Defendants answered jointly, denying the allegations of the complaint, and in a separate answer alleged that defendant George Biaggi purchased the property from the state at a public tax sale held on July 10, 1919; that the sale followed the failure to pay the taxes assessed thereon for the year 1913; that on July 17, 1919, he obtained a deed thereto

from the tax collector, and ever since has been the owner in fee simple and in the possession of the premises; and that plaintiffs claim some interest or estate therein adverse to said defendant. Prayer followed for a decree adjudging said defendant to be the owner in fee of the property, adjudging that plaintiffs have no estate or interest therein, and for general relief. At the opening of the trial it was stipulated that all the allegations of the answer be deemed denied, and the trial proceeded on the issues so framed.

The pleadings present a cause in ejectment on the part of plaintiffs, a denial and a separate answer in the nature of a cross-complaint to quiet title on the part of defendants, and a trial of these mixed issues of law and equity without objection from either party. The trial court found that the tax deed upon which defendants relied was void on account of various irregularities in the tax proceedings, and gave judgment for plaintiffs, decreeing that plaintiff Maud May Munro was the owner of a life estate in the property; that plaintiff Barbara California Munro was the owner of a remainder interest subject only to said life estate; and that defendants have no right, title, or interest therein. The equities of the case were adjusted by awarding to defendant George Biaggi the sum paid into court by plaintiffs representing the amount of his outlay as a result of the tax sale.

The appeal is prosecuted under section 953a, Code of Civil Procedure. The issues are plainly stated in appellants' opening brief to be:

"First. That the respondents wholly failed to show a record title chaining back to a paramount source, and hence they failed to prove a fee-simple title. Second. That respondents wholly failed to show a prior actual possession of the premises, under a claim of ownership in fee; that any possession without such a claim is not presumptive evidence of title. Third. That if the evidence had been sufficient to show in plaintiffs either a record title, or a prior actual possession taken under a claim of ownership, such title or possession of respondents, and all outstanding title to the property was, on July 10, 1919, sold and conveyed by the state of California, through the tax collector of Alameda county, to George Biaggi, an appellant here."

[1] In the oral argument appellants assailed the finding of the trial court upon the issue of the validity of the tax deed, but, as this point was not raised in the briefs, and as none of the evidence bearing upon that phase of the case has been printed or referred to by appellants, this court is not required to consider the point further than to say that, in a record so presented, the finding of the trial court will be deemed sufficient.

[2] As to the first point urged by appel-

lants, it is sufficient to say that respondents showed a record title by deed from Mrs. M. J. Woolley, dated June 9, 1905, and recorded January 24, 1907, immediately after Mrs. Woolley's death. They then showed peaceful and uninterrupted possession of the premises for over 12 years, accompanied by the payment of all taxes assessed thereon for more than 5 years. The deed was received in evidence without objection, after counsel for respondents had asked appellants' counsel if he would insist upon his showing the deraignment of title. If appellants had objected to the admission of the deed when it was finally offered in evidence, respondents would have had ample opportunity to make this proof. As they made no objection, respondents were entitled to assume that the point was waived. Thus, if the proof had been attempted and had showed no title in the respondents as of the date of the tax levy, such proof would have defeated the claim here asserted by the appellants as well as the respondents. If the proof had been otherwise, it would have benefited the appellants as well as the respondents.

[3] As to the second point urged by appellants, the record shows that Maud May Munro was the owner of a life estate, and her coplaintiff was the owner of the remainder. Cases are cited to the effect that actual possession cannot ripen into prescriptive title unless the possession was taken under a "claim of ownership." From these it is argued that the mother could not obtain any title through possession unless possession was "taken under a claim of ownership in fee simple absolute, against all the world." Putting it in another way the contention is that as Maud May Munro claimed a life estate only and took possession under the deed, thus recognizing the remainder interest of her daughter, she did not obtain any title at all through possession. Appellants have cited no authority directly in point, and in view of what has been said regarding the proof of title by deed, the question is not of sufficient importance to require original research by the court. It is a question which would not arise frequently because the claimant of a life estate would naturally claim under some paper title—such as by will or deed—and the matter of possession would be immaterial. But in the absence of authority we would not hold that such a claimant could not obtain good title by adverse possession if some technical defect appeared in the paper title. Though, strictly speaking, the claimant of a life estate does not hold or claim the fee, he does "claim ownership" to the extent of the life interest. When possession is taken under such a claim of ownership with the recognition of the claim of the remainderman and with his consent, there does not seem to be

any sound reason why such possession may not ripen into title by prescription as against all others.

[4, 5] Appellants' argument on their third point is that respondents could not impeach the tax deed they offered in evidence—they could not collaterally assail it—that the tax deed was not void on its face, and it conveyed the absolute title to the property. The answer is that appellants themselves put this tax deed in issue by their answer and cross-complaint, and prayed judgment quieting the title based on the deed. They offered the deed in evidence as a part of the respondents' case, and the attack which respondents made was therefore direct and not collateral. The deed to Biaggi and nothing more is printed in appellants' brief. We are not even informed upon what grounds it was attacked. It is argued that it is conclusive evidence of the regularity of all proceedings from the assessment up to the execution of the deed, and section 3787, Political Code, is cited as authority. But this section refers to all "other" proceedings. *Bernhard v. Wall*, 194 Pac. 1040, 1045. If the grounds of attack related to the proceedings mentioned in section 3786, then, under that section, the deed was but prima facie evidence of the regularity of such proceedings. Upon the record as presented we find no error.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

HERSPRING v. UNITED CANNERIES CO. OF CALIFORNIA. (Civ. 3766.)

(District Court of Appeal, First District, Division 2, California. Sept. 30, 1921.)

1. Account stated \S 6(2)—Failure to reply to letter stating amount of claim held not an admission of correctness in view of answer to prior letter.

Defendant's silence by failure to answer plaintiff's letter, stating the amount of his claim and asking for remittance, was not an admission of the correctness of the account, rendering it an account stated, where only a few days before defendant, in answering plaintiff's prior letter, asking a check for a balance claimed, had emphatically and at length refused any further remittance and claimed that it had been wronged.

2. Frauds, statute of \S 44(3)—Oral contract of employment for 10 years void as not to be performed in year.

An oral contract of employment for 10 years is, under Civ. Code, \S 1624, subd. 1, invalid, as an agreement that by its terms is not to be performed within a year from the making thereof.

Appeal from Superior Court, Alameda County; Everett J. Brown, Judge.

Action by Joseph Herspring against the United Canneries Company of California. From an adverse judgment, plaintiff appeals. Affirmed.

Peck, Bunker & Cole, of San Francisco, and Robert H. Schwab, of Sacramento, for appellant.

Roscoe D. Jones, of Oakland, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover moneys alleged to be due and owing to him. The defendant answered and filed a cross-complaint which the plaintiff answered, and the judgment of the trial court was rendered in favor of the defendant and against the plaintiff on the issues made by the plaintiff's complaint, and in favor of the defendant and against the plaintiff on the issues made by the cross-complaint. From that judgment the plaintiff has appealed, bringing up the judgment roll and a bill of exceptions.

On the 17th day of February, 1917, a contract in writing was made which is as follows:

"We the undersigned, hereby authorize Mr. Jos. Herspring, of San Francisco, to secure for us signed contracts for peaches and apricots from growers and at such points as we may direct, under the following conditions: All contracts to be on blanks furnished by us, a copy to be given the grower and the original to be turned over to us. Prices to be such as we authorize from time to time as market conditions warrant. Specifications as we direct. When fruit is offered for delivery under these contracts at shipping points, it shall be inspected by said Jos. Herspring, and such fruit as conforms to contract specifications shall be accepted and weigh slip issued therefor by him. He shall also supervise the loading into cars in first-class workmanlike manner. He shall also superintend the distribution of empty boxes, taking grower's receipts therefor on suitable blanks furnished by us. For faithful performance of the above obligations we agree to pay the said Jos. Herspring, at the end of the 1917 season when all deliveries have been made, the sum of one dollar and fifty cents (\$1.50) for each ton of 2,000 pounds net fruit delivered on all such contracts secured by him, in full payment and satisfaction for his services.

"United Canneries Company of California,
"By A. C. Harvey, Prest."

The parties entered upon the performance of the contract, and during the same month in which the same was made the plaintiff, being out in the field engaged in negotiating contracts, called up the defendant on the telephone and said, "Mr. Harvey, I can get a lot of peaches up here on seven and ten year contracts; you only want me to buy now for one year. I can get these contracts," and as the plaintiff testified, Mr. Harvey replied, "All right, Herspring; go ahead and

take them." Thereafter, during 1917, the plaintiff proceeded to negotiate contracts and to perform the contract of employment in other respects. At the end of the year a settlement was had, and nothing is claimed in this case as for the year 1917. During the following season certain services were rendered and an accounting was attempted, but no settlement was agreed upon. On December 6, 1918, the plaintiff wrote to the defendant asking for a check for a balance claimed. On December 11, 1918, the defendant wrote the plaintiff a long letter full of acerbity, and refused to make any further remittance, claiming that the defendant had been wronged. On December 16, 1918, the plaintiff wrote to the defendant stating the amount of his claim and again asking for a further remittance. This action was commenced January 28, 1919.

[1] On these facts the plaintiff claims, among other things, that an account was stated. However, we think that the facts show a decided disagreement as to the account instead of showing an agreement as to an account. Owing to the very heated language used in the letter of the defendant under date of December 6th, it is clear that the defendant was not called upon to answer the letter written later by the plaintiff. Such silence on his part, under such circumstances, was not an admission as to the correctness of the later letter. The trial court found against the plaintiff on this issue, and this court is not at liberty to disturb that finding.

We understand the plaintiff to claim that the oral conversation quoted above prolonged the term of the hiring of the plaintiff through the year 1918. Assuming, solely for the purpose of stating the point, that such was the fact, then it became the duty of the plaintiff during the year 1918 to perform the written contract in all its terms, for none of them had been eliminated, according to the plaintiff's own wording of the oral conversation; but the proof introduced was all to the effect that during the year 1918 the plaintiff did not inspect before shipping but a very small portion of the fruit offered for shipping. The same remark applies to the supervision of the loading into cars, and also to the superintending of the distribution of empty boxes. If, therefore, the oral conversation be treated as extending the terms of the contract, it is patent that the plaintiff may not recover because he did not perform those things provided in the contract for him to do and perform.

However, the plaintiff does not rely solely on the oral conversation above mentioned, but he relies also on another conversation. In June, 1918, Mr. Harvey, the president of the defendant corporation, went to Sacramento and had a conversation with the plaintiff. That conversation had a double aspect. In one aspect it was with regard to the interests

of the growers, and that subject-matter is not at all involved in this case. In another aspect it involved the relations of the plaintiff and the defendant. The plaintiff testified that he said to Mr. Harvey:

"I do not want to go on with you any further unless our business relations are going to be smoother. Now, I expect you to pay me for the life of my contract. * * * How about it?"

And he said:

"That is all right, Herspring; you go ahead and everything will go smooth with us this year."

The plaintiff further testified:

"He (meaning Mr. Harvey) came back and said, 'I want you to go out and see if you can buy me 400 tons of free peaches. I want some Lovells and Muira.'"

At this point it may be stated that the peaches were purchased and paid for, and this action does not involve that element. Looking at the other portions of the oral conversation, the utmost that can be said is that it continued the employment of 1917, according to the terms of the above writing, through the year 1918, without any other alteration. So treating it, the plaintiff was not entitled to recover for the same reasons stated above with reference to the conversation which occurred in February, 1917. Furthermore, if we run together and combine the conversation of February, 1917, with the conversation of June, 1918, we reach the same conclusion.

[2] But the plaintiff's cause of action has yet another theory. He contends that the oral understanding between himself and the defendant as above recited had the legal effect to continue him in the employment of the defendant year after year—to obtain compensation for services rendered by him. In other words, the plaintiff's contention is that he was employed orally for the term extending from 1917 to a date ten years thereafter, namely, the term corresponding with the term of years existing between the producer and the canner. If such was the contract, it violated section 1624, subd. 1, of the Civil Code. Again, the language used in the oral contract will not sustain such a broad claim. And, even though the language used by the parties would sustain such a claim, still the plaintiff may not recover, for, as shown above, he has not performed the contract on his part.

Before dismissing this portion of the case, it may be said that the plaintiff contends that those portions of the contract which the plaintiff did not perform were waived by the defendant. The evidence does not sustain the plaintiff in that position. It does not appear that plaintiff's nonperformance was

known to the defendant until the action was commenced.

From what has been said above, it follows that the plaintiff was not entitled to make any charge against the defendant for fruit purchased in 1917, but received out of the crop of 1918. Passing to the fruit which was purchased in 1918 and delivered in that year, the plaintiff was entitled to receive \$1,099.53. The parties did not seriously disagree as to this item. The whole of that sum has been paid. Indeed, the defendant paid to the plaintiff \$2,000, which included \$900.47 more than the plaintiff was entitled to. For that item the trial court gave judgment in favor of the defendant and against the plaintiff, and in so doing it committed no error.

The plaintiff sought to be reimbursed for expenditures for telephone service. Such payments were not made "at the special instance and request of the defendant." If claimed as on an account stated, the same was neither pleaded nor proved.

Much of the time of the trial court was taken up with the introduction of evidence concerning the item of damage alleged to have accrued in favor of the defendant by reason of the failure of the plaintiff to properly perform his contract. That damage was estimated by the trial court in the sum of \$401.88; but no judgment was rendered against the plaintiff on that item. The defendant has not appealed. It is not necessary, therefore, for us to dwell on that subject.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

In re BANGLE et al.

HUTTON et al. v. TITLE INS. & TRUST CO.

(Civ. 3483.)

(District Court of Appeal, Second District, Division 1, California. Sept. 30, 1921.)

1. Records \S 9(10½)—Decree of registration subject to restrictions held not to preserve lien.

A provision in a deed that the sum which the grantee agreed to pay for maintenance of improvements should be a lien upon the land until paid is a lien within the definition in Civ. Code, \S 2872, created by the contract of the parties within section 2881, and was not covered by a decree registering the title subject to the exceptions, reservations, and conditions contained in the deed of conveyance, but omitting reference to the liens in such deed.

2. Records \S 9(10½)—Decree of registration should declare amount of lien not barred.

Where a deed made the amount the grantees were to pay for maintenance of public

improvements a lien upon the property, the failure of the grantor to enforce such payments did not waive its right thereto in the future, and a decree registering the title affected by the deed should specify that it was subject to the lien and fix the amount due thereon which was not barred by limitations.

3. Deeds §166—Protection of mortgages from forfeiture for violation of restriction is valid.

A clause in a deed containing a number of restrictive provisions the violation of which would defeat the title of the grantee, which clause exempted from the forfeiture the lien of any mortgage or deed of trust made in good faith, was valid.

4. Records §9(10½)—Registration referring to restrictions in deed not in chain of title is erroneous.

A decree of registration of title which stated that the title was subject to the conditions and restrictions in a deed recorded on a specified book and page was erroneous where the deed recorded on that book and page was not in the chain of title registered.

5. Records §9(12)—Findings and decree as to deed containing restrictions cannot be changed.

On appeal from a decree registering title to real estate, findings and decree with reference to the deed containing the conditions and restrictions to which the title was subject cannot be corrected so as to make it refer to a deed which was within the chain of title.

6. Deeds §150—Restrictions on sale of intoxicating liquors is valid.

A provision in a deed prohibiting the use of the premises for the sale of intoxicating liquors and providing that on breach of such condition the premises should revert to the grantor is not void.

7. Records §9(12)—Where registration decree referred to wrong deed, restrictions in other deed present abstract questions.

On appeal from decree registering title which erroneously stated the title to be subject to conditions and restrictions in a deed not in the chain of title, the validity of other conditions and restrictions in a deed in the chain of title will not be determined, since questions with reference thereto are abstract and may be properly decided after remand of the case.

8. Records §9(10½)—Registration should specify valid restrictions not merely refer to deeds.

Decree of registration of title should specify the conditions and restrictions subject to which the title is held where the deeds imposing such conditions and restrictions are confusing and ambiguous, and some of the restrictions are no longer in force, though a reference to the deed might otherwise be sufficient, since the object of the registration is to simplify the title.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

In the matter of the petition of Paul Monroe Bangle and others against the Title Insurance & Trust Company for registration of title to real property. From so much of the judgment as registered the title of Charles Newton Hutton and others, defendant appeals. Reversed.

Charles H. Brock and Edmund W. Pugh, both of Los Angeles, for appellant.

L. M. Hartwick, of Van Nuys, and John G. Mott, Albert M. Cross, Albert Lee Stephens, and I. B. Dockweiler, all of Los Angeles, for respondents.

James W. Bell, of Los Angeles, amicus curiae.

SHAW, J. This proceeding was instituted by the owners of certain lots and parcels of land to have title thereto registered in accordance with the provisions of the law known as the Torrens Land Title Act (St. 1915, p. 1932), adopted by the people of the state at the general election held on November 3, 1914.

The lots in question constituted a part of a large tract of land subdivided and conveyed by the owner, Title Insurance & Trust Company, which, as defendant, and claiming that its rights reserved in the grants so executed by it are not protected by the decree rendered, has appealed therefrom in so far as it applies to certain of the lots described in the petition, to wit:

Lot 14, block 45, of tract 1200, city of Los Angeles, as per map recorded in Book 19 of Maps, page 35, title to which was vested in Charles Newton Hutton and his wife, Grace Iliff Hutton, which is herein designated as No. 1.

Lots 8, 10, 11, and 12, block 20, of tract 1200, city of Los Angeles, as per map recorded in Book 19 of Maps, at page 35, title to which was vested in Samuel Andrus as community property, herein designated as No. 2.

Lot 9, block 20, of tract 1200, Van Nuys district, city of Los Angeles, as per map recorded in Book 19 of Maps, page 35, title to which was by the decree declared to be in Adolph John Boulanger and Lillian Maude Boulanger, as joint tenants, herein designated as No. 3.

Lot 348 of tract 1000, in the city of Los Angeles, as per map recorded in Book 19 of Maps, pages 1 to 34, herein designated as No. 4.

As to the Hutton lot, description of which we have designated as No. 1, the applicants alleged that the deed from appellant, Title Insurance & Trust Company, to the grantor of petitioners, contained certain restrictions and reservations which were not conditions of the conveyance and had been abandoned and were void, which provisions they asked to have canceled. This allegation was denied

in the answer of defendant, and the question presented on the appeal is whether the language of the decree, to wit, "exceptions, reservations, and conditions contained in deed recorded in Book 5018, page 203, of Deeds," to which as declared by the decree, the land was subject, is sufficiently broad to include all of the valid and existing covenants, exceptions, reservations, restrictions, conditions, and liens contained in the deed executed by defendant to one Agnes H. Brown, whose title and interest in the lot was by the administratrix of her estate conveyed to applicants. The "deed recorded in Book 5018, page 203, of Deeds" was dated May 22, 1912, and among other provisions contained therein was a covenant on the part of the grantee to pay the grantor \$5 per year for each lot described in the conveyance, which sum, with like payments to be contributed by other lot owners in the district, should constitute a fund devoted to the care, maintenance, and replanting of street trees, repair and upkeep of street curbs and sidewalks, and to otherwise keeping up and beautifying the district as far as possible with the fund derived from such source. It was further provided in the deed that the obligation to make such payments should terminate whenever said lot should be permanently occupied, and in any case at the expiration of ten years from January 1, 1911, or, at the option of the grantor, at any time after four years from January 1, 1911, followed by an express provision that "the above sum agreed to be paid shall be and remain a lien upon the land hereby conveyed until paid."

[1] By section 2872, Civil Code, a lien is defined as "a charge imposed in some mode other than by a transfer in trust upon specific property, by which it is made security for the performance of the act." It is created by contract of the parties, or by operation of law. Section 2881, Civ. Code. By acceptance of a deed the grantees not only promised to pay the \$5 per lot, but by contract in the language quoted created a lien upon the property as security for its payment. We may readily concede, as claimed by respondents, that the covenant cannot be construed as a restriction, condition subsequent, or exception the compliance or noncompliance with which could work a forfeiture of the estate. As in other cases of lien, the remedy of the lienor upon nonperformance of the covenant would be an action of foreclosure. Since the deed containing the covenant imposing the charge upon the lot was recorded, subsequent purchasers of the land must be held to have taken title upon constructive notice of the fact that the lien not only existed, but that, subject to permanent occupancy or bar of the statute of limitations, it would continue until the sum agreed to be paid was liquidated. *Van Loben Sels v. Bunnell*, 120 Cal. 680, 53 Pac. 266; *Fresno*

Canal & Irrigation Co. v. Rowell, 80 Cal. 114, 22 Pac. 53, 13 Am. St. Rep. 112.

[2] While it appears that appellant has not enforced the collection of said sums, no waiver of the provision on its part is shown, nor any action had the effect of which would, as to the whole obligation, terminate or extinguish the lien; and, since by the covenant the property was made the subject of a lien to secure the payment of \$5 per year, the decree, in the absence of any showing by respondent, should in express terms, as provided in section 15 of the act, have established the amount thereof not barred by limitation and declared the same to be a lien and incumbrance upon the land, subject to which it should have been ordered registered.

What is said upon this point is likewise applicable to the lots designated herein as No. 2, title to which is vested in Samuel Andrus, and the lot designated as No. 3, title to which is vested in the Boulangers, as to each of which lots the grantees thereof covenanted to pay \$5 per annum, and wherein, as in the *Hutton case*, it was stipulated that until paid such sums should, subject to the conditions therein expressed, constitute a charge and lien upon the lot or lots so conveyed.

[3] In application No. 2 the deed conveying the lots to Samuel Andrus contained a number of restrictive provisions for the violation of which it was agreed the title of the grantee should cease and revert to the appellant as grantor, and subject to some of which provisions title to the lots was registered in the name of Andrus. The deed also contained a provision, designated "I," that a breach of any or either of said conditions, or any re-entry by reason of the breach thereof, should not defeat or render invalid the lien of any mortgage or deed of trust made in good faith for value as to said land and the improvements thereon. The purpose of this provision clearly expressed was to protect innocent parties, as holders of liens based upon mortgages or deeds of trust, from the penalties imposed upon owners of the property for breach of the conditions. That, in addition to the restrictions subject to which the lots were ordered registered, the decree should also have ordered the registration of the property subject to the covenants and provisions designated "I" in the deed, appears to admit of no question, and respondent offers no argument in justification of the action of the court in declaring the same inoperative and of no effect.

[4] It appears that title to lot 9 in block 20, herein designated as No. 3, was registered in the name of Adolph John Boulanger, to whom title was conveyed by Samuel Andrus, who acquired the property under a deed from appellant, which deed was recorded in Books of Deeds, No. 6194, at page 44. This deed contained a number of conditions, re-

strictions, and reservations, but, instead of registering the lot subject thereto, the title was by the decree ordered to be registered in the name of Boulanger, subject to "exceptions and reservations as contained in deed recorded in Book 6081, page 307, of Deeds," which deed, it is conceded by both parties, is not in the chain of title for the reason, as stated, the title of applicant was under another and different deed recorded in Book 6194, at page 44, to which reference was made by the court in properly ordering registration subject to the provisions contained therein under which it was agreed the title should, in case of the vending of intoxicating liquors upon the lot, be forfeited. In thus registering the title subject to the conditions, exceptions, and reservations contained in a deed which was no part of the chain of title and under which Boulanger made no claim to the property, and in the absence of any evidence to warrant it, the court erred.

[5] As we understand counsel for appellant, his objection to the decree, in so far as it applies to lot 848, tract 1000, which we have designated No. 4, is that, while the decree declared title to the lot was subject to "forfeiture of title if intoxicating liquors are vended thereon, as set forth in deed recorded in Book 4351, page 813, of Deeds," such deed is not in the chain of title, and there is no evidence whatever tending to show that the title was conveyed subject to the provisions contained therein. These facts are conceded by respondent, who suggests, however, that the court correct the error by inserting in lieu of the deed so referred to the words "deed recorded in Book 6081, page 307." For obvious reasons, the court has no power to make such change in the findings and decree. The deed under which the applicant for registration held title to the lot was recorded in Book 6081, at page 307, and, subject to the exceptions and reservations contained therein, title to the lot was ordered to be registered in the name of Adolph John Boulanger and Lillian Maude Boulanger, as joint tenants; it being declared, however, that conditions and restrictions numbered 2 in said deed are void.

[6] The conditions in No. 2 of said deed contained a provision that "no part of said premises shall ever at any time be used for the purpose of buying, selling, or handling intoxicating liquors," and that for the breach of such condition the premises should revert to the grantor, its successors and assigns. We perceive no reason why the court should have declared the provision void, and respondent has offered none. He suggests, however, that the reference made in the decree to condition No. 2, which the court declared void, should in fact have referred to another and different provision which the court intended by the decree to declare void. While this deed provided that a breach of

the conditions should cause the premises to revert to the grantor, it further provided that such provision should not defeat or render invalid the lien of any mortgage or deed of trust made in good faith for value as to said land and the improvements thereon. What is said upon this point as to application No. 2 herein is likewise applicable to lot 848 in tract 1000.

[7] Appellant also insists that the registration of the title to lot 9, block 20, No. 3, hereinbefore referred to, should have been made subject to certain rights of way for the erection, construction, and operation of pole lines, conduits, and pipe lines for the transmission of electric energy and for telephone and telegraph lines and gas mains, of a width of four feet, and also subject to the reservation of all minerals, oils, natural gas, etc. (not for the purpose of mining the same by the grantor in the deed, but to prevent the exploration or use of said land for the discovery and production of such commodities), as well as other rights of way reserved from the operation of the deed, and all mentioned in deed recorded in Book 6081, page 307. Since, however, any action of the court in regard to title to this property was, as hereinbefore stated, based upon the erroneous reference to a deed other than that under which the applicant claimed title, we do not feel called upon to discuss or determine an abstract question not before the court and as to which upon a retrial a decision may be rendered in accordance with the law applicable thereto.

[8] Counsel for respondent very properly suggests that the deeds under consideration "are well calculated to confuse, and the brief of appellant has not served to any great extent to clarify the confusion." We fully concur in this statement, and may add that what is said concerning appellant's brief is equally applicable to that of respondent. The petition for registration contained the application of a number of owners claiming property under different deeds, which deeds, while being of great length and containing many provisions relating to reservations, liens, restrictions, and exceptions, and while in some respects containing like provisions, were nevertheless different in wording. Each of them was made the basis of a distinct application for registration of title to the lot therein referred to. The decree presented is in terms ambiguous and uncertain in meaning. No doubt some of the liens for the annual payment of \$5 against the lots are barred by the statute of limitations. Some of the restrictions have expired by limitation. Some of the provisions binding upon owners do not apply to innocent mortgagees and holders of liens under deeds of trust. Since the purpose of the proceeding is, so far as possible, to simplify the title and eliminate questions that no longer affect it, the decree should in plain,

explicit, and unmistakable terms set forth the conclusion of the court thereon. While under the act reference may be had to records of deeds, nevertheless, as to a title which, as here, under the deeds is limited and qualified by so many covenants contained therein, the purpose contemplated would be far better subserved if the decree in specific language set forth the conditions, restrictions, reservations, and liens to which the court found the title to be subject, rather than by reference. We are fully cognizant that in discussing the case, in the absence of material aid from counsel, we may have omitted questions involved in the jumbled record presented. However this may be, we are clearly of the opinion that the judgment appealed from should, for the reasons given, be reversed.

The judgments, in so far as they affect the lots in question, are reversed.

We concur: CONREY, P. J.; JAMES, J.

KELLIHER v. FITZGERALD et al.
(Civ. 2188.)

(District Court of Appeal, Third District, California, Oct. 5, 1921. Rehearing Denied Nov. 4, 1921. Hearing Denied by Supreme Court Dec. 1, 1921.)

1. Pleading §19—Complaint, alleging damage to property, held not reversible for ambiguity.

In an action for abatement of nuisance, injunction, and damages, a complaint, alleging that as a result of washing, cutting, and silting of plaintiff's lands they have become, are, and will be more expensive to plow, harrow, sow, crop and harvest, and thereby their economical use has been diminished and damaged to plaintiff's damage in the sum of \$1,000, is not so ambiguous as to justify reversal.

2. Waters and water courses §179(4)—Evidence of sources, character, and extent of injuries of damage to land held sufficient to support a verdict.

In an action for abatement of nuisance, injunction, and damages, testimony as to the sources, character, and extent of the injuries to land and as to amount of damages held sufficient to support a verdict for damages.

3. Trial §395(5)—Finding of court held to be on material issues.

In an action for abatement of nuisance, injunction, and damages, where the complaint alleged the existence of certain depressions called swales, Nos. 1, 2, and 3, which was denied in the answer, the finding of the court that the evidence was sufficient to support the allegations of the complaint as to the existence of the swales is a sufficient finding on material issues.

4. Waters and water courses §179(6)—Finding that water flowed from lands to other lands held equivalent to a finding that the first lands were higher.

A finding that surface waters under normal conditions flowed from the lands of defendant across the lands of plaintiff is a finding of ultimate fact, and is equivalent to a finding that defendants' land is higher than plaintiff's land.

5. Appeal and error §1011(1)—Finding of trial court is conclusive as to point where evidence is in conflict.

The appellate court is bound by the finding of the trial court as to points concerning which the evidence is in conflict.

6. Judgment §255—No special evidence necessary to support judgment that defendants in action to abate nuisance shall fill in an excavation.

In an action for abatement of nuisance, injunction, and damages, no special item of evidence is needed to support the judgment that the defendant shall fill an excavation, since when the court found that the nuisance had been created by the act of defendants, it followed as conclusion that plaintiff was entitled to have it abated.

7. Waters and water courses §179(6)—Finding that water did not affect course of drainway held not contrary to a finding that increased overflow damaged farm land.

In an action for abatement of nuisance, injunction, and damages, where the chief injury resulted from the water overflowing over the farming land, and washing, cutting, and otherwise injuring the same, the finding that the water did not widen, deepen, or change the course of a drainway, as alleged by plaintiff, is not contrary to a finding that the increased flow caused by the nuisance damaged his farm land.

8. Waters and water courses §179(6)—Judgment, directing defendant to maintain waterway at a certain depth, held erroneous.

In an action for abatement of nuisance, injunction, and damages, a judgment, directing the defendants to maintain a waterway across plaintiff's land, so that it would not have dimensions exceeding certain specified width and depth, since it makes defendants responsible for damage by natural causes or third person, is erroneous.

On Petition for Rehearing.

9. Appeal and error §931(1)—Findings of trial court are, if possible, to be reconciled so as to support the judgment.

On appeal, findings of the trial court must, if possible, be reconciled so as to support the judgment.

Appeal from Superior Court, Stanislaus County; E. N. Rector, Judge.

Suit by D. E. Kelliher against Nora Fitzgerald and others. From judgment for plaintiff, defendants appeal. Modified and affirmed.

Newton Rutherford, of Stockton, and Hatton & Scott, of Modesto, for appellants.

A. H. Ashley, of Stockton, and Griffin, Carlson & Boone, of Modesto, for respondent.

PER CURIAM. The court granted a rehearing of this case mainly for the purpose of further considering the claim of the appellants that the findings are hopelessly conflicting. It is earnestly insisted that finding 5 conflicts with finding 6 and other findings. We have given the matter mature consideration, and we are satisfied as the result of such examination that there is no conflict whatever between them. It is clear to us that finding 5 relates to one matter and finding 6 to another.

To understand this point fully it must be recalled that the respondent urges two causes of action in his complaint. They are not stated in separate counts, but they are quite distinct. They are:

First. That the flood waters are so diverted by the embankments of which he complains that they are thrown in volume into a drainway upon and across the premises of the respondent, and that they have washed and deepened this drainway to such an extent that he cannot plow and harrow across it as he was accustomed to do. The following quotation from paragraph 25 of the respondent's complaint will make this plain:

"That upon plaintiff's said lands adjoining said Fitzgeralds there is no marked depression or swale and, with the exception of said above drainway, the same were, prior to said flooding thereof, practically level for approximately a mile or more west of said boundary or division line; that said unusual surface waters so in the spring of 1918 forced thereon and thereafter by said acts of said Fitzgeralds flowed over said portion of said section 1 until they reached said drainway in the westerly portion of said triangle; that such waters then followed substantially the said course of said drainway, and so frequently and irregularly cut, washed, deepened, widened, or changed the same and so carried the soil therefrom throughout most of its entire length that it is and was thereafter and will hereafter be impossible or imprudent to plow or drill the said lands through which said drainway meandered, except by plowing on either side of said enlarged and deepened drainway," etc.

The issue tendered by this allegation is met and covered by finding 5. It will be noted that the court found against the respondent as to this cause of action, and in so doing it employed the language found in that finding.

The second and principal cause of action stated by respondent relates to the injury inflicted by flood waters in spreading out upon and over his farming lands and destroying the crops growing thereon.

The court determined this issue in favor of the respondent, and awarded damages

and preventive relief. It awarded, also, certain mandatory relief, which will be noticed further along.

We find no ground for reversing the judgment. On the contrary, we adhere to the views expressed in the opinion filed herein on the former hearing as prepared by Judge Prewett, presiding justice pro tem., and we hereby adopt the same as the opinion of the court. Correcting a trifling typographical misprision, said opinion is in the following words:

"Action for abatement of nuisance, injunction, and damages. It is averred that the alleged nuisance consists of embankments and excavations constructed in the years 1916 and 1917, and since maintained by the defendants, thereby causing the surface waters to flow in increased volume from lands of the defendants to the adjoining lands of the plaintiff to his damage in the sum of \$11,500. The answer traverses all the allegations of the complaint. The plaintiff had judgment abating the nuisance, prohibiting its future maintenance and relief by way of damages in the sum of \$200. The evidence in the case is unusually voluminous, and is emphatically contradictory on every contested point. The evidence, together with the briefs and other papers, fills about 1,700 pages. In addition, about 80 photographs and several maps accompany the transcript.

"The defendants appeal from the judgment and assign various alleged errors, some of which invite only a passing notice. The pleadings are unusually lengthy. In fact, they leave nothing to be desired in the way of prolixity of detail. The complaint, reduced to its lowest terms, is simply an allegation that the defendants, by the construction and maintenance of two embankments and the excavation of a ravine beyond its normal dimensions, have thereby caused the surface waters to flow across and injure the lands of the plaintiff, instead of flowing, as they would under normal conditions, across the lands belonging to themselves. The various assigned errors may be summarized as follows:

"(1) Overruling the demurrer to the complaint; (2) contradictory findings; (3) no evidence of damages to the amount of \$200; (4) error in admitting proof of damages; (5) failure to find on material issues; (6) finding No. 4 not supported by evidence; (7) a portion of the judgment unsupported by evidence.

[1] "The only point urged on demurrer is that the complaint is ambiguous and uncertain as to a certain allegation which reads as follows: 'That as a result of said washing, cutting, and silting of plaintiff's said lands, same have become, are, and will be more expensive to plow, harrow, sow, crop, and harvest, and thereby their economical use has been diminished and damaged to plaintiff's damage in the sum of \$1,000.' We think this allegation is not so obnoxious to the rule requiring certainty and freedom from ambiguity as to justify a reversal.

"The point as to contradictory findings will be passed until we shall have noticed the other ground urged by defendants.

[2] "It is insisted that there is no evidence of the injury on account of which the court allowed \$200 by way of damages, and no evi-

dence as to the amount of injury wrought. But the testimony of the plaintiff given under objection by the defendants is quite full upon this point.

"He stated the sources, character, and extent of the injuries and gave an estimate of his damages at \$1,000. The point is not well taken. The fourth ground is practically a repetition of the third, and is answered by what is said with reference to that point.

[3] "In the fifth ground, it is claimed that the court failed to find on material issues. The complaint alleged the existence of certain depressions on the ground designated as swales, Nos. 1, 2, and 3. This was denied in the answer. Assuming for the moment that this is a material issue upon which the court was required to find, it will be seen that the court did find as follows: 'That the evidence is insufficient to support the allegations of plaintiff's complaint as to the existence of swale No. 1, swale No. 2 and swale No. 3.' This is sufficient, especially as to a probative fact like this.

"In the sixth point, the court is asked to reverse the judgment on the ground that finding No. 4 is not supported by the evidence. This finding purports to give the maximum dimensions of the waterway in question, and it is claimed that there is no evidence upon this point. But in this position, counsel are in error. A vast amount of testimony throughout the trial dealt, in one way and another, with this waterway and its depth, width, meanderings, and general course. It would be unprofitable and needless to undertake to quote it in detail.

[4] "In the same connection it is claimed that the court failed to find that the lands of the appellants are higher in elevation than those of the respondent. But the court did find that the surface waters, under normal conditions, flow from the lands of the appellants upon and across the lands of the respondent, and it must be conceded that even in the locality in question water under normal conditions flows down hill. Besides, the respective elevations are probative facts. The ultimate fact is the flow of the water.

[5] "As to all these points the evidence is by no means all one way, and this court is bound by the finding of the trial court. We find no fault with his conclusions. On the contrary, they appear to be fully supported by the record.

[6] "It is urged that a portion of the judgment is not supported by the evidence. The portion thus excepted to provides that the excavation made by the defendants, be 'by said defendants, at their own cost and expense, forthwith filled in, repaired and corrected,' etc. No especial item of evidence is needed to support such a provision. When the court found upon sufficient evidence, that the nuisance had been created by the act of the defendants, it followed as a conclusion therefrom that the plaintiff was entitled to have the nuisance abated. The provision objected to is proper.

[7] "There remains for consideration only the second point. This requires a little more extended notice. It is claimed that finding numbered 5 is contradictory of other findings, and especially of finding numbered 6. Finding 5 is in the following words:

"(5) That the quantity of water so thrown upon and flowing over said lands of plaintiff (which quantity, but for said excavations, embankments, etc., would have flowed upon and over said 249.67 acres of defendants), did not frequently, irregularly, or at all appreciably up to the present time cut, wash, deepen, widen, or change the said course or the drainway across any of said lands of plaintiff and carry soil therefrom throughout much of its entire length of said two miles; that said channel, unless corrected, will result in the more rapid passage of said waters and in the increase of the water flowing upon and across plaintiff's lands."

"(6) That said excavation, said construction of said embankments, etc., was done by defendants without right and without plaintiff's consent and against his will; that as a result of said washing and said cutting of plaintiff's lands in March, 1918, the same became, are, and will be more expensive to plow, harrow, sow, crop, and harvest; that thereby their economical use has been and is diminished and damaged in the sum of \$200. That the said work by the said defendants on said 249.67 acres has resulted and will result in throwing more water on plaintiff's lands than otherwise has or would naturally have flowed to or come upon the same; that said water so thrown upon plaintiff's lands has done damage to plaintiff's lands, and has damaged the economical value or use thereof."

"It will be seen that finding 5 relates to one matter and finding 6 to quite another. The former finds that the waters unlawfully thrown upon the lands of the plaintiff 'did not * * * cut, wash, deepen, widen, or change said course or the drainway across any of said plaintiff's lands,' etc. The apparent meaning of this is that the waters did not enlarge the drainway, thereby committing little or no injury. The chief injury would have resulted, and did result, from spreading the waters out over the farming land and washing, cutting, and otherwise injuring the same. Finding 5, while infelicitous, is not contradictory of the other findings.

[8] "It is urged that a portion of the judgment is erroneous, in that it directs the defendants to 'maintain' the waterway so as not to have dimensions exceeding a certain specified width and depth. This provision should be stricken out. Elsewhere in the judgment it is provided that the defendants be 'forever enjoined and restrained from deepening or widening said waterway.' While they are properly restrained from deepening or widening the waterway, they should not be commanded to maintain it as against the operation of natural conditions for which they are not responsible. Floods, the acts of third parties, or other causes might, without the fault of the defendants, operate to widen or deepen it."

The last point discussed in the foregoing opinion demands a little further attention at our hands. In its judgment, the trial court decreed that the appellants "maintain" the excavation at its reduced dimensions. This mandate appears to extend through all future time, and it imposes a hardship upon appellants which they should not be compelled to bear. They are, of course, responsible for

their own injurious acts, and the court has properly restrained them from a repetition or continuance of them; but upon no principle of equity should they be compelled to anticipate or correct the effect of agencies or causes over which they have no control. They are restrained from widening or deepening the excavation, and thus far the judgment is proper. But natural causes, such as floods, long-continued storms, cloudbursts, and other natural agencies, may widen or deepen the excavation; or it may be done by third persons without the consent or co-operation of the appellants. The respondent asks us to refrain from excising these mandatory parts from the judgment. We cannot accede to this view. It is presumed that the respondent was awarded the proper sum as damages for all injuries actually inflicted, or which must inevitably ensue. For any other injuries that may be inflicted in the future, he must depend upon his preventive relief or upon such other action as may be available to him.

The judgment is modified by striking therefrom the following words: "And that the same be by defendants, at their own cost and expense, so maintained as not to have dimensions exceeding those above mentioned and provided for," and also the following words: "And maintain" as last used in said judgment. As thus modified, the judgment is affirmed, the respondent to recover his costs of this appeal.

On Petition for Rehearing.

PER CURIAM. In response to appellant's petition for rehearing we may state that there is an inaccuracy in the following italicized portion of our opinion:

"The second and principal cause of action stated by respondent relates to the injury inflicted by flood waters in spreading out upon and over his farming lands and *destroying the crops growing thereon.*"

The damage was not to *growing crops*, but it was caused by the additional expense that would be incurred in cultivating the land and harvesting a future crop. There was some evidence to support the finding in that respect.

[§] As to the supposed conflict between findings 5 and 6 we must remember that, if possible, findings are to be reconciled so as to support the judgment. While the expression in finding 6, "said washing and said cutting," standing alone, might be construed as referring to the "drainway" mentioned in finding 5, yet when the entire finding, No. 6, is read in connection with finding No. 7, it is not difficult to determine that it was intended to embrace the damage caused by the overflow of the flood waters.

The petition for rehearing is denied.

PEOPLE v. SINDICI. (Cr. 970.)

(District Court of Appeal, First District, Division 1, California. Sept. 12, 1921. Hearing Denied by Supreme Court Nov. 10, 1921.)

1. Criminal law §371(5), 661—Evidence of other forgeries admissible notwithstanding offer of admission by accused.

In prosecution for forgery of an indorsement, evidence of other forgeries was admissible to show criminal intent, and the prosecution was not required to accept an offer of accused to stipulate that whoever wrote the indorsement in question did so with intent to defraud.

On Hearing in Supreme Court.

2. Criminal law §371(5), 372(12)—Evidence of other forgeries admissible to show intent or common scheme.

In a prosecution for forgery by timekeeper of name of mythical employee, court properly admitted in evidence a number of other checks payable to fictitious persons to show criminal intent, and also a common scheme or plan embracing two or more unlawful acts so related that proof of one tended to establish the other.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Annito Sindici was convicted of forgery, and appeals. Affirmed in District Court of Appeal, and hearing denied in Supreme Court.

John J. Greeley and Theodore A. Bell, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and John H. Rioridan, Deputy Atty. Gen., for the People.

KERRIGAN, J. This is an appeal from the judgment and from an order denying defendant's motion for a new trial upon conviction of forgery.

The defendant was charged with having forged the name "L. Corvina" as an indorsement upon a pay check of the California Packing Corporation purporting to have been issued on the 10th day of April, 1919, to L. Corvina in the sum of \$21.55. The information also charged the defendant with having uttered and passed the alleged forged instrument, but there was no evidence to support this portion of the charge, and the court so instructed the jury. Thus the only issue finally submitted to them was as to whether or not the defendant forged the above-mentioned indorsement.

The defendant at the time of the alleged forgery was employed as a timekeeper of the North Beach plant of said California Packing Corporation. There was also employed at the same time and place Elia Calpestri as bookkeeper, and one Giuseppe Rinaudo as assistant timekeeper; and the evidence tended to show that the forgery

was the result of a conspiracy among these three persons to defraud said corporation. It appears that they placed upon the company's pay roll fictitious names, issued pay checks in the names of such fictitious persons, which they indorsed and cashed, dividing among them the money thus obtained. One of these checks was indorsed in the name of L. Corvina, a mythical employee.

During the trial, and notwithstanding that the defendant offered to stipulate that whoever wrote the said indorsement did so with intent to defraud the purported maker of the check, the court, against the objection of the defendant, admitted in evidence a number of other checks payable to fictitious persons issued about the same time as the one forming the basis of the charge, and indorsed by the defendant. The appellant contends that it was error to admit evidence of these other forgeries for the reason that under the circumstances of this case they came within none of the exceptions to the settled rule that in a prosecution for a particular offense evidence of other independent offenses is irrelevant. On the other hand, the prosecution argues that the questioned evidence falls within two of the established exceptions to the general rule stated, namely, to show intent, and also to show a common scheme or plan embracing two or more unlawful acts so related that proof of one tends to establish the other.

We think the evidence was admissible under either or both of these exceptions.

There are cases where proof of the commission of the act charged implies indubitably criminal intent. In such cases it is generally held that evidence of wrongful intent is inadmissible. 8 R. C. L. § 200, p. 206; 1 Jones on Ev. § 143. In certain other classes of offenses the criminal intent is not necessarily inferable from the mere commission of the act charged, so that the prosecution is compelled to resort to other proof to establish such intent. Frequently this proof takes the form of evidence of other similar acts, which rebuts the inference of mistake or inadvertence. In the case at bar the defense was a general denial; and one of the facts essential to be established in order to warrant a conviction was the felonious intent with which the indorsement was made. For this purpose evidence of other similar offenses committed about the same time was admissible to establish the criminal intent. Sykes v. State, 112 Tenn. 572, 82 S. W. 185, 105 Am. St. Rep. 972.

In the case of *People v. Molineux*, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193, the court said:

"There are cases in which the intent may be inferred from the nature of the act. There are others where willful intent or guilty knowledge must be proved before a conviction can be had. Familiar illustrations of the latter rule are to

be found in cases of passing counterfeit money, forgery, receiving stolen property, and obtaining money under false pretenses. An innocent man may, in a single instance, pass a counterfeit coin or bill. Therefore intent is of the essence of the crime, and previous offenses of a similar character by the same person may be proved to show intent. [Citing cases.] So in a case where the defendant is charged with having received stolen property guilty knowledge is the gravamen of the offense, and scienter may be proven by other previous similar acts. [Citing cases.] In cases of alleged forgery of checks, etc., evidence is admissible to show that at or near the same time that the instrument described in the indictment was forged or uttered the defendant had passed, or had in his possession, similar forged instruments, as it tends to prove intent."

In the class of cases referred to as constituting an exception to the general rule evidence is admitted to show guilty knowledge, or intent of the defendant, and especially so where there is a question whether the act was accidental or intentional, since the fact that the act formed part of a series of similar occurrences in each of which the defendant was concerned is relevant as characterizing the act. *State v. Brady*, 100 Iowa, 191, 69 N. W. 290, 36 L. R. A. 693, 62 Am. St. Rep. 560. Likewise in trials for arson or embezzlement evidence of other contemporaneous acts of a similar character were held admissible to show intent, or to rebut the defense of accident or mistake. *Knights v. State*, 58 Neb. 225, 78 N. E. 508, 76 Am. St. Rep. 78; *U. S. v. Russell* (D. C.) 19 Fed. 591. So also in forgery cases. *People v. Bird*, 124 Cal. 32, 56 Pac. 639; *People v. McGlade*, 139 Cal. 66, 72 Pac. 600; *State v. Minton*, 116 Mo. 606, 22 S. W. 808.

[1] The evidence of the other forgeries, then, was pertinent and relevant unless, as claimed by the defendant, his admission that whoever wrote the signature on the back of the pleaded check did so with felonious intent precluded the prosecution from the right to introduce such evidence. It is said to have been substantially so held in some courts. We have no doubt, however, that the evidence being admissible the prosecution could either accept the admission or introduce its proof, as it deemed advisable. The right of the prosecution to introduce evidence to show intent could not be limited by any admission of the defendant. 8 R. C. L. § 200, p. 207. With the court in *Higgins v. State*, 157 Ind. 57, 60 N. E. 685, we say:

"We do not think that the admission of any competent evidence can be rendered erroneous by statements or admissions of the accused made to the court and jury during the trial."

But we think that the evidence was also clearly admissible to show a common plan or system. Evidence of other similar crimes is competent which tends to show a plan or design, and that the act charged was

the result of the plan. Such evidence is competent to prove the offense charged.

"Where the very doing of the act charged is in issue and is to be evidenced, one of the essential facts admissible is the person's plan or design to do the act. This plan or design itself may be evidenced by his conduct, and such conduct may consist of other similar acts so connected as to indicate a common purpose including in its scope the act charged. There is a decided difference between this use" and the one to show intent; "for there the object is merely to give a complexion to an act conceded or proved, i. e., to negative innocent intent, while here the object is to evidence a prior general plan, scheme or design, which in its turn is to evidence the doing of the act so planned." 1 Greenleaf on Ev. 72; Wigmore on Ev. § 304; People v. Ciulla, 187 Pac. 46.

Here the other forgeries were contemporaneous with the one charged in that they were committed about the same time, in the same manner, and against the same person; and the evidence of them was admissible for the purpose of showing that the offense charged was a part of a scheme to defraud the California Packing Corporation.

In State v. Marshall, 77 Vt. 262, 59 Atl. 916, evidence of fraudulently obtaining an additional sum of money from the same person subsequent to the one concerned in the charge, both acts being in pursuance of the same scheme to obtain money by falsely impersonating another, was admissible because such evidence tended to lessen the probability of defendant being innocent of the crime charged.

In Trimble v. State, 66 Tex. Cr. R. 207, 145 S. W. 929, evidence of the "salting" by defendant of another mine involved in another transaction between the same parties was admissible to assist in making out the guilt of the defendant by a chain of circumstances connected with the act charged.

On a trial for forgery evidence of other forgeries by defendant is admissible on the issue of intent or to show system. Taylor v. State, 47 Tex. Cr. R. 101, 81 S. W. 933.

The judgment and order are affirmed.

We concur: WASTE, P. J.; RICHARDS, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. [2] The application for a hearing in this court after decision by the district court of appeal of the first appellate district, division one, is denied for the reason that evidence objected to of the commission of similar offenses by defendant was clearly admissible on the ground stated by the district court of appeal that such evidence tended to prove such similarity of plan or system in committing the other acts as to indicate that the offense charged was likewise the act of this defendant, but we

express no opinion on the other ground for its admission stated by the district court of appeal.

SLOANE, SHURTLEFF, SHAW, and WILBUR, JJ., concur.

BELLONE v. KLEINAU. (Civ. 3376.)

(District Court of Appeal, Second District, Division 2, California. Oct. 4, 1921.)

1. Landlord and tenant \S 48(1)—Complaint by lessee to rescind surrender of lease held to state cause of action for value of fruit.

In a suit by a lessee induced to surrender the premises by a false representation that they had been sold, complaint held to state a cause of action for the value of fruit taken by the lessor on the theory that he had repudiated and rescinded the surrender of the premises.

2. Landlord and tenant \S 48(2)—Tenant induced to surrender premises by misrepresentation entitled to recover the property and crop of fruit or its value.

Where a lessee, induced to surrender the premises by a false representation that they had been sold, repudiated and rescinded the transaction, he was entitled to recover the premises and the fruit growing thereon, and where the fruit had been sold by the lessor to an innocent purchaser to recover its value, notwithstanding the general rule that a defrauded party cannot both rescind and recover damages.

3. Appeal and error \S 994(3)—Credibility of witnesses and truth of testimony is for trial judge, unless record demonstrates falsity.

The credibility of the witnesses and the apparent inconsistencies between their testimony and the admitted facts ordinarily fall within the exclusive province of the trial judge, and his findings may not be reversed unless the record demonstrates that in the very nature of things the testimony of a witness cannot be true.

4. Landlord and tenant \S 48(1)—Evidence held to support findings that one inducing surrender of lease and selling crop was landlord's agent.

In an action by a lessee induced to surrender the premises by a false representation that they had been sold, evidence held to support findings that a real estate agent making such representation, and, after the surrender of the premises, selling the fruit thereon, was the landlord's agent and had authority from her.

5. Landlord and tenant \S 48(1/2)—Representation inducing surrender of lease held false, and lessor charged with knowledge of falsity.

Where a lease provided for termination upon payment of liquidated damages in case of a sale of the premises, a representation

by the landlord's agent that the premises had been sold was false, and the landlord was charged with knowledge of its falsity where she had never accepted the prospective purchaser's terms, but had insisted upon different terms.

6. Evidence §241(1)—Evidence of representations by agent admissible where there was evidence of agency and authority.

In an action by a tenant, induced to surrender the premises by the false representation of the landlord's agent that they had been sold, evidence as to statements of the agent was admissible, where his agency and authority were shown by other evidence.

7. Landlord and tenant §48(1/2)—Lessee, attempting to rescind surrender of premises, held to have made sufficient offer to restore everything received.

Where a lease provided for termination in case of a sale of the premises on payment of liquidated damages, and, in such case released the lessee from liability for rent, and the lessee was induced to surrender the premises by a false representation that they had been sold, and thereafter attempted to repudiate such surrender, a letter written the lessor, expressing his willingness and ability to return the liquidated damages and the rent, to which the landlord would be entitled on repudiation of the transaction, was a sufficient offer to restore everything received under such transaction.

8. Appeal and error §205—Error in exclusion of evidence as to conversation not shown when no attempt made to show nature of conversation.

Error in the exclusion of a question as to whether a witness had any other conversation with a certain person was not affirmatively made to appear, where there was no attempt to show the nature of the conversation that defendant expected to prove by the witness.

9. Appeal and error §1032(1)—Judgment not reversed unless prejudicial error affirmatively shown.

A judgment will not be reversed unless prejudicial error be shown affirmatively.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by Sam Bellone against Lena Kleinau. From a judgment for plaintiff, defendant appeals. Affirmed.

C. W. Pendleton, of Los Angeles, for appellant.

Fred W. Morrison, of Los Angeles, for respondent.

FINLAYSON, P. J. Defendant, who owns a small ranch in Los Angeles county, leased the property to plaintiff for the term of nine months, commencing February 1, 1919. Plaintiff, as the lessee, immediately entered into possession, and remained on the land until May 28, 1919, when, by reason of the false representation of defendant's agent, he

was induced to surrender possession of the ranch and of the fruit crops growing thereon. The lease contains the following clauses:

"The party of the second part [the lessee, who is the plaintiff in this action] agrees to pay to the party of the first part [the lessor, who is the defendant here] the sum of \$500 [as rent] on the first day of June, 1919, provided, however, that the said party of the first part [the lessor] reserves unto herself the right to dispose of said property at any time prior to said first day of June, 1919, and in the event that the property is so sold and in the further event that the purchaser shall require possession of said property prior to the said first day of June, 1919, then, in that event, the party of the second part [the lessee] agrees to deliver possession of said premises to the said purchaser, after receiving from the said party of the first part [the lessor] the sum of \$250 as liquidation damages for his work and labor on said premises; and in said event said second party [the lessee] is hereby relieved from the payment of the \$500 hereinabove specified. Should the premises not be sold, then the crops raised on said premises shall be the sole property of said party of the second part."

Some time prior to June 1, 1919, defendant instructed one Peckham, a real estate agent, to sell the property for \$8,250, \$2,250 to be paid in cash at the date of sale, and the balance, \$6,000, within four years. Thereafter, and on or about May 16, 1919, Peckham received from one Erickson an offer to purchase the property for said sum of \$8,250. Erickson paid Peckham \$100 down, and offered to pay the balance as follows: \$850 in cash as and when the sale was consummated, \$1,500 to be allowed for the fruit on the ranch, and the balance, \$6,000, to be paid in six years. Peckham, whose authority to sell was oral, communicated to defendant the terms of Erickson's offer. She, however, refused to accept the offer, insisting that the balance of \$6,000 be paid in four, not six, years. The result is that there never was any unconditional acceptance of any unconditional offer, and therefore no consummated agreement to sell. This notwithstanding, Peckham, on or about May 28, 1919—while the negotiations with Erickson were pending and when it appeared that a sale of the property might be consummated—told plaintiff that the property had been sold, and induced him to accept the \$250 which, in her lease of the premises, defendant had agreed should be paid to plaintiff in the event that the property should be sold prior to June 1, 1919. At the same time, plaintiff signed and delivered to Peckham a written assignment of his interest in the lease. When this assignment was delivered by plaintiff to Peckham, it did not contain the name of any assignee. Subsequently Peckham filled in his own name as the assignee. At about this time Peckham obtained from defendant a similar assignment

of her interest in the lease. It is a fair inference that plaintiff and defendant each supposed that Peckham was procuring these assignments for the benefit of Erickson, who then appeared to be a prospective purchaser of the property, and that they were executed in the belief that thus delivery of possession to Erickson would be insured. Thereafter, on May 28, 1919, Peckham sold the fruit on the property to one Mastripolito for the sum of \$1,500. Later, defendant accepted a part of the proceeds of this sale, paid to her by Peckham pursuant to a previous understanding. Mastripolito appears to have been a bona fide purchaser of the fruit.

About June 4, 1919, plaintiff discovered that defendant had not accepted Erickson's offer to purchase the ranch, and that the property had not been sold. Accordingly, on July 5, 1919, he caused to be delivered to defendant a letter in which, after stating his readiness to return to defendant the \$250 that he had received from her agent, Peckham, and to pay the rent of \$500, which, under the terms of the lease, became due on June 1, 1919, he demanded repossession of the leased property, and that there be delivered to him the fruit on the ranch, or, in the event that it had been sold, the amount that defendant had received for it. Defendant disregarded this letter, and shortly thereafter this action was commenced. The lower court found the value of the fruit to be the amount for which it had been sold to Mastripolito, namely, \$1,500, and gave plaintiff judgment for \$750, being the amount of the proceeds of the sale of the fruit less the \$250 and the \$500 that respectively, became due to defendant from plaintiff upon the latter's rescission of the transaction whereby he had been induced to surrender his lease. From this judgment defendant appeals.

Appellant contends: (1) That the amended complaint—hereafter referred to simply as the complaint—does not state a cause of action; (2) that the evidence is not sufficient to sustain certain of the findings; and (3) that the court erred in the admission and likewise in the rejection of certain items of evidence.

[1] We think the complaint states a cause of action for the relief prayed—the recovery of a money judgment. After setting forth a copy of the written lease whereby defendant, as the lessor, had leased the ranch to plaintiff, as the lessee, the complaint proceeds to allege, in substance, that plaintiff, upon the execution of the lease, took possession thereunder and complied with the conditions thereof; that on May 28, 1919, defendant and her agent represented to plaintiff that the property had been sold and that the purchaser required possession prior to June 1, 1919; that thereupon defendant tendered plaintiff \$250, according to the terms of that clause in the lease which we have

quoted above; that, relying upon defendant's said representation, plaintiff accepted from the former the \$250, relinquished possession of the leased premises, and assigned his lease to defendant and her agent; that, in truth and in fact, the property had not been sold, and defendant's representation that it had been was false, as defendant well knew; that as soon as plaintiff discovered that the property had not been sold, he demanded of defendant and her agent repossession of the premises and the fruit growing thereon, and, at the same time, tendered to defendant and her agent the \$250 that had been paid to him and also the \$500 rental which the lease required to be paid on June 1, 1919, in the event that the property should not be sold prior to that date; that, though the property was not sold prior to June 1, 1919, plaintiff and her agent have taken possession thereof; that defendant refuses to deliver to plaintiff possession of the premises and the fruit; that defendant and her agent "have sold from said premises the fruit growing thereon which belonged to said plaintiff," the value whereof is \$2,500; and that by reason thereof plaintiff has been damaged in the sum of \$1,750, being the value of the fruit sold by defendant and her agent, namely, \$2,500, less the \$250 that was paid to plaintiff when he surrendered possession and the \$500 that became due from him on June 1, 1919, as the agreed rental. Wherefore plaintiff prayed judgment for \$1,750.

Appellant erroneously assumes that this action is one sounding in tort, and that respondent in suing to recover damages for the deceit practiced upon him. So assuming, she attacks the complaint upon the ground that, though a defrauded party may elect either to rescind the fraudulent transaction and recover what he may have been induced to surrender or to affirm it and claim damages, he cannot do both. Appellant's claim, to state it in her counsel's language, is that the complaint "undertakes to state a cause of action bottomed upon both rescission and damages." There is no merit in this contention. The complaint clearly proceeds upon the theory that the transaction that involved the relinquishment of possession by plaintiff and the acceptance by him of the agreed \$250 was repudiated and rescinded by him upon his discovering the falsity of the representation that the property had been sold prior to June 1, 1919. All the facts necessary to show that plaintiff had repudiated and rescinded that transaction are set forth in the complaint. And he is suing for the monetary equivalent of the fruit which defendant had put it out of her power to restore. He is suing for that equivalent, not as damages, but as a substitute for the fruit itself.

Plaintiff places much reliance upon the decision of our Supreme Court in *Westerfeld v. New York Life Ins. Co.*, 129 Cal. 68, 58

Pac. 92, 61 Pac. 667, where it is held that if the fraudulent transaction—in that case a contract of settlement or compromise—be rescinded or repudiated, an action sounding in tort to recover damages for the deceit cannot be maintained. The gist of that decision is substantially this: If the defrauded party has elected to stand upon and affirm the fraudulent transaction, then he may recover damages in an action of tort based upon the deceit, his damages being compensation for whatever loss he may have sustained by reason of having been induced to accept something of less value than that for which he had bargained. But if, instead of standing upon and affirming the transaction, the defrauded party has elected to repudiate the whole fraudulent transaction and thus entitle himself to be restored to the status quo, he can recover that which he may have transferred to the defrauding party upon making to the latter a proper offer to restore anything of value which he may have received. The defrauded party may not, however, recover the property or thing of value that he was induced to transfer to the defrauding party, and, in addition, damages occasioned by the deceit.

[2] The complaint in the instant case does not do violence to the principles announced in the *Westerfeld* Case. The facts alleged in the complaint show that plaintiff elected to repudiate and rescind, and that he has repudiated and rescinded the fraudulent transaction which resulted in his loss of possession of the leased land and the fruit growing thereon. Having thus repudiated that transaction, plaintiff became entitled to recover all the property that he had been induced to relinquish—the land and the fruit. But the complaint discloses that a valuable part of the relinquished property, the fruit, had been sold by defendant to an innocent purchaser before the action was commenced, thus revealing the fact that defendant has put it out of her power to make restitution of the fruit itself. Such being the case, plaintiff, still basing his right to relief upon his rescission and repudiation of the fraudulent transaction, is entitled to recover from defendant the money for which the fruit was sold, less the amounts due from him to defendant, namely, the \$250 that was paid to him by defendant's agent when he was induced to surrender the leased property, and the \$500 rental that would have become due from him to defendant on June 1, 1919, had he not surrendered the leased property to defendant's agent. Any money judgment that might be given upon the cause of action alleged in the complaint would be given, not in affirmance of the fraudulent transaction, but for the monetary equivalent of fruit which, as between plaintiff and defendant, belonged to the former when plaintiff rescinded the fraudulent transaction. Such monetary equivalent is recoverable, not

as damages, but as a substitute for the fruit that defendant is unable to restore. In support of our conclusion that the complaint states a cause of action and that it warrants the relief that was granted, reference may be had to the following cases—If, indeed, any authority be necessary to sustain so plain a proposition: *Sprinkle v. Wellborn*, 140 N. C. 163, 52 S. E. 686, 3 L. R. A. (N. S.) 174, 111 Am. St. Rep. 827, and *Valentine v. Richards*, 59 Hun, 619, 13 N. Y. Supp. 417, *Valentine v. Richardt*, affirmed in 126 N. Y. 272, 27 N. E. 255.

[3] It is earnestly urged that the evidence is insufficient to justify certain of the findings. This contention is based largely upon matters going to the credibility of the witnesses and to apparent inconsistencies between the statements of certain witnesses and the admitted facts. Such questions ordinarily fall within the exclusive province of the trial judge, and we may not reverse his findings unless the record demonstrates that in the very nature of things the testimony of a witness cannot be true. We have no such case here. It would serve no useful purpose to set forth the testimony in extenso or to consider in detail all of the matters as to which it is claimed the evidence is insufficient. It will suffice to consider those upon which appellant chiefly relies.

[4] It is urged that there is nothing in the evidence to show that defendant represented to plaintiff that the property had been sold. The claim is that the evidence does not show that defendant's agent, Peckham, was authorized to represent to plaintiff that the property had been sold, and that the purchaser required possession. Defendant testified that she "gave Peckham the ranch to sell; that he had the right to sell it." He had previously acted for defendant in other matters. The evidence as a whole warranted the inference that defendant had verbally authorized Peckham to do whatever might be necessary to sell the property, on terms satisfactory to her, and to put the purchaser in possession if he should succeed in selling the property on satisfactory terms. It also is a fair inference from the evidence, considered in its entirety, that defendant left to her son, as well as to Peckham, all matters connected with the sale of the ranch. She and her son testified that the son, prior to June 1, 1919, presumably with defendant's knowledge and consent and as her representative, told plaintiff over the telephone that the property had been sold, that the purchaser required possession, and that Peckham would pay plaintiff the \$250 which, by the terms of the lease, was to be paid to him in the event that the leased property should be sold before the 1st of June. It sufficiently appears, therefore, from defendant's own testimony, that through her authorized agents, Peckham and her son, she notified plaintiff that the property had

been sold, and that possession would be required by the purchaser.

[5] The evidence shows beyond all cavil the falsity of the representation that the property had been sold. There never was any meeting of the minds of defendant and the prospective purchaser, Erickson, respecting terms of sale. Erickson offered to pay the balance of \$6,000 in six years; defendant insisted upon that balance being paid in four years; the two never did come to an agreement; and Erickson's offer to purchase on the terms proposed by him never was unconditionally accepted. Therefore there never was a sale of the premises. Defendant is charged with knowledge that the property was not sold and that the representation that it had been was false. In the very nature of things, she must be deemed to have known whether or not she had sold her own property.

It is claimed that the evidence shows that Peckham, when he sold the fruit, was acting in his own behalf, or as Erickson's agent, and not for or on behalf of defendant. Upon this issue there was a sharp conflict in the evidence. There was, however, testimony sufficient to sustain the finding that defendant sold the fruit through Peckham as her agent. The receipt that was given by Peckham to Erickson for the \$100 deposited by the latter when he made his offer to purchase shows, as we interpret it, that one of the terms of the proposed sale was that Erickson would allow \$1,500 for the fruit. Peckham testified that Erickson's proposed terms of purchase were immediately communicated by him to defendant, who, therefore, must have known that it was proposed to sell the fruit for \$1,500. Indeed, Peckham testified that he told defendant that, in order to complete the deal, he would have to sell the fruit to make to Erickson the \$1,500 that the latter agreed to allow therefor. Asked why he had filled in his own name in the blank space that had been left for the name of the assignee in the written assignment of plaintiff's interest in the lease, Peckham replied:

"Because I was—I had—it was to give a bill of sale of that fruit. I was to handle the sale of the fruit. It was just a question. I had to sell the fruit for \$1,500 in order to put this sale through, and she [defendant] told me to go on and sell the fruit."

After Peckham sold the fruit he divided the proceeds with defendant pursuant to an agreement which, he testified, he had theretofore made with her. Appellant makes much of the fact that, after she and plaintiff had assigned to Peckham their respective interests in the lease, Peckham, according to testimony given by defendant and her witnesses, asserted the right under these written assignments to sell the fruit as his own. But Peckham testified:

"When I bought this lease, or took this lease from Mr. Bellone [meaning Bellone's assignment of his interest in the lease], I absolutely was acting merely for Mrs. Kleinau."

The learned trial judge, as was his privilege, evidently believed this testimony. It was sufficient for the purpose, and we, therefore, may not reverse the finding. Without further citation from the record, let it suffice to say that the evidence fully warranted the trial judge in his conclusions upon the facts in issue. Only the apparent earnestness of counsel has induced us to give more attention to this point than it deserves in view of the rule so thoroughly established by our decisions that a reviewing court may not set aside a finding if there is any substantial evidence to support it.

[6] Appellant was not prejudiced by the court's rulings on the admission and rejection of evidence. Plaintiff, over defendant's objection, was permitted to testify that, defendant not being present, Peckham told him on May 28, 1919, that the premises had been sold, and that the purchaser had demanded possession. As we already have shown, Peckham's agency and his authority to represent defendant in all matters pertaining to the sale of the premises, including delivery of possession to the purchaser, should the latter require it, was sufficiently shown by other evidence in the case. It was proper, therefore, to permit Peckham to testify to what he, as defendant's agent, told plaintiff respecting the sale of the ranch and the necessity for surrendering possession to the supposed purchaser.

[7] The court did not err in admitting in evidence the letter of July 5, 1919, from plaintiff's attorney to defendant—the letter demanding that defendant deliver to plaintiff the fruit, or pay to him the amount for which she had sold it. The claim seems to be that this letter was not a sufficient offer to restore to defendant everything of value that plaintiff had received from her under the transaction whereby he had been trapped into surrendering possession of the leased property on the supposition that it had been sold to Erickson prior to June 1, 1919. In the first place, we doubt if, under the circumstances of this case, it was necessary to offer to restore to defendant the two amounts which, on a rescission of the fraudulent transaction, should be credited to her, namely, the \$250 and the \$500, respectively. The \$1,500 that defendant and her agent received from the sale of the fruit—fruit to which plaintiff would have been entitled had it not been sold—exceeded the aggregate of the two sums which, on plaintiff's election to repudiate the fraudulent transaction and to affirm the lease contract, would be due from him to defendant. Defendant, therefore, would be required to account to plaintiff for a greater sum than the amount that was due from him

to her. But this notwithstanding, and assuming, for the purposes of this decision, that under the circumstances an offer to restore to defendant everything of value was necessary, it was not necessary that the language of the tender should conform to technical niceties. The letter of July 5, 1919, expressed plaintiff's willingness and ability to return the two sums—the \$250 and the \$500—to which defendant would be entitled upon plaintiff's repudiation of the transaction that resulted in the surrender by him of the leased premises. That was all that was required. *Mitchell v. Moore*, 24 Iowa, 394, 9 C. J. 1213.

[8, 9] Complaint is made that the court erred in sustaining an objection to a question propounded to defendant's daughter when called as a witness for the defendant. That witness, after having detailed a conversation that she had had with Peckham, was asked, "Was there any other conversation that you had with Mr. Peckham at his office?" The court sustained an objection to this question. Defendant made no attempt to show the nature of the conversation that she expected to prove by this witness, and we, therefore, cannot say that it has affirmatively been made to appear that the court erred. A judgment will not be reversed unless prejudicial error be shown affirmatively. There are other objections as trivial and unimportant as those to which we have adverted. No purpose would be subserved by a more extended reference thereto. Suffice it to say that we find no reversible error.

The judgment and order are affirmed.

We concur: WORKS, J.; CRAIG, J.

BOLLENBACH v. LUDLUM. (No. 10417.)

(Supreme Court of Oklahoma. Dec. 1, 1921.)

(Syllabus by the Court.)

1. Mortgages §401(1)—Due date of promissory note may be accelerated by clause of securing mortgage.

The due date of a promissory note payable at a fixed time may be accelerated by a clause in a mortgage or a deed of trust securing the same, providing that it shall become due before the time fixed, in the event of some other default than in its payment, for the purpose of an action upon the note and to foreclose the mortgage.

2. Mortgages §401(1)—Accelerating clause is for mortgagee's sole benefit to enforce it or not.

Such accelerating clause is solely for the benefit of the mortgagee or his assigns, who may enforce it or not at his option or election.

3. Mortgages §401(1)—Upon default accelerating clause renders entire debt due as to maker, indorsers, and guarantors.

Where, as in the case at bar, the creditor elects to enforce the accelerating clause, and action is commenced upon the note and for the foreclosure of the mortgage, the note and mortgage constitute a single contract, which must be so construed as to give effect to all its parts, and when the mortgage provides that the note shall become due upon default in the payment of any installment of interest, such default renders the note due immediately upon default and entitles the holder to maintain an action at once for the entire debt; and in such case the default also renders the paper due as respects indorsers and guarantors.

4. Bills and notes §404(1)—Where due date is accelerated by mortgage clause, note becomes due upon default, and indorsers must be notified.

In such case the note falls due upon default according to the terms of the accelerating clause, and not upon the commencement of the action, and thereupon the holder must present the same for payment and give notice of non-payment, under the Negotiable Instruments Law, in order to bind indorsers.

Appeal from District Court, Beckham County; T. P. Clay, Judge.

Action by Hulda Ludlum against Kathrina Bollenbach, executrix of the estate of Jacob Bollenbach, deceased. Judgment in favor of plaintiff, and defendant appeals. Reversed and remanded, with directions.

G. W. Cornell, of Weatherford, for plaintiff in error.

T. W. Jones, Jr., of Weatherford, for defendant in error.

KANE, J. This was an action upon a promissory note and to foreclose a mortgage given to secure the payment thereof, commenced by the defendant in error, plaintiff below, against Adolph Bollenbach, Ena Bollenbach, and Kathrina Bollenbach, executrix of the estate of Jacob Bollenbach, deceased. The note and mortgage were executed by Adolph Bollenbach and Ena Bollenbach to Jacob Bollenbach, who transferred the same to the plaintiff, indorsing his name in blank on the back of the note. Subsequent to the indorsement of the note Jacob Bollenbach, the payee, died, and Kathrina Bollenbach was duly appointed executrix of his estate, and subsequent to this, this action was commenced.

The note upon its face purported to be a straight promissory note payable approximately five years after date. The mortgage contained a provision that if the sums of money secured thereby or any part thereof or any interest thereon is not paid when the same is due, then the whole of said sum or sums and interest thereon shall become due and payable at once. The petition alleged:

(201 P.)

"That no interest has been paid upon said note, although by the terms thereof the said interest is payable annually, and that by reason thereof and by virtue of the mortgage hereinafter set forth and the agreement herein set forth the said note is now due and payable."

Upon the trial it was shown, and in this court it is agreed, that there was default in the payment of interest as alleged in the petition, and that—

"presentment for payment was never made, nor notice of dishonor was never given to said indorser, Jacob Bollenbach, deceased, nor his personal representative."

The judgment of the trial court complained of was as follows:

"It is therefore ordered, adjudged, and decreed by the court that the plaintiff Hulda Ludlum, recover of and from Kathrina Bollenbach, as executrix of the estate of Jacob Bollenbach, deceased, the sum of \$2,707.06, and that said Kathrina Bollenbach, executrix of said estate, pay in due course of administration of the estate of Jacob Bollenbach, deceased, pending in the county court of Custer county, Okla., the sum of \$2,707.06, hereby adjudged to be due the plaintiff herein, with interest at 7 per cent. from this date from the estate of Jacob Bollenbach, deceased."

It was to reverse this judgment that this proceeding in error was commenced by Kathrina Bollenbach, executrix.

In the view we take of the case it will be only necessary to notice one assignment of error, to wit:

"That the findings and judgment of the court is not sustained by sufficient evidence and is contrary to law, and that the court erred in rendering judgment in favor of defendant in error and in not rendering judgment in favor of the plaintiff in error."

Under this assignment of error it is contended that, inasmuch as the note was not presented for payment after default in the payment of the installment of interest which it was alleged accelerated the due date thereof, and no notice of dishonor was given, the plaintiff in error, who appears as executrix of the estate of the indorser of the note, is not liable thereon.

[1, 2] It seems to be reasonably well settled that the due date of a promissory note payable at a fixed time may be accelerated by a clause in a mortgage or a deed of trust securing the same, providing that it shall become due before the time fixed, in the event of some other default than in its payment, for the purpose of an action upon the note and to foreclose the mortgage. Thus the time of payment is accelerated by a provision for the maturity of the principal, on the default of the payment of an installment, of interest; or taxes, or insurance on mortgaged property, by a provision in one of a series of notes or other instruments, or in a mortgage or deed of trust securing the same,

that the entire sum shall become due and payable upon default of any one of the instruments, or by a provision in a note payable in installments that the whole shall become due upon default in the payment of any installment. When a note provides it shall become due upon default in the payment of any installment of interest, such default renders it due immediately, and entitles the holder to maintain an action at once for the entire debt. In such cases the default also renders the paper due as respects indorsors and guarantors. 8 C. J. 415.

This court has several times held that in an action on the note and to foreclose the mortgage given to secure its payment the note and mortgage are to be construed as one contract, and where the mortgage contains a provision that upon default of the payment of interest the note and mortgage become due immediately, an action may be maintained thereon. *F. B. Collins Inv. Co. v. Sanner*, 42 Okl. 634, 142 Pac. 318; *City Development Co. v. Picard*, 44 Okl. 674, 146 Pac. 31.

In the case at bar, as we have seen, the provision accelerating the due date is in the mortgage, and not in the note; the note upon its face not being due when the action was commenced.

In *Westlake v. Cooper et al.*, 171 Pac. 859, L. R. A. 1918D, 522, it was held that when the stipulation for acceleration in payment is contained in the mortgage and not in the note, the notes are evidence of the debt fixing the terms and time of its payment. The mortgage gives a lien upon real estate to secure the promise to pay contained in the note, and merely affords an additional remedy for the failure to perform such promise; its provisions relating wholly to the security.

In *Phillips v. Williams*, 38 Okl. 766, 127 Pac. 1072, it was held that the provision in the mortgage accelerating payment relates to the remedy of foreclosure under the mortgage, and that upon default the mortgage may be foreclosed for the whole debt; that the provision is for the advantage of the mortgagee and of full force as to a remedy on the mortgage, but does not operate to vary or extinguish the obligations expressed on the face of the notes themselves for general purposes.

In another case (*Alwood v. Harrison*, 171 Pac. 325) it was held that in an action upon the note alone the provision in the mortgage only operates to accelerate the time of payment of the note where a foreclosure of the mortgage is sought, and that default in the payment of interest does not accelerate the maturity of the note for the purpose of an action upon the note alone.

[3, 4] So it seems that under the authorities in this jurisdiction the holder of a promissory note secured by a mortgage containing an accelerating clause, has two alternative remedies: First, he may commence an

action on the note and to foreclose his mortgage upon default in the payment of interest, and in that event a violation of the accelerating provision has the effect of maturing both the note and the mortgage; second, he may strip the note of its impedimenta and sue upon it alone without reference to the mortgage, in which event he must treat the note as a courier without luggage, as it appears to be on its face, and be governed solely by its terms as to date of maturity.

In this action, as we have seen, the plaintiff selected the first alternative. In these circumstances it seems quite clear that under the authorities cited the note became due according to the terms of the accelerating provision of the mortgage; that is upon default in the payment of the interest. We are unable to perceive why, in these circumstances, the holder of the note should be excused from presenting the note for payment or from giving the indorser notice of dishonor. The note was always a negotiable instrument, and under the Negotiable Instruments Law presentment for payment and notice of dishonor are necessary in order to hold an indorser liable. *Westlake v. Cooper*, supra.

Indeed, the necessity for presentment for payment and notice of nonpayment is not seriously questioned by counsel for the defendant in error. He concedes the maturity of the note under the acceleration clause of the mortgage at the time the action was commenced, but contends that, the note not being due by its terms, it could not be presented for payment, and notice of dishonor could not be given until it was thereafter dishonored on presentation for payment. We do not understand that the authorities cited go to this extent. The authorities seem to hold that where, as in the case at bar, the creditor elects to enforce the accelerating clause and action is commenced upon the note and for the foreclosure of the mortgage, for default in the payment of interest, the note and mortgage constitute a single contract, which must be so construed as to give effect to all its parts, and when the mortgage provides that the note shall become due upon default in the payment of any installment of interest, such default renders the note due immediately, and entitles the holder to maintain an action at once for the entire debt; and that in such case the default also renders the paper due as respects indorsers and guarantors.

There was some intimation in argument that in order to put the acceleration clause into operation action on the instrument must be actually commenced, and therefore the commencement of the action was all the presentment for payment and notice of dishonor that in the circumstances was possible. In our opinion this position is untenable. The accelerating clause specifically prescribes

that the entire sum shall become due and payable at once upon default in the payment of interest without any further action on the part of the holder. This contingency having happened, the paper matured in accordance with the terms of the acceleration clause, and the necessity for presentment for payment and notice and dishonor immediately arose.

For the reasons stated, the action of the trial court complained of is reversed, and the cause remanded, with directions to proceed in accordance with the views herein expressed.

PITCHFORD, V. C. J., and JOHNSON, MILLER, and KENNAMER, JJ., concur.

WAPA OIL & DEVELOPMENT CO. v. McBRIDE et al. (No. 10342.)

(Supreme Court of Oklahoma. Oct. 25, 1921.
Rehearing Denied Nov. 22, 1921.)

(Syllabus by the Court.)

1. Mines and minerals ¶78(2) — Will decree forfeiture of lease for breach of implied contract where such will effectuate justice.

Although a court of equity will decree a forfeiture of an oil and gas lease on account of a breach of an implied covenant to diligently operate and develop the property, when such forfeiture will effectuate justice, the granting of such relief depends upon the facts and circumstances surrounding the particular case.

2. Equity ¶65(1)—Lessor must have clean hands to invoke rescission of lease in equity court.

A lessor invoking the jurisdiction of a court of equity to cancel and rescind a lease for breach of an implied covenant must come into court with clean hands.

3. Mines and minerals ¶78(3) — Generally equity will not cancel a lease for failure to comply with covenant to drill in absence of notice of forfeiture.

The general rule is that a court of equity will not cancel an oil and gas lease for failure to comply with an implied covenant to drill offset wells, unless notice has been served upon lessee that a failure to protect the line within a certain time will be considered grounds for forfeiture.

4. Vendor and purchaser ¶220 — Elements constituting bona fide purchaser stated.

The essential elements which constitute a bona fide purchaser are (1) a purchase in good faith (2) for value and (3) without notice.

5. Notice ¶6—Party with sufficient "notice" to draw attention to fact is deemed conversant with fact.

Whatever is "notice" enough to excite attention and put a reasonably prudent person on his guard and calls for inquiry is notice of

everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant with it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Notice.]

Appeal from Superior Court, Okmulgee County; R. E. Simpson, Judge.

Action by the Wapa Oil & Development Company against W. A. McBride, Jr., and others to enjoin interference with drilling for oil on leased land in which W. F. Keehn intervened. The trial court found the issues in favor of the defendant and the intervener and canceled plaintiff's lease, and plaintiff appeals. Reversed and remanded, with instructions to render judgment in favor of plaintiff against the defendant and the intervener and to proceed to an accounting between the plaintiff and the defendant W. A. McBride.

Herbert E. Smith, of Okmulgee, and Stuart, Sharp & Cruce, of Oklahoma City, for plaintiff in error.

Belford & Hiatt, of Okmulgee, for defendants in error.

McNEILL, J. This action was commenced in the superior court of Okmulgee county by the Wapa Oil & Development Company against W. A. McBride, E. R. Black, and Black Drilling & Development Company to enjoin the defendants from going upon or drilling upon a certain 40 acres of land in Okmulgee county, and from interfering with the plaintiff from drilling upon said land, and to declare a subsequent lease executed by the landowner to W. A. McBride void and asked that the same be canceled.

The defendant McBride answered, alleging he had a valid oil and gas lease upon said premises, and the plaintiff's oil and gas lease was null and void. The landowner, W. F. Keehn, intervened in said action and asked to have the lease of the Wapa Oil & Development Company declared forfeited. Upon the trial of the case the trial court found the issues in favor of the defendant and the intervener and against the plaintiff, and canceled plaintiff's lease. From said judgment the plaintiff has appealed.

[1, 2] For reversal it is contended that under the undisputed facts plaintiff was entitled to recover, and that the finding of the trial court, when the law is applied to the facts, is clearly against the weight of the evidence. The undisputed facts may be stated as follows: W. F. Keehn is the owner of the fee of this 40 acres and an adjoining 40 acres. On the 24th day of April, 1914, he executed an oil and gas lease upon these two 40-acre tracts of land to N. C. Vaughan and C. S. Vaughan. The lease was for the term of two years, and as much longer as oil or gas was found in paying quantities. The

Wapa Oil & Development Company became the owner of the lease in so far as it pertained to the 40 acres of land in question. The lease, so far as it pertained to the other 40 acres, was assigned and was owned by parties at Tulsa, Okl. During the term of this lease an oil well was drilled upon the 40 acres of land covered by the plaintiff's lease and produced some oil. No pipe line was in that vicinity and no market for the oil, and the well was not pumped regularly nor kept in good condition. The lease by its terms would expire on April 24, 1916, unless the well extended its terms. The plaintiffs, however, without objection from the landowner, continued to occupy the premises, and occasionally did some work upon the well, and both parties treated the lease in full force and effect by virtue of this well.

The parties at Tulsa contended that the oil well upon this 40 acres was a compliance with the terms of the lease and inured to their benefit, and made the part of the lease assigned to them a valid and existing lease. Mr. Keehn, the owner of the land during the month of May, 1917, had an opportunity to lease the 40 acres covered by the part of lease owned by the Tulsa parties for the sum of \$500, and a well should be commenced within 30 or 60 days if he could obtain a release from the Tulsa parties.

Mr. Keehn in his endeavors to secure a release from the Tulsa parties talked to the different officers of the Wapa Oil & Development Company and to Mr. Herbert E. Smith, secretary and treasurer, who is also an attorney, and requesting that the company assist him in getting a release from the Tulsa people to the east 40 acres. Mr. Smith called a meeting of the stockholders of the plaintiff company for the 31st day of May, 1917, and Mr. Keehn was present, and at said meeting it was agreed between the stockholders and Mr. Keehn that the company would execute a release to Mr. Keehn to the 40 acres covered by its lease, reserving, however, the equipment in the well that was on said 40 acres. The release was executed. At the same time it was agreed that Mr. Keehn should execute to the plaintiff a new lease upon this 40 acres of land, which was done. Mr. Keehn advised the Tulsa parties that the plaintiff company had executed a release to their 40 acres and demanded they execute a release to that 40; Mr. Herbert E. Smith, the secretary of the plaintiff writing the letters for Mr. Keehn, or at least a portion of the same. In this manner a release was obtained from the Tulsa parties within about 30 days. The new lease executed the 31st day of May was not recorded. The second lease contained the following provision:

"If no well be commenced on said lease before the first of December, 1917, this lease shall terminate as to both parties."

The lease, however, was for the term of two years and as long thereafter as oil and gas was produced on the premises. The lease also contained the further provision:

"It is understood and agreed that the oil well and equipment now upon said hereinabove premises belong to said second party and its right therein and thereto under former lease, which right is resumed in the release of said lease."

During the month of June the Beelor Oil & Gas Company brought in an oil well offsetting this 40 acres of the Keehn land, and was shot on the 7th day of July, 1917. Some time along about the 1st of July, the exact date being indefinite, Mr. C. T. Smith, who was apparently assuming the management of the lease in question for the plaintiff, employed Mr. Keehn to build a tank upon the leased premises for the purpose of saving water to drill a well. Immediately after employing Mr. Keehn to build said tank, Mr. Smith, on account of sickness, left for the East, giving Mr. Keehn his address, and instructed him to send him the bill for building the tank at that address. Mr. Keehn built the tank, and in August some time mailed the bill to Mr. Smith, but did not have the correct address, and his letter was returned. Some time during the month of August the Beelor Oil & Gas Company brought in the second well offsetting the Keehn land. This well was put on the pump the 1st day of September. Mr. C. T. Smith did not return from the East until September 10th.

On September 1st Mr. Keehn had a conversation with Mr. Herbert E. Smith, the secretary of the company, regarding the drilling of an offset well to the Beelor wells. On said date it was agreed between Mr. Herbert E. Smith and Mr. Keehn that the plaintiff company might drill one well on the Keehn land to be located about equal distance between the two Beelor wells, and the drilling of this one well would be considered as offsetting both said wells. On the same date Mr. Keehn advised Mr. Smith that he did not know exactly what the Beelor wells were making, but would keep an account of the same, and expect the Wapa Oil & Development Company to pay him as damages an amount equal to royalty obtained from the Beelor well 30 days after the completion of the wells for failure to offset said wells or until the offset well was completed. There was nothing said at that time when the plaintiff was to drill the offset well or how soon it should start the same. Although at the time Mr. Smith endeavored to get parties over to have them drill the well, this was while Keehn was talking to him.

On the 10th day of September Mr. Keehn, without any further notice to the Wapa Oil & Development Company, executed a lease to Mr. McBride on this identical land. Mr. C. T. Smith returned on said date or the next

day and offered to pay Mr. Keehn for building the tank, and he refused the same. On the 12th or 13th of September the Wapa Oil & Development Company placed some material on the lease for the purpose of drilling a well. This was removed by Mr. McBride or his men. Different notices were served by McBride and Keehn directing the Wapa Oil & Development Company to keep off the premises. On the 15th day of September the Wapa Oil & Development Company brought this action.

The amount of oil that had been produced from the two Beelor wells from the date the first well was shot on July 7th, and the second well, until the 10th day of September is not very definite, but the record discloses it was between 500 and 800 barrels.

There was a great amount of evidence regarding the amount of oil that had been produced from the old well and the amount that it would produce, also regarding the sufficiency of the water in the vicinity during the month of July and August to drill a well, but we think these questions in this case are all material.

The plaintiff's lease was executed on the 31st day of May and extended for a period of two years, provided, however, that if no well was commenced upon the premises prior to the 1st of December, the lease would become null and void. The lease was founded upon a sufficient consideration. The court in stating his reason for cancelling the lease stated it was for failure to comply with the implied covenants which was to protect the premises from drainage of offset wells. The law in this jurisdiction is stated as follows:

"Although a court of equity will decree a forfeiture of an oil and gas lease on account of a breach of an implied covenant to diligently operate and develop the property when such forfeiture will effectuate justice, the granting of such relief depends upon the facts and circumstances surrounding the particular case." *Pelham Petroleum Co. v. North*, 78 Okl. 39, 188 Pac. 1069; *Indiana Oil, Gas & Development Co. v. McCrory*, 42 Okl. 136, 140 Pac. 610.

If the defendants' testimony is true that the first offset well was shot on the 7th day of July, and the second well was not placed upon the pump until the 1st day of September, then accepting the testimony of Mr. Keehn as true, would this justify a forfeiture of the lease? In view of the facts that about the 1st of July Mr. Smith, representing the plaintiff company, employed Mr. Keehn to build a tank to catch and save water to enable the parties to drill a well, Mr. Keehn accepting the employment and completed the tank about the 1st of August. On the 1st day of September he agreed that one well would be sufficient to comply with the implied covenant in the lease for drilling offset wells, and at the same time he advised the

plaintiff that he would expect to hold them for damages for failure to drill an offset well, and the amount that he would demand would be the same royalty that the landowner would receive from the Beelor wells after 30 days until his well was completed. Under this state of facts, could he then without any further notice to the company or without making any other demand upon the company to commence a well declare the lease forfeited on the 10th day of September? Having entered into an agreement on the 1st day of September that he would accept one well as being a compliance with the implied covenant, the plaintiff was entitled to a reasonable time, when no time was stipulated, to commence the drilling or begin operations. There is no evidence in the record that 10 days would be an unusual length of time after making an agreement before commencing a well.

[3-5] The general rule as gathered from the different cases may be stated that, before the lessor is entitled to declare a forfeiture for failure to comply with implied covenants, for failure to drill offset wells, he must notify the lessee and demand that the lessee comply with the implied covenants. This is nothing more than equitable. No case has ever been called to our attention where the landowner could, within 10 days after agreeing where offset wells should be located, declare the lease forfeited without any notice to the lessee, and especially where there was no time mentioned as to when the drilling should be commenced. We think the facts in this case fail to bring the case within any of the rules or any of the principles announced in any of the above-entitled cases, and this is accepting the landowner's testimony as being true in every particular.

The only other question arises over the failure to record the second lease. Mr. Cooper represented Mr. McBride in obtaining the lease, and he testified that Mr. Keehn advised him when he took his lease that he had given the plaintiff a new lease, and that Keehn had advised him the terms of the lease had been violated. Mr. Keehn testified that he had advised Mr. Cooper that he had given a new lease to the plaintiff, and Mr. Cooper advised him he would take care of that. In addition to the representations made by Mr. Keehn, Cooper knew that a well was already upon the premises, and plaintiff's equipment was still in the well. He also knew or could see that a tank had been built on the premises for the purpose of saving the water to be used to drill a well. All of these things were known to Cooper, and he was McBride's agent, and represented McBride in all of these transactions.

This court, in the case of *Brooks v. Reynolds*, 37 Okl. 767, 132 Pac. 1091, states as follows:

"Where a person has knowledge of circumstances such as would put a prudent person, acting in good faith, upon inquiry, he is chargeable with actual notice of the facts the inquiry would have disclosed."

See, also, *Winsted v. Shank*, 173 Pac. 1041. McBride had actual notice that the lease had been executed upon the premises, that the tank had just been built, indicating possession of the plaintiff, and the equipment was still in the old well, with all of these facts, his duty was to inquire of the lessee the right and extent of the title claimed by him. Such was the holding of this court in the case of *Wilkinson v. Stone*, 200 Pac. 196 (not yet officially reported), decided June 21, 1921. See, also, *Shaffer v. Turner*, 43 Okl. 744, 144 Pac. 366. Under the undisputed evidence, the intervenor himself was not entitled to forfeiture of the lease for failure to comply with the implied covenants, and McBride is in no better position than the landowner, he having taken his lease with notice of the former lease.

The judgment of the court is therefore reversed and remanded, with instructions of the trial court to render judgment in favor of the plaintiff and against the defendant and the intervenor, and to proceed with an accounting between the plaintiff and the defendant McBride.

HARRISON, C. J., and PITCHFORD, ELTING, and NICHOLSON, JJ., concur.

BROWN et al. v. THOMPSON et al.
(No. 10380.)

(Supreme Court of Oklahoma. Nov. 15, 1921.)

(Syllabus by the Court.)

1. Mortgages \S 460—Plaintiffs in foreclosure must show title in grantor acquired prior to foreclosure.

The plaintiff in an action to foreclose a real estate mortgage must show, as a necessary part of his case, title in the grantors to the land covered by the mortgage at the time they executed the same or title subsequently acquired and prior to the trial of the foreclosure proceeding.

2. Indians \S 27(6)—Quieting title \S 44(1)—In mortgage foreclosure, defendant held not to have adduced sufficient proof for quieting title in him.

In an action to foreclose a real estate mortgage and where the defendant in such action files an answer and cross-petition in which he alleges ownership of the land covered by the mortgage and asked that the title to said land be quieted in him, the burden is upon the said defendant to show title in himself to the land in controversy, and where the evidence relied on

by him to show such title consisted of quitclaim deeds to him from persons claiming to be the heirs of the original allottee of the land, who was a member of the Cherokee Tribe of Indians, without offering any testimony to show the death of said allottee and that she died intestate or that such grantors were the heirs or next of kin to said allottee, who six days after selecting her allotment and before receiving a certificate of allotment for said land had, by general warranty deed, conveyed the allotted land to a third party who was not a party to the action, and for aught that appears in the record to the contrary, the title to the land is outstanding in the grantee, in the deed of the allottee, and there is no testimony in the case tending to connect such defendant with such title, *held*, that the proof of the defendant has failed to establish his right to have the title to the land quieted in him, and that the judgment of the trial court quieting such title in him is without evidence to support the same, and must be reversed.

3. Quieting title — 44(3)—Evidence held not to support judgment quieting title in one of the defendants.

Record examined, and *held*, that the judgment of the trial court quieting title to the land in controversy in one of the defendants is without evidence to support it, and ordered that the judgment be reversed and the cause remanded for new trial.

Appeal from District Court, Rogers County; W. J. Campbell, Judge.

Action by O. H. Brown against Columbus H. De Ford and others, in which James T. Thompson, as guardian of James Granville Thompson, a minor, filed an answer alleging such minor's interest in the real estate on which plaintiffs sought mortgage foreclosure. From the judgment therein, plaintiff and defendant P. G. Utley appeal. Reversed and remanded for new trial.

Keaton, Wells & Johnston, of Oklahoma City, for plaintiffs in error.

H. B. Martin and R. A. Reynolds, both of Tulsa, for defendants in error.

JOHNSON, J. On the 23d day of August, 1916, C. H. Brown, as plaintiff, commenced an action in the district court of Rogers county, against Columbus H. De Ford, Francis A. De Ford, James T. Thompson, and Mary E. Thompson, as defendants, to recover the sum of \$200 with interest and attorney's fees, upon a promissory note executed by the defendants on the 1st day of October, 1914, the interest thereon being evidenced by five coupons of said date attached to said note in the sum of \$12 each, each due on the 1st day of February, 1916, 1917, 1918, 1919, and 1920, respectively, and to foreclose a real estate mortgage given to secure said principal sum and interest upon 50 acres of land out of the S. W. $\frac{1}{4}$ of section 27, Township 20 North, Range 15 East, I.

M., situated in Rogers county, Okl., and during the progress of the cause the other named defendants were from time to time made defendants and filed answers herein, excepting the defendants De Ford, who made default.

James Granville Thompson, a minor, and James T. Thompson, as guardian, filed their separate answers, alleging that the said James Granville Thompson was the owner of the real estate described in the plaintiffs' petition, and that he obtained title to said land by virtue of certain quitclaim deeds, and alleging further that at the time of the execution of the mortgage attempted to be foreclosed by plaintiff, the parties executing the same had no right, title, or interest in and to the land covered thereby, and that none of the said parties have since acquired any right, title, or interest therein, and praying that the fee-simple title to said land be decreed and adjudged to be in the defendant James Granville Thompson, a minor.

On December 11, 1916, the defendant P. G. Utley, administrator of the estate of R. H. Utley, deceased, was made a party and filed his answer and cross-petition setting up a certain note and mortgage and asking for foreclosure of same, and on January 13, 1917, the plaintiff C. H. Brown filed his reply to the answer and cross-petition of the defendants James Granville Thompson, a minor, and James T. Thompson, as guardian, denying the allegations which in any way tended to controvert the allegations and statements contained in the plaintiffs' petition.

On May 10, 1917, defendant James Granville Thompson, by his guardian ad litem, R. A. Reynolds, filed a separate answer containing a general denial, and alleged that the said defendant, James Granville Thompson, was the owner of the land described in the plaintiffs' petition, and the plaintiffs had no interest therein, and praying judgment accordingly.

On May 12, 1917, the plaintiff C. H. Brown filed a reply to the separate answer of defendant James Granville Thompson, a minor, consisting of a general denial, and on December 14, 1917, a jury having been waived by the parties, the cause was tried to the court, and at the conclusion of such trial the court rendered judgment in favor of the plaintiff C. H. Brown, and against the defendants Columbus H. and Francis De Ford, James T. and Mary E. Thompson, in the sum of \$249.15, with interest at the rate of 10 per cent. per annum from August 23, 1916, and for \$50 attorney's fees, and for foreclosure of the mortgage, declaring the same to be and is a prior lien on 10 acres of the land described as the N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 27, and rendered further judgment in favor of the defendant James

Granville Thompson, a minor, quieting title in him to the remaining 40 acres of land described in the plaintiff's petition, as the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section 27.

The plaintiff C. H. Brown filed his motion for a new trial which was overruled by the court, and from which judgment overruling the same the said C. H. Brown, plaintiff, and P. G. Utley, administrator of the estate of R. H. Utley, deceased, as plaintiff in error, commenced this proceeding in error to reverse such judgment of the trial court, making the other named defendants except the De Fords, who made default, and the defendants F. W. Galer and J. A. Wettack, who filed disclaimers in the court below.

The said plaintiffs in error assign as error as follows:

"(1) Said court erred in overruling the motion of the plaintiff in error for a new trial.

"(2) Said court erred in rendering judgment in favor of the defendant in error James Granville Thompson, a minor, and against said plaintiffs in error.

"(3) Said court erred in not rendering judgment in favor of said plaintiffs in error and against the defendant in error James Granville Thompson, a minor.

"(4) That the judgment of said court is not supported by the evidence."

And in said assignments argue in their brief two propositions which are as follows:

"1. The court erred in holding that the deed of the allottee, Sarah Phillips, dated December 23, 1907, did not convey the title to property.

"2. The judgment entered on behalf of the defendant James Granville Thompson, quieting title in him and canceling the mortgage of plaintiff, was not supported by any evidence."

The findings of the trial court upon which he rendered judgment was as follows:

"And now at this time, the court having heard the argument of counsel and being well and truly advised in the premises did then and there find and render judgment in favor of the plaintiff C. H. Brown, and against the defendants Columbus H. De Ford, Francis A. De Ford, James T. Thompson and Mary E. Thompson for the sum of \$249.15, together with interest thereon at the rate of 10 per cent. per annum from August 23, 1916, and for the further sum of \$50 attorney fees, and the court renders further judgment in favor of the plaintiff foreclosing his mortgage and decreeing the same to be a first and prior lien on that part of the real property described in plaintiff's petition. The court further found in favor of the defendant and cross-petitioner P. G. Utley, administrator, against the defendants James T. Thompson and Mary E. Thompson, for the sum of \$299.82, together with interest at 10 per cent. from August 8, 1916, and \$50 attorney fees, and renders judgment in favor of said cross-petitioner foreclosing his mortgage lien and decreeing the same to be a lien on said property described therein.

"The court further found in favor of the defendant James Granville Thompson, a minor,

quieting title in said defendant to the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 27, T. 20 north, range 15 east, in Rogers county, Okl., and orders the mortgage of plaintiff and cross-petitioner be canceled and removed all clouds upon the title of said defendant, James Granville Thompson, to all of which said adverse finding said plaintiff duly excepted."

The judgment as contained in the journal entry was that the plaintiff C. H. Brown recovered a personal judgment against the defendants De Ford and James T. and Mary E. Thompson for the sum hereinbefore stated, and declared the same to be a first and prior lien upon the 10 acres of land described as the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 27, and a judgment in favor of the cross-petitioner P. G. Utley, administrator, and against James T. and Mary E. Thompson, for the sum of the \$299.82, with 10 per cent. interest from August 8, 1916, and \$50 attorney fees, decreeing the same to be a second lien upon said 10 acres of land, and rendered a judgment quieting the title to the 40 acres of land described as the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 27, in the defendant James Granville Thompson, a minor.

Counsel for defendants in error state in their brief as follows:

"As we understand it, there is really but one question before the court. That is whether or not the deed of Sarah Phillips dated December 23, 1907, conveyed title to the grantee therein named."

At the trial, the plaintiff C. H. Brown introduced his note and mortgage. There was also introduced on behalf of the plaintiff a certified copy of surplus selection of Sarah Phillips covering the N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ section 27, township 20 north, range 15 east, in Rogers county, Okl., dated December 17, 1907; also, certified copy of certificate of allotment dated February 21, 1908, showing that the N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ 27—20—15 had been allotted to Sarah Phillips; also, allotment deed dated March 17, 1909, from the Cherokee Nation to Sarah Phillips covering said above-described N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ 27—20—15; also, a warranty deed from Sarah Phillips, a widow, to R. W. Radford, covering said N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ 27—20—15, dated December 23, 1907. Thereupon the plaintiff rested.

The attorney for the defendant James Granville Thompson thereupon made the following statement:

"This selection was made on December 17, 1907. On December 23, 1907, following, Sarah Phillips, the allottee, conveyed the lands in question to P. W. Radford. On February 21, 1908, certificate of allotment was issued to the allottee. The defendant James Granville Thompson, a minor, claims under certain quitclaim deeds from the heirs of Sarah Phillips, deceased."

The defendant James Granville Thompson thereupon introduced in evidence a quitclaim deed from Elmer L. Phillips and wife to James Granville Thompson dated August 13, 1915, and a quitclaim deed from J. W. Bridges and Thomas H. Bridges to James G. Thompson, dated August 25, 1915, and a quitclaim deed from Roxie E. Patrick (née Phillips) and husband to James Granville Thompson, dated August 18, 1915; and a quitclaim deed from Henry G. Phillips, a single man, and Bettie Bridges, wife of Thomas H. Bridges, to James G. Thompson, dated August 30, 1915, and a quitclaim deed from James T. Thompson and Mary E. Thompson to James Granville Thompson, dated September 3, 1915, all of said deeds covering the said N. E. $\frac{1}{4}$ S. W. $\frac{1}{4}$ 27—20—15.

Thereupon the case was closed.

[1] It is obvious that the plaintiffs in error were not entitled to a decree foreclosing their respective mortgages upon the N. W. $\frac{1}{4}$ S. W. $\frac{1}{4}$ of section 27, the 40 acres involved herein, as it is a part of the plaintiffs' case in a foreclosure proceeding to show that the mortgagors either had title to the land covered by the mortgage at the time of the execution of the same, or that they thereafter acquired title thereto prior to the foreclosure proceeding.

The plaintiffs' testimony tended to show that at the time of the trial there was an outstanding title to the land involved in one P. W. Radford, a third party who was not a party to the suit, and the record is entirely barren of testimony tending to connect the mortgagors with such title. Hence the trial court did not err in refusing to grant the foreclosure on the premises involved.

[2, 3] It is also quite obvious that the defendant James Granville Thompson, a minor, was not entitled to a judgment quieting title to the land in controversy in him. In his cross-petition he alleged ownership in the land, and the burden rested upon him to prove his ownership by a preponderance of the testimony. He sought to do this, as the record discloses, by the introduction in evidence in the case of all the quitclaim deeds hereinbefore referred to, and offered no testimony tending to show that the grantors in such quitclaim deeds were the heirs of Sarah Phillips, the allottee, or that the said allottee, Sarah Phillips, was either dead at the time of the trial or that she died intestate. So that if it be true, as contended by counsel for the defendants in error, that the deed from Sarah Phillips to P. W. Radford be void, upon which point we express no opinion, the defendant James Granville Thompson failed to establish his title to the land in controversy for the reasons stated.

So the judgment of the trial court quieting title in him, was wholly without evidence

to sustain it, and for that reason the judgment must be reversed.

We deem it unnecessary to cite authorities to support the principles of law announced, as the same are elementary, and we think no decisions can be found announcing a contrary doctrine.

For the reasons cited, the plaintiff in errors' second proposition, "That the judgment entered on behalf of the defendant James Granville Thompson, quieting title in him and canceling the mortgage of plaintiff, was not supported by any evidence," is well taken and must be sustained, and such judgment of the trial court is therefore reversed, and the causes remanded for new trial.

HARRISON, C. J., and KANE, MILLER, and KENNAMER, JJ., concur.

LONG v. TALLEY et al. (No. 10258.)

(Supreme Court of Oklahoma. Oct. 18, 1921.
Rehearing Denied Nov. 22, 1921.)

(Syllabus by the Court.)

1. Homestead §168—Temporary renting does not change character.

Any temporary renting of the homestead shall not change the character of the same when no other homestead has been acquired.

2. Homestead §117—Wife's temporary absence does not permit husband to sell without her consent.

The wife may consent to renting the homestead and voluntarily accompany her husband to another state without losing her rights in the homestead, so that the husband can sell it without her consent.

3. Homestead §117—Wife's abandonment of homestead must appear before husband can convey without her consent.

When property has once been impressed with the homestead character, the title to which is in the husband, it must be made to clearly appear that the wife voluntarily intended to relinquish and did abandon the homestead, and that another homestead has been acquired, before the husband can convey it without her consent given as required by law.

4. Homestead §133—Findings of wife's homestead right and nonrelinquishment thereof sustained.

The evidence examined, and held, that it supports the findings and judgment of the trial court.

5. Homestead §118(5), 133—Contract for sale not subscribed by husband and wife is void and will be canceled.

Under the Constitution and laws of Oklahoma, a contract for the sale of the homestead, to be valid, must be in writing and subscribed by both husband and wife where that relation exists. Such contract, being subscribed by the

husband only, is void, and should be canceled by a court having jurisdiction thereof in an action instituted by the wife for that purpose.

Appeal from District Court, Tulsa County; N. E. McNeill, Judge.

Action by Pearl Talley against Elton S. Long and others. Judgment for plaintiff, and defendant named appeals. Affirmed.

Shell S. Bassett, of Tulsa, for plaintiff in error.

T. L. Brown and Kirkpatrick & Brown, all of Tulsa, for defendants in error.

MILLER, J. This action was commenced in the district court of Tulsa county by Pearl Talley, as plaintiff, against Haskell B. Talley and Elton S. Long, as defendants. The action was to require her husband, defendant Talley, to pay alimony for the support of the plaintiff and her children under section 4975, Revised Laws of Oklahoma 1910, and to subject certain real estate in the city of Tulsa to her use and control. She also asked the court to cancel a purported contract made by her husband, Haskell B. Talley, whereby he had agreed to sell to defendant Long the real estate above referred to. She alleged that said property was the homestead of the plaintiff and defendant Haskell B. Talley at the time of making the contract; that plaintiff had not joined in the execution of the contract and had not consented thereto; therefore the contract was void. Defendant Long filed an answer and contested the cancellation of the contract. Defendant Haskell B. Talley made no appearance in his own behalf, but his deposition was taken in behalf of his codefendant, Long and introduced on the trial of the case. The case was tried to the court without a jury, which resulted in findings of fact by the court that the property in controversy was the homestead and inalienable, except by the joint consent of the husband and wife. Judgment was rendered canceling the contract and granting other relief to the plaintiff as prayed for. Defendant Long filed a motion for a new trial, which was overruled. He appealed, and appears here as plaintiff in error. For convenience the parties will be referred to as they appeared in the lower court.

At the commencement of the trial of this case it was agreed in open court by counsel for plaintiff and counsel for defendant Long that the only issue before the court affecting the rights and claims of defendant Long is whether or not this property was the homestead of the plaintiff and so impressed with the homestead that it could not be conveyed without the wife joining in the deed. Defendant Long contends that, though it may at one time have been homestead property, it was not homestead property at the time Mr. Talley sold it and contracted to convey it to Mr. Long, and, that contract having been

made in good faith, the legal title having been vested in Mr. Talley, his wife cannot subject the property to any claim of hers.

Defendant Long in his brief refers to his assignments of error as follows:

"Aside from the formal assignments of error set out in the petition in error as to the overruling of motion for new trial, and that the court erred in rendering judgment in the case, plaintiff in error assigns as error the following:

"(1) That the trial court erred in holding that the contract entered into between the defendant Talley and the defendant Long was not a binding and valid contract, and erred in setting aside and cancelling the same.

"(2) That the trial court erred in holding that the property involved in said contract was the homestead of the defendant Haskell B. Talley and the plaintiff, Pearl Talley, and could not be disposed of by Haskell B. Talley on the date of his contract with Long, to wit, June 6, 1917, without the consent of his wife and without her joining in the conveyance.

"(3) That the trial court erred in holding that the plaintiff below had never changed her residence from the city of Tulsa and state of Oklahoma, and that for this reason she had a homestead right in the property covered by the contract between Talley and Long, and that for this reason the defendant could not on June 6, 1917, dispose of said property without the plaintiff joining in the conveyance.

"(4) That the decision of the court below was not sustained by sufficient evidence.

"(5) That the decision of the court below was contrary to law."

At the outset of his argument defendant Long lays down this proposition:

"For the purposes of this brief, all the assignments of error may be embodied in one proposition, as in our judgment the correctness of the decision of the trial court rests upon whether or not the court correctly answered this question: Did Pearl Talley, the plaintiff below, on June 6, 1917, have such an interest in the property covered by the contract between her husband and the plaintiff in error as would prevent her husband from disposing of that property without her consent or without her joining in the conveyance? Or, to state the question more simply: Was the property which was the subject-matter of the contract of June 6, 1917, the homestead of the Talley family on that date?

"The court answered this question in the affirmative and it is our contention that the answer was incorrect; that it was contrary to and against the weight of the evidence and the undisputed facts in the record and a misapplication of the law to these facts."

Under this statement the only questions presented to this court are: Is the findings of fact of the trial court clearly against the weight of the evidence? Did the court commit error in applying the law to the facts? We will first consider the question of fact as presented by the evidence.

The following facts are indisputably established by the evidence:

The plaintiff and defendant Haskell B. Talley were legally married on June 12, 1909, and have ever since been and up to the time of the trial of this case in the lower court were husband and wife. Four children were born as a result of this marriage, to wit: Hershell Talley, aged eight years; Esther Talley, aged six years; Rebecca Talley, aged four years; and Charles Emanuel Talley, aged two years. Haskell B. Talley, the father, and Pearl Talley, the mother, with these children constituted the family. They established their residence and home at 724 North Denver street, in the city of Tulsa, Tulsa county, Okl., on the property in controversy in this action which is described as lot 1, block 5 Brady Heights addition to the city of Tulsa. They occupied these premises as their homestead from a short time after their marriage until in May, 1916, when defendant Haskell B. Talley went to his mother's home at Florence, Tenn.

Haskell B. Talley testified by deposition in substance as follows: On May 10, 1916, he shipped a part of their household goods to his mother, Katie Talley, in Tennessee, and immediately after that he went to his mother's home in Tennessee. He had rented the house, which had formerly been their homestead, and the plaintiff came to Tennessee in July, 1916. She remained there until March, 1917. Haskell B. Talley's health was very much impaired, and he was trying to make arrangements to enter an officers' training camp. He went to Tulsa in the early part of March, 1917. He was then asked these questions:

"Q. How long did you remain in Tulsa on this visit? A. I left Tulsa on the night of April 10, 1917, going to a farm I am interested in near Depew, Okl. On the morning of the 11th of April I began a journey on horseback and afoot for home, reaching home on the night of April 30, 1917.

"Q. What was your purpose in taking this trip? A. My principal reason was to build up my health so that I could stand a physical examination for admission into the army. I also wished to bring a thoroughbred mare which I had on the farm near Depew home, and to observe the 1917 cotton acreage."

He also testified that about February 1, 1916, he went to Tennessee with the intention of relinquishing his residence in Oklahoma and of acquiring a new domicile in Tennessee, and that he did not at any time prior to the filing of this suit intend to re-establish his residence in Oklahoma.

Mrs. Katie Talley, the mother of Haskell B. Talley, testified by deposition that she lived near Florence, Tenn., and that Pearl Talley came to her house in the first part of the summer of 1916 and stayed until the latter part of March, 1917; that her son, Haskell B. Talley, was there until March 3, 1917, when he returned to Tulsa. Her dep-

osition then shows the following questions and answers:

"Q. What occurred when he left about March 3, 1917, to go to Tulsa? What did he say to his wife, and what was his conduct? A. She cried bitterly after he left and said she reckoned if he was killed his mother and her mother would take care of her and her children.

"Q. State whether or not she expected him to go from Tulsa to a training camp, and whether or not his wife understood he was going to do anything of that sort. A. Yes; it was understood he was going to a training camp.

"Q. Had he been to a training camp the summer before? A. Yes.

"Q. What was the state of your son's health a year before that time when he returned to your house from Tulsa? A. He was in poor health.

"Q. While your son was at your house state whether or not Mrs. Pearl Talley was well provided for or not by you and your son Haskell Talley. A. I live on a large farm, and did at that time, and Mrs. Pearl Talley had all that she needed to live on and so did her children.

"Q. Did you at any time make a deed to your grandchildren to give them the home place? State whether or not you expected Mrs. Pearl Talley to live on that place when you made that deed after your death. A. Yes; I did, made the deed, and expected my son and his children to live on my home place, where my family had lived for several generations."

Defendant Elton S. Long testified to having purchased the property in controversy from defendant Talley and then testified as follows:

"Q. Mr. Long, I will ask you what was done towards the carrying out of this contract, if you know? A. In what way? I don't understand you.

"Q. The contract provides for the payment of \$1,750 in cash upon the consummation of the sale, and the balance of the purchase price to be paid in notes of \$1,000.00 bearing interest at the rate of 8 per cent. per annum, all the instruments and the sum of money of \$1,750 to be placed in escrow in the National Bank of Commerce with this contract? A. Yes, sir.

"Q. Until Mr. Talley could furnish you good title to this property? A. Yes, sir.

"Q. That was done, was it? A. Yes, sir; and is there at the present time.

"Q. I will ask you, Mr. Long, if you made this purchase of this property in good faith? A. Yes, sir.

"Q. And you expected and still expect Capt. Talley to furnish you a good title to the property? A. Yes, sir.

"Mr. Bassett: That is all.

"Cross-examination by Mr. Biddison:

"Q. The good title you refer to is the fact of getting his wife's signature to the deed? A. A man would not want to buy a piece of property unless he could get a clear title to it.

"Q. That is the objections you had to the title, because his wife wouldn't sign the deed? A. I wouldn't want to buy property unless it had a good title, and it would not be a good

title unless his wife's signature was on the deed.

"Q. That was your objection to this and the reason you put this money up was because his wife would not sign the deed or didn't sign the contract? A. Well—

"Q. Was it? A. Why I wouldn't want to pay out money either—

"Q. Well, now, just answer the question is that the reason the money was put up? A. Yes; that there wasn't a clear title, and we were waiting for the title.

"Q. Did you pay Mr. Talley any money? A. No, sir; the money that was put up is in escrow.

"Q. Mr. Long, did you employ the counsel that appeared to take these depositions in Tennessee? A. No, sir.

"Q. Did you pay for the taking of those depositions? A. No, sir.

"Q. Did you employ the counsel who are appearing here to represent you? A. No, sir."

The plaintiff, Mrs. Pearl Talley, testified as follows:

"Q. Where did you live after you were married? I mean in what state. A. Oklahoma.

"Q. Living in Tulsa? A. Yes.

"Q. Have you ever lived anywhere else except in Tulsa during all these years? A. No, sir.

"Q. This has always been your home? A. Yes, sir.

"Q. Where has your home been since you have been married? A. In Tulsa, Okl.

"Q. How much of the time since your marriage up to the present time have you resided in Tulsa, Okl.? How much of that time have you lived here as your home? A. With the exception of taking little trips, I have always lived here since I have been married.

"Q. Do you know the lot and block number? A. No.

"Q. You verified this petition as being lot No. 1, block 5. Do you know whether that is true or not? A. Yes.

"Q. Brady Heights addition? A. Yes, sir. * * *

"Q. Spend the summer; did you ever go to Tennessee for the purpose of making that your home? A. No, Sir.

"Q. Did you ever have any other home— A. No, sir.

"Q. —since you have been married other than the lot 1, block 5, Brady Heights addition? A. No, sir. * * *

"Q. Were you ever called down to Nixon, Bassett & Nixon's office for the purpose of signing a deed? A. Yes, sir.

"Q. Under what conditions were you sent for? A. He came up to the house and made threats.

"Q. Who came up? A. Mr. Talley. * * *

"Q. Made threats he would kill your mother and Mr. Kistler and ought to finish you? A. Yes.

"Q. What did you tell him? A. I told him if he felt that way about it and wanted the home I would go up and sign the deed to keep him from killing anybody.

"Q. Did you go up and sign a deed? A. Yes, sir; he waited for me to get ready. * * *

"Q. You did not sign the deed, did you? A. No, sir.

"Q. Have you ever signed a deed to it? A. No, sir.

"Q. Where were you living while you were back in Tennessee? A. His mother's home.

"Q. Did he ever prepare any place out there for you to live? A. No, sir; only his mother's home. * * *

"Q. Where were you when he took the furniture and sold part of it and shipped the rest of it to Tennessee? A. I was living with my mother. * * *

"Q. He told you at the time that the furniture was shipped that he was going to Tennessee to make his home, didn't he? A. No, sir; I didn't know that he shipped the furniture away.

"Q. That was about the time that he sold the furniture, that is, a part of the furniture and shipped the rest of it? A. I asked him what he was going to do with the furniture, and he told me I could have it and send for it. I knew that was my home, why did I want to take the furniture out? So in the meantime he hurriedly packed the furniture and shipped it before I knew anything about it.

"Q. Then told you about it after he had shipped it? A. Yes, sir. * * *

"Q. Didn't he ask you to come and go with him to Tennessee and make your home there at that time? A. He said something about wanting to sell the home, and I refused.

"Q. I understand, but didn't he ask you to come and go with him to Tennessee to make his home? A. I wanted to go see the children, but I didn't agree to make my home. * * *

"Q. Now, when you left here in July, what did you take with you to Tennessee, anything? A. My trunk. * * *

"Q. I will ask you if it isn't true that this was the arrangement: Talley was going to build a home right across the pike from his mother's home on his mother's land, and you and he were going to live there, and Talley was going to open up a law office in Murphreesboro and practice law and go in and out morning and evening in his car? A. No, sir, I never heard of that before."

After testifying she had returned to Tulsa in March, 1917, from her visit to Tennessee, to make her home in Tulsa, she testified as follows:

"Q. And you had come off without bringing the clothing for the children and Talley had to go down and buy some clothing for the little boy Hershell? A. I didn't leave anything there.

"Q. What was the answer to that question, Mrs. Talley? A. I say I didn't leave the children's clothing there.

"Q. Didn't leave any clothing there? A. I left some discarded clothes.

"Q. I will ask you if it isn't a fact that while Mr. Talley was in Tennessee and while you were there with him between July, 1916, and March 25, 1917, if it wasn't finally agreed between you and Mr. Talley that he was to go to war to Ft. Oglethorpe and join the army, and that you were to make your home with his mother and sister and father on the farm there until he could come back; wasn't that the arrangement between you and him? A. No, sir. * * *

"Q. Mrs. Talley, did you ever intend to give that place up as your home? A. No, sir.

"Q. Have you always intended to return to it and keep it as your homestead? A. Yes.

"Q. Did Mr. Talley ever at any time or has he had at any time since you have been married a home or a residence in Tennessee? A. No, sir."

Defendant Long in his brief sets out the following excerpts of the testimony of Mrs. Talley:

"Q. But on this particular occasion (referring to the time that he removed to Tennessee) didn't he see you and tell you that he was going to Tennessee to live? A. He knew I never wanted to go to Tennessee.

"Q. That isn't it at all, Mrs. Talley. I will ask you if he didn't tell you he was going to Tennessee to make his home? A. I wanted to see him because I wanted to see the children. I used to cry night and day to see the children.

"Q. You refer to the time you went to Tennessee? A. It was at the time when he told me he was going away.

"Didn't he tell you here in Oklahoma or in Tennessee that he was going to make his home in Tennessee? A. I went up to his office because I wanted to see the children, and he told me he was fixing to leave.

"Q. That was about the time he sold the furniture, that is, a part of the furniture and shipped the rest of it? A. I asked him what he was going to do with the furniture, and he told me I could have it and send for it. I knew that was my home, why did I want to take the furniture out? So in the meantime he hurriedly packed the furniture and shipped it before I knew anything about it.

"Q. Then told you about it after he had shipped it? A. Yes, sir.

"Q. Didn't he ask you to come and go with him to Tennessee and make your home there at that time? A. He said something about wanting to sell the home, and I refused.

"Q. I understand, but didn't he ask you to come and go with him to Tennessee to make his home? A. I wanted to go see the children, but I didn't agree to make my home.

"Q. That is not what I am asking. A. I don't think he had any intention to make his home.

"Q. That is not what I asked you at all.

"The Court: Just answer my question.

"Q. I will ask you a plain, simple question. If you will just kindly confine your answers to my questions, we will get along quickly. I will be just as polite and agreeable as I possibly can. What I want to know is this, didn't he tell you that he was going to Tennessee to make his home and asked you as his wife and the mother of his children to come and go with him and make your home with him and the children in Tennessee? A. He told me I could go over there to see the children and stay there for the summer.

"Q. Didn't he ask you to go with him to Tennessee to make your home there; isn't that true? A. He said something about wanting me to go.

"Q. What did you say? A. I wanted to go see the children. He said I had a chance to go, so I would go."

Defendant Long then says in his brief:

"It was practically admitted that when she returned to Tulsa in March, 1917, her purpose

was to spend the Passover with her mother, she being a Jewess. On direct examination she testified, referring to her coming to Tulsa, that she wanted to come home for the Passover."

"Q. What do you mean by home? A. Tulsa.

"Q. What did he say about it? A. He didn't want to let me come back.

"Q. Did you go anywhere to spend the Passover that year? A. I came back to Tulsa."

[4] Defendant Long contends that the trial court's findings of fact that the property in controversy was impressed with the homestead is clearly against the weight of the testimony. We cannot agree with this contention. We think the testimony so well supports the findings of fact of the trial court that, had it found otherwise, its findings would not have been supported by the testimony. In weighing testimony in the legal balances, we must use the Constitution and laws as the weights by which its sufficiency is to be determined. In this State the Constitution has defined what the homestead shall consist of (section 1, art. 12):

"The homestead of any family in this state, not within any city, town, or village, shall consist of not more than one hundred and sixty acres of land, which may be in one or more parcels, to be selected by the owner. The homestead within any city, town, or village, owned and occupied as a residence only, shall consist of not exceeding one acre of land, to be selected by the owner: Provided, that the same shall not exceed in value the sum of five thousand dollars, and in no event shall the homestead be reduced to less than one-quarter of an acre, without regard to value: And provided further, that in case said homestead is used for both residence and business purposes, the homestead interest therein shall not exceed in value the sum of five thousand dollars: Provided, that nothing in the laws of the United States, or any treaties with the Indian Tribes in the state, shall deprive any Indian or other allottee of the benefit of the homestead and exemption laws of the state: And provided further, that any temporary renting of the homestead shall not change the character of the same when no other homestead has been acquired."

Defendant Long is not contending that the first part of the first proviso, "that the same shall not exceed in value the sum of five thousand dollars," prevents it from being impressed with the homestead. Therefore we are not passing upon that question or expressing any opinion, for it is not before us in this case.

Defendant Long insists the law by which this evidence is to be weighed is as set forth in his brief, from which we quote.

"Section 3350 of the Revised Laws of 1910 is as follows: 'The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto.'

"Section 3342 of Revised Laws of 1910 is in part as follows: 'The following property shall be reserved to the head of every family

residing in the state: First. The homestead of the family, which shall consist of the home of the family, whether the title to the same shall be lodged in or owned by the husband or wife.' And section 3344 provides that the homestead exemption herein provided must not be construed to apply to a nonresident.

"Section 3350 of our statute above quoted is declaratory of the common law and is consonant with the great weight of authority and with reason and justice.

"In Ruling Case Law, vol. 9, p. 543, is the following statement: '*Matrimonial Domicile; General Rules.*—Following the rule established at common law, a woman on her marriage loses her own domicile and acquires that of her husband; and the matrimonial domicile is presumed to be that of the husband at the time of the marriage. In general, this rule governs no matter where the wife actually resides. Under this rule it has been held that in a suit for divorce based on the ground of a wife's desertion of her husband the legal fiction that a wife's domicile follows that of her husband gives jurisdiction to the court of a state to which the husband had removed and in which he had resided for the time required by the statute, although the marriage took place and the desertion arose in the state in which the wife continued to reside. However, a man cannot change the matrimonial domicile by abandoning his wife and going into another state to reside. Though the husband has the legal right to determine the place of abode of the family, and the wife must submit to his decision, this power must be exercised in a reasonable and just manner. It cannot be exercised arbitrarily, nor used as a means of procuring a dissolution of the marital relation.' And a large number of authorities are cited in support of this statement of law. In 19 Corpus Juris, p. 414 it is stated as follows: '*Married Women. 1. In General.*—Following out the theory of an identity of person, the law fixes the domicile of the wife by that of the husband, and denies to her during cohabitation the power of acquiring a domicile of her own separate and apart from him; and she cannot during such period of cohabitation effect a separate domicile by her intention that his domicile shall not be hers, even though assented to by him. The domicile of the husband is that of the wife only when the husband provides a domicile where the wife may go and stay at her will. Under modern statutes affecting the status of married women, it has been suggested that there is no reason why a wife may not acquire a separate domicile for every purpose known to the law, and it has been held that she may do so whenever it is necessary or proper, as where the husband has forfeited his marital rights by misconduct. But the domicile of the husband is at least prima facie the domicile of the wife.'—And a multitude of cases are cited in support of the rule as above stated, including the decisions of the Supreme Court of the United States, the different federal courts and of almost every state in the Union, as well as England and Canada. The following cases, selected almost at random, show the application of the rule by the Supreme Court of the United States and by the Supreme Courts of other states: Peter Lee Atherton v. Mary G. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45

L. Ed. 794; John W. Haddock v. Harriet Haddock, 201 U. S. 562, 26 Sup. Ct. 544, 50 L. Ed. 867, 5 Ann. Cas. 1; Anderson et al. v. Watts, 138 U. S. 694, 11 Sup. Ct. 449, 34 L. Ed. 1078; Cheely v. Clayton, 110 U. S. 701, 705, 4 Sup. Ct. 328, 28 L. Ed. 298; Modern Woodmen of America v. Hester, 66 Kan. 129, 71 Pac. 279; Town of Watertown v. Greaves, 50 C. C. A. 172, 112 Fed. 183, 56 L. R. A. 865; Petty v. Petty, 42 Ind. App. 443, 85 N. E. 995; Sneed v. Sneed, 14 Ariz. 17, 123 Pac. 312, 40 L. R. A. (N. S.) 99; In re Wickes' Estate, 128 Cal. 270, 60 Pac. 867, 49 L. R. A. (N. S.) 138."

In the case of De Vry v. De Vry, 46 Okl. 254, 148 Pac. 840, Commissioner Devereux says:

"The contention of the plaintiff in error is that the husband has the right to choose the domicile of the family, and it is the duty of the wife to accompany and live with him in the home so selected, unless there be good reason for her refusing to do so, and that a failure of the wife so to do is abandonment, authorizing a divorce. There can be no question that this statement of the law is correct. Buell v. Buell, 42 Wash. 277, 84 Pac. 821; Franklin v. Franklin, 190 Mass. 349, 77 N. E. 48, 4 L. R. A. (N. S.) 145, 5 Ann. Cas. 851; 14 Cyc. 612."

The foregoing cases cited by defendant Long may state the law correctly on the questions before the court in the respective cases, but it does not apply to the questions presented in this case. The husband may select the domicile, and it may be the duty of the wife to reside with him at the domicile so selected by him. On her refusal so to do, he may be entitled to a divorce unless she establishes a good cause for her refusal.

[1-3] The Constitution and laws of Oklahoma relating to homesteads are for the benefit of families residing in this state. But the family cannot be deprived of the homestead without the consent of both husband and wife when that relation exists.

It is undisputed that this property was once impressed with the homestead. In Alton Merc. Co. v. Spindel et al., 42 Okl. 210, 140 Pac. 1168, it is said in paragraph 3 of the syllabus:

"When property has once been impressed with the homestead character, no act or omission on the part of the husband, without the consent of his spouse, can result in an abandonment of the homestead by the family. The homestead is for the benefit of the entire family, and such joint interest is to be regarded as paramount to the rights of any individual member thereof."

Any act on the part of defendant Haskell B. Talley, selling part of the household goods, shipping part of them to Tennessee, renting out the homestead, or his going to Tennessee, cannot result in an abandonment of the homestead without the wife's consent. Clearly under the evidence she did not consent. She refused to sign a deed to convey it away. She was clinging to this homestead as the

last plank saved from her shipwrecked marriage relation with Haskell B. Talley. She was saving it as a refuge for herself and for her children.

The question is not what was the intention of Haskell B. Talley about abandoning this home, but what was the intention of the plaintiff. Haskell B. Talley's intention was to abandon the home and thereby divest it of its homestead character so that he could sell it without the consent of his wife. If the husband's intention to abandon the homestead is sufficient, then all that is necessary for him to do is wait for an opportunity when his wife is away from home, move out the furniture, and then convey it free from any homestead lien. The last proviso of section 1 of article 12 of the Constitution, *supra*, says:

"And provided further, that any temporary renting of the homestead shall not change the character of the same when no other homestead has been acquired."

By taking his wife to live with his mother from July, 1916, to March, 1917, while he was trying to regain his health and get into a training camp, he did not thereby acquire another homestead. The renting of the homestead by defendant Talley was temporary, for no other homestead had been acquired. He had not even established a home for his family, but they were living with his mother. When the husband attempts to sell the homestead without the consent of his wife, great latitude must be allowed for her acts. The wife may consent to rent the homestead and voluntarily accompany her husband to another state without losing her rights in the homestead. If this was not the law, she could be placed in a bad plight by a husband who wanted to take advantage of her and dispose of the homestead. If she refused to go, he might use her refusal as grounds for a divorce; if she did go, she would lose her homestead rights. It must be made to clearly appear that she voluntarily intended to relinquish and did abandon the homestead, and that another homestead has been acquired before her husband can convey it without her consent given as required by law. Where she persistently refuses to sign a deed to convey it and continues to claim her rights to it as a homestead, it cannot be said she intended to abandon her homestead rights.

It is not even contended that Pearl Talley ever consented to the sale of this property to defendant Long. Even when defendant Talley threatened to kill her and she consented under these threats to sign a deed, when she was able to escape without signing it, she made her escape and never has signed it. Defendant Long knew it was the homestead and that the title would not pass to him until Pearl Talley signed the deed. His money was not paid to defendant Talley,

but put in escrow so it would be safe until he obtained the signature of Pearl Talley to the deed, or could get some court to say that she could be deprived of the homestead without her consent. The findings of the court are in full accord with the evidence.

[5] We do not think the court committed any error in applying the law to the facts. Section 2 of article 12 of the Constitution reads:

"The homestead of the family shall be, and is hereby protected from forced sale for the payment of debts, except for the purchase money therefor or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon; nor shall the owner, if married, sell the homestead without the consent of his or her spouse, given in such manner as may be prescribed by law: provided, nothing in this article shall prohibit any person from mortgaging his homestead, the spouse, if any, joining therein; nor prevent the sale thereof on foreclosure to satisfy any such mortgage."

Pursuant to this section of the Constitution, the Legislature prescribed the manner in which the spouse may consent by enacting section 1143, Revised Laws of 1910, which reads:

"No deed, mortgage or other conveyance relating to real estate or any interest therein, other than for a lease for a period not to exceed one year, shall be valid until reduced to writing and subscribed by the grantors; and no deed, mortgage or contract relating to the homestead exempt by law, except a lease for a period not exceeding one year, shall be valid unless in writing and subscribed by both husband and wife, where both are living and not divorced or legally separated, except to the extent hereinafter provided."

This court has just recently construed section 2 of the Constitution, *supra*, and section 1143 of the Statutes, *supra*, in Case No. 10190, *Hawkins v. Corbit*, 201 Pac. 649, opinion filed October 4, 1921, not yet officially reported, in which it is held:

"Under the above provisions of the Constitution and laws of Oklahoma, the homestead, exempt by law, cannot be alienated except by a written instrument joined in and subscribed by both husband and wife, where that relation exists."

See *Pettis v. Johnston*, 78 Okl. 277, 190 Pac. 681; *Oressler v. Brown*, 79 Okl. 170, 192 Pac. 426; *Whelan v. Adams et al.*, 44 Okl. 696, 145 Pac. 1158, L. R. A. 1915D, 551; *Shanks v. Norton*, 79 Okl. 93, 191 Pac. 170; *Elliott v. Bond*, 176 Pac. 991; *Carter Oil Co. v. Popp*, 174 Pac. 747; *Kelly et al. v. Mosby et al.*, 34 Okl. 218, 124 Pac. 984; *Dickinson v. McLane*, 57 N. H. 31; *Howell, Jewett & Co. v. McCrie*, 36 Kan. 636, 14 Pac. 257, 59 Am. Rep. 584; *Wallace v. Travelers' Ins. Co.*, 54 Kan. 442, 38 Pac. 489, 26 L. R. A. 806, 45 Am. St. Rep. 288; *Locke v. Redmond*, 6 Kan. App. 79, 49 Pac. 670; *Morris v.*

Ward, 5 Kan. 239; Bird v. Logan et al., 35 Kan. 228, 10 Pac. 564; Berry v. Berry, 57 Kan. 691, 47 Pac. 837, 57 Am. St. Rep. 351; Withers v. Love, 72 Kan. 140, 83 Pac. 204, 3 L. R. A. (N. S.) 514; Tarrant v. Swain, 15 Kan. 146; Chambers v. Cox, 23 Kan. 393; Coughlin v. Coughlin, 26 Kan. 116; Warden v. Reser, 38 Kan. 86, 16 Pac. 60.

The contract to sell the homestead to defendant Long was not joined in by plaintiff; therefore it was void, and, if void, defendant Long could not assert any rights under it. He cannot complain of a decree of court that cancels a contract under which he cannot assert any rights.

Finding no reversible error, the judgment of the trial court is affirmed.

HARRISON, C. J., and KANE, JOHNSON, and KENNAMER, JJ., concur.

LUSK et al. v. ELROD & STINE. (No. 10102.)

(Supreme Court of Oklahoma. Nov. 8, 1921.)

(Syllabus by the Court.)

Appeal and error — 773(5)—Judgment may be reversed on brief of appellant where appellee has failed to file brief.

Where the defendants in error fail to file a brief, and have not offered any excuse for such failure, and the plaintiff in error has filed a complete record in the Supreme Court, and has served and filed a brief in compliance with the rules of the court, the Supreme Court is not required to search such record to find some theory upon which the judgment below may be sustained; and, where the brief filed by the plaintiff in error appears to reasonably sustain his assignments of error, the court may reverse the case in accordance with the prayer of the petition of the plaintiff in error.

Appeal from District Court, Comanche County; Cham Jones, Judge.

Action by Elrod & Stine, a firm composed of S. A. Elrod and J. Stine, against James W. Lusk and others, as receivers of the St. Louis & San Francisco Railroad. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

W. F. Evans, of St. Louis, Mo., and Kleinschmidt & Grant, and W. T. Stratton, all of Oklahoma City, for plaintiffs in error.

W. C. Stevens, of Lawton, for defendants in error.

ELTING, J. This suit was commenced in the district court of Comanche county, Okl., by Elrod & Stine, a firm composed of S. A. Elrod and J. Stine, against James W. Lusk, W. C. Nixon, and W. B. Biddle, as receivers

of the St. Louis & San Francisco Railroad Company, a corporation. Said petition was filed September 27, 1916, and was for the recovery of \$300 for alleged negligent and careless handling and transportation by said receivers of a shipment of bulls; said shipment being from Howard, Kan., to Indianola, Okl., and was on March 27, 1916.

To said petition the defendant receivers filed an answer. In addition to a general denial, they averred other matters in defense of the action of the plaintiffs.

The original answer was filed May 22, 1917, and on September 11, 1918, the defendants filed a supplemental answer, alleging that on the 29th day of January, 1918, an order was entered in said United States court by Sanborn, Circuit Judge, finally releasing Lusk and Biddle, as receivers of the St. Louis & San Francisco Railroad Company, and attached as exhibits thereto orders of the court pertaining thereto.

Said cause went to trial, and on the 13th day of September, 1918, a jury returned a verdict against the receivers in the sum of \$200. Motion for a new trial was filed, and the same overruled, appeal prayed, and petition in error, supported by case-made, filed in this court July 20, 1918, in which said receivers appear as plaintiffs in error and Elrod & Stine appear as defendants in error. The plaintiffs in error, in their petition in error, set out 16 assignments of error.

The plaintiffs in error have filed a brief in support of their petition in error. The defendants in error have filed no brief in answer thereto, and have shown no cause for such failure. The following is the well-known rule invariably followed by this court in such cases:

"Where the defendants in error fail to file a brief, and have not offered any excuse for such failure, and the plaintiff in error has filed a complete record in the Supreme Court, and has served and filed a brief in compliance with the rules of the court, the Supreme Court is not required to search such record to find some theory upon which the judgment below may be sustained; and, where the brief filed by the plaintiff in error appears to reasonably sustain his assignments of error, the court may reverse the case in accordance with the prayer of the petition of the plaintiff in error."

If, after examining the brief of the plaintiff in error, we find that the same reasonably sustains the assignments of error, this court may reverse and remand said cause for a new trial.

One of the main contentions of the plaintiff in error is that, at the date of judgment, the plaintiffs in error were no longer receivers of the said railroad company, and that the trial court had no authority to enter judgment against them, and that the trial court should have abated said suit upon the

motion of the plaintiffs in error for such purpose.

After an examination of the brief of the plaintiff, we find that the contentions of the plaintiffs in error seem to be reasonably sustained by their brief.

We therefore reverse and remand said cause for a new trial.

HARRISON, C. J., PITCHFORD, V. C. J., and McNEILL and NICHOLSON, JJ., concur.

BOARD OF COM'RS OF OKMULGEE COUNTY v. STATE ex rel. JACKSON et al., State Industrial Commission. (No. 11914.)

(Supreme Court of Oklahoma. Nov. 8, 1921.)

(Syllabus by the Court.)

1. Master and servant §361—Hauling water for road engine held "hazardous occupation" within Compensation Act.

D. was engaged in hauling water for a steam engine used in pulling a road grader in the construction of a public highway. The team driven by D. became frightened at the noise made by the engine and ran away. D. was thrown from the wagon and injured. *Held*, that D., at the time of the injury, was engaged in a "hazardous occupation" as contemplated by the Workman's Compensation Act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Hazardous.]

2. Master and servant §416½, New, vol. 11A Key-No. Series—Compensation award conclusive in absence of fraud if Commission had jurisdiction.

The award made by the Industrial Commission under the Workman's Compensation Act becomes final and conclusive, unless appealed from as therein provided; and in an action instituted by the Commission as provided in the act to recover the amount of the award so made, the only question to be considered by the trial court in the absence of fraud is whether or not the Commission had jurisdiction in the premises.

Appeal from District Court, Okmulgee County; Mark L. Bozarth, Judge.

Proceeding by F. Deal before the State Industrial Commission for an award for personal injuries, opposed by the Board of County Commissioners of Okmulgee County, employer, in which an award was made for the applicant, but was not paid, and an action was brought by the State, on the relation of the State Industrial Commission, for the benefit of the applicant, against such Board of County Commissioners. Judgment for plaintiff, and, from an order denying motion for new trial, the Board of County Commissioners appeals. Affirmed.

L. A. Wallace, of Okmulgee, for plaintiff in error.

Hughes & Dannenburg, of Sapulpa, for defendant in error.

PITCHFORD, J. This is an appeal from the district court of Okmulgee county, Okla., complaining of a judgment rendered on the 18th day of May, 1920, in favor of the defendants in error, who were the plaintiffs in the lower court, and against the board of county commissioners of Okmulgee county, defendants in the lower court. For convenience, the parties will hereafter be designated as plaintiffs and defendant.

The action grew out of a personal injury sustained by F. Deal while engaged in work on a public highway, in Okmulgee county, and involves the construction of chapter 246, Sess. Laws of 1915. The accident occurred on June 26, 1919, while Deal was acting as a teamster in hauling water for a steam engine used in pulling a road grader in the construction of the highway. The team which Deal was driving became frightened at the steam engine and ran away, which caused him to be thrown from his wagon to the ground, thereby suffering the injuries complained of in the petition. In due time, Deal filed a claim against the county with the State Industrial Commission. Thereafter, on the 18th day of August, 1919, the Industrial Commission made its award upon said claim by which it ordered the county of Okmulgee to pay the claimant compensation computed from the 10th day of July, 1919, at the rate of \$10 per week, and until the final termination of his disability, and for the payment of all medical treatment during the first 15 days after the accident. The instant action followed as a result of the failure of the board of county commissioners to pay the claimant the amount awarded him or any part thereof. A jury trial was waived and the cause was tried to the court. The plaintiff recovered a judgment against Okmulgee county in the sum of \$5,000 and the cost of the suit. From the order denying its motion for new trial, the defendant prosecutes this appeal.

[1, 2] The defendant contends that work upon the public highway does not come within the terms of hazardous employment as contemplated by the Workman's Compensation Act, and as a consequence would not cover injuries sustained by an employee of the county engaged in the construction or repair of public roads at the time of injury. The act referred to is found in Sess. Laws of Oklahoma 1915, p. 574, section 2 of which reads as follows:

"Compensation provided for in this act shall be payable for injuries sustained by employees engaged in the following hazardous employments, to wit:

"Factories, cotton gins, mills and workshops where machinery is used; printing, electrotyping, photograving and stereotyping plants where machinery is used: foundries, blast furnaces, mines, wells, gas works, waterworks, reduction works, elevators, dredges, smelters, powder works; laundries operated by power; quarries; engineering works, logging, lumbering, street and interurban railroads not engaged in interstate commerce, buildings being constructed, repaired or demolished, farm building and farm improvements excepted, telegraph, telephone, electric light or power plants or lines, steam heating or power plants, and railroads not engaged in interstate commerce. If there be or arise any hazardous occupation or work other than those hereinabove enumerated it shall come under this act."

It is true work on a highway is not specifically mentioned as a hazardous employment in the act, and if we are to be governed only by a strict construction of the language contained in section 2, in all probability we would be forced to hold that the work in which Deal was engaged at the time he received the injury complained of would not be covered by the provisions of the act. But when we consider the purposes to be subserved, and the object of the Legislature in enacting the Workman's Compensation Laws, we are able to appreciate the humanitarian motives prompting the passage of the act. The law as enacted is for the protection of the injured workmen, who in the great majority of cases are dependent upon their daily wage, not only for the support of themselves, but likewise for the support of their families. The act, as we construe the same, is intended to cover all accidental injuries received by employees in any kind of hazardous employments enumerated in section 2, where the work performed by such employee is of a manual or mechanical nature. The act must be construed as a whole, and from the entire act deduce, if we can do so, just what is embraced within its terms.

Section 11 of the act provides as follows:

"In any proceeding for the enforcement of a claim for compensation under this act, it shall be presumed in the absence of substantial evidence to the contrary:

"(1) That the claim comes within the provisions of this act.

"(2) That sufficient notice thereof was given.

"(3) That the injury was not occasioned by the willful intention of the injured employee to bring about the injury of himself or of another.

"(4) That the injury did not result solely from the intoxication of the injured employee while on duty.

"(5) That the injury did not result directly from the willful failure of the injured employee to use a guard or protection against accident furnished for his use pursuant to any statute or by order of the Labor Commissioner."

The term "employer," as used in the act, includes the state, county, city, or any mu-

nicipality when engaged in any hazardous work within the meaning of the act in which workmen are employed for wages.

Section 13 of the act provides that the award of the Industrial Commission shall be final and conclusive upon all questions within its jurisdiction between the parties, unless appealed from as therein provided.

In the instant case, the county failed to make any defense before the Commission and failed to appeal from the finding or award of the Commission. It therefore follows that the only question for our determination is whether or not the work in which Deal was engaged at the time of his injury is included within the terms of section 2, supra.

It is further provided by the act, if payment of the award is not made, that the amount awarded by the Commission shall constitute a liquidated claim for damages against the employer which may be recovered in an action to be instituted by the Commission in the name of the people of the state; the compensation recovered by the Commission to be paid to the person entitled thereto in accordance with the award.

As we have before stated, the word "highway" or "public road" is not specifically mentioned in section 2, supra; but the act does include any employee engaged in working a quarry which is designated as a hazardous employment. "Quarry" is defined by the act as an opening or cut from which coal is mined, or clay, ore, mineral gypsum, gravel, sand, or rock is cut or taken for manufacturing, building, or construction purposes. "Construction work" is defined by the act as improvements or alteration of building, structures, streets, highways, etc. In fact, all work seems to be considered as hazardous work under the act where machinery is used in the prosecution of the work, the only exception being farm building and farm improvements; but it has been held in numerous decisions in other states that this exception does not obtain where the work on the farm is done in connection with machinery. *Raney v. State Industrial Acc. Commission et al.*, 85 Or. 199, 166 Pac. 523; *In re Boer*, 65 Ind. App. 408, 117 N. E. 507.

The case relied upon by the defendant for reversal is *Board of Commissioners of Kingfisher County v. Grimes et al.*, 75 Okl. 219, 182 Pac. 897. In that case, the plaintiff was employed by the county to survey a public road. The injury of which he complained was sustained while going to his work. The claim for recovery was based under the head of "engineering works," as contained in the statute. In delivering the opinion of the court, it was said:

"We are constrained to hold that the term 'engineering works' as used in section 2 of the act refers to establishments or places of business where engineering work is carried on, and

does not include or refer to work of an engineer on a public highway."

The Grimes Case, *supra*, came before this court on direct appeal from the action of the State Industrial Commission, and this court had before it all the evidence concerning the character of the employment in which the employee was engaged at the time of the injury. The decision in the Grimes Case might have been different had the evidence disclosed that the injury was received while the plaintiff was engaged in surveying, and that the injury was occasioned by reason of machinery used in the construction of roads. The compensation provided for injured workmen in the various hazardous employments specifically mentioned in the act is not confined to the employee operating the machinery, but applies to any employee regardless of any direct connection between the nature of the work of such employee and the machinery.

The case of Board of Commissioners of Cleveland County v. Barr et al., 173 Pac. 206, in many respects, is similar to the instant case. Barr received injuries while engaged in doing blasting upon the state highway in Cleveland county, which had been declared a public highway by the board of county commissioners, for which injures the State Industrial Commission awarded him compensation. From this award, the board of county commissioners appealed. In delivering the opinion, the court said:

"It is provided in section 10, art. 2, of the Workmen's Compensation Act that the decision of the Industrial Commission shall be final as to all questions of fact. Since it is conceded that George T. Barr was engaged in work on a state highway being improved under the directions of the board of county commissioners of Cleveland county, the only question presented by the appeal is whether the Commission erred, as a matter of law, in holding that the said George T. Barr was an employee of Cleveland county while pursuing the work in which he was engaged at the time of his injuries."

In that case the only question at issue was as to the employment of Barr by the board of county commissioners. The question as to whether or not his being engaged in work on the public highway would be included under section 2 of the act was not raised. It seems to have been conceded that the act did cover work on the public highway.

The act in question, in order to effectuate the legislative intent, should be given a reasonable construction, and we are of the opinion that it is clearly deductible from the entire act that one working on a public highway is engaged in a hazardous occupation where a steam engine is used in connection therewith at the time of the injury, and particularly so where the injury resulted from the use of the engine.

It is our opinion that the judgment of the trial court should be affirmed, and it is so ordered.

HARRISON, C. J., and McNEILL, NICHOLSON, ELTING, and KENNAMER, JJ., concur.

WOODARD v. STATE. (No. A-3743.)

(Criminal Court of Appeals of Oklahoma.
Nov. 30, 1921.)

(Syllabus by the Court.)

Homicide \S 257(1)—Evidence held to sustain verdict for assault with intent to kill.

In a prosecution for shooting another with intent to kill, evidence held sufficient to support the verdict and judgment of conviction.

Appeal from District Court, Stephens County; Cham Jones, Judge.

E. W. Woodard was convicted of assault to murder, and he appeals. Affirmed.

Bond & Kolb, of Duncan, for plaintiff in error.

The Attorney General and E. L. Fulton, Asst. Atty. Gen., for the State.

DOYLE, P. J. Plaintiff in error, Woodard, was convicted on a charge of shooting one Grover Grey with intent to kill, and his punishment fixed at imprisonment for a term of one year and one day. He has appealed from the judgment rendered upon such conviction, but there has been no appearance on his behalf in this court.

The errors assigned are substantially as follows: That the verdict is not sustained by sufficient evidence and is contrary to law; that the court erred in admitting incompetent testimony and in rejecting legal and material testimony, all to the prejudice of the rights of the defendant.

There is very little conflict in the evidence. It appears the defendant lived in a tenant house on the farm of the father of Grover Grey, and there was some disagreement over the fencing of a garden which resulted in the shooting charged.

Grover Grey testified:

"I went up by Mr. Woodard's house to see if he would fence his garden. He said he did not have any wire to fence it with. I told him to take one wire from the fence around the house. Then he said he did not have any posts. I went back to my father. He said he could use the posts at the barn. Then I returned to Mr. Woodard and told him where to get the posts, and he said it was my father's place to fence the garden. I said I did not think so, and started away. I had taken about five steps when I heard him say, 'God damn you, I will kill you,' I looked back. He had a shotgun on

me, and it snapped. I said there was no need of shooting; we could fix it without any trouble. He broke the gun and loaded it and shot me in the hand and side from the knee up. I fell. Then I saw him hold the gun on my father, and I heard him say, 'Old man, stop, or I will let you have the same thing.'"

Earl Cole testified:

"The defendant lived within a half a mile of my place. About 9 o'clock the night before the shooting he came to my place and borrowed my Winchester shotgun."

Dr. Decker testified:

"I was called to attend Grover Grey. There were shot scattered from his knee up. Two penetrated the abdomen and 60 the leg. There were 23 shot in his hand, and 2 or 3 went through."

For the defendant his wife testified:

"Grover Grey came to our house that day and wanted us to fence the garden. My husband told him he didn't have any fence posts. He came back again in about 10 minutes and said, 'I am going to cut that feed or kill you.' My husband was standing in the door. He raised his gun and shot towards his hand. Grover said, 'I will not say any more.' Then he fell, and his father came and fooled around him."

As a witness in his own behalf the defendant testified:

"Grover Grey started cutting my feed without asking me about it; I ordered him to stop and to get off my premises until I gathered the crop and paid him the rent. The next day he came to my house and said, 'We are going to turn our stock in, and if you want your garden you had better fence it.' I said, 'You furnish the wire and I will fence it.' Then he went off to his father. In about 10 minutes he came back and said, 'If you want to fence the garden, you can get your wire and post; we don't fence anything.' I was standing in the door. Then he said, 'I am going to cut that feed or I will shoot hell out of you,' and he made towards me. I grabbed the gun and shot him as quick as I could shoot. As he fell he said, 'Don't shoot me any more.'"

Where there is substantial evidence to show the guilt of the accused, this court will not weigh the sufficiency of the evidence to sustain a conviction. The weight of the evidence was for the jury. The rule is that a man will be presumed to intend the natural and necessary consequence of his act, and intent or design to kill in this class of cases may be presumed from the character of the weapon used.

After a careful examination of the record, we conclude that there was no error which could have been prejudicial to the defendant.

The judgment of the lower court is therefore affirmed.

MATSON and BESSEY, JJ., concur.

DAVIS v. STATE. (No. A-3647.)

(Criminal Court of Appeals of Oklahoma.
Nov. 23, 1921.)

(Syllabus by the Court.)

1. Criminal law \S 544, 662(6)—Where accused cross-examined witness at preliminary hearing and witness cannot be secured for trial, transcript of his testimony admissible.

Where the accused at a former trial or at a preliminary hearing once enjoyed his right to be confronted by a witness against him and had the privilege of cross-examining the witness, if at a subsequent trial, involving the same issues, it satisfactorily appears that the witness has died, become insane, or has permanently left the state without collusion or procurement of either party and that his presence with due diligence cannot be had, or where the witness is sick and unable to testify, or his whereabouts cannot with due diligence be ascertained, a transcript of the testimony of such witness may be introduced as the evidence of such absent witness.

(a) Having once been confronted with a witness, and having had the right to cross-examine him, the admission of such transcript in evidence is not in violation of the constitutional right of the accused to be confronted with the witnesses against him.

2. Criminal law \S 543(2)—Where attendance of witness could be had, a mere showing of his absence does not authorize introducing transcript of his testimony.

Where it appears that the attendance of a resident witness could have been had by the exercise of due diligence, the mere showing that on the day of trial the witness is temporarily in another state on private business is not a sufficient predicate to authorize the reception of his evidence taken at the preliminary hearing.

3. Larceny \S 77(4)—Accused held entitled to instruction covering his explanation of possession of recently stolen property.

Where the accused is charged with larceny and the possession of the stolen property is admitted by the accused, who by himself and others makes a plausible explanation of such possession, which if believed by the jury would indicate his innocence, the accused under such circumstances, at his request, is entitled to appropriate instructions touching upon his possession of recently stolen property.

Appeal from District Court, Kay County; J. W. Bird, Judge.

Bert Davis was convicted of larceny and sentenced to serve a term of four years in the state penitentiary, and he appeals. Reversed and remanded.

B. O. Wleck, of Ponca City, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. O. Hall, Asst. Atty. Gen., for the State.

BESSEY, J. Bert Davis, plaintiff in error, herein referred to as the defendant, was convicted on the 24th day of April, 1919, of the larceny of a Ford touring car, said to have been stolen early in the month of February, 1918. His punishment was fixed at four years in the state penitentiary. After the overruling of a motion for a new trial, an appeal was taken and regularly lodged in this court.

The record shows that the subject of the larceny, a Ford touring car, was stolen from the residence of F. C. Hall at Chickasha, Okla., and that the car was afterwards found on the 20th day of February, 1918, in the possession of one Vince Cumiford, in Kay county, and that Cumiford had purchased the car from the defendant a short time previous. Mr. Hall, the owner of the car, went to the premises of Mr. Cumiford and identified the car to the satisfaction of Mr. Cumiford, who then surrendered it to Mr. Hall.

The defendant at this time was engaged in the shoe repairing business at Ponca City, where he maintained a shop for that purpose. In addition to this business, he had been engaged in buying and selling second-hand cars, and the testimony on the part of the defendant tends to show that he had bought this particular car from David Lessert, who was a member of the firm of Lessert & Lessert, and that they conducted a garage at Ponca City; that soon after Davis claims to have purchased the car, David Lessert disappeared, and though diligent search was made to ascertain his whereabouts, no one had been able to locate him. There is testimony tending to show that Irv Killion made or negotiated this trade between the defendant and Cumiford, and that Killion had delivered the car to Cumiford; that after the defendant was arrested and placed in jail, Cumiford went to see him, and the defendant denied having sold the car to him.

Numerous assignments of error have been urged why this case should be reversed. Two of these assignments we think are decisive in this case, and these only will be analyzed, namely:

(1) That the court erred in permitting the state to introduce in evidence a transcript of the testimony of F. C. Hall given at the preliminary hearing of this cause, for the reason that a proper predicate was not laid and proper diligence to obtain the presence of the witness was not shown, as a condition precedent for the reception of such testimony.

(2) That the court erred in instructing the jury only upon the state's theory of the case and, on the same issue, in refusing to instruct the jury upon the defendant's theory of the case, tending to explain his possession of the stolen car.

[1] Upon the first proposition, it appears that F. C. Hall's residence was known to the county attorney and the sheriff as being in Chickasha, Grady county, Okla.; that Mr. Hall had promised the sheriff of Kay county that he would come to Kay county to testify in the case upon notice, without a subpoena. The case was set for trial in the trial court for the 7th day of April, 1919, and on that day was continued and reset for the 22d day of April, 1919. On the 16th day of April, the county attorney testified, he put in a call at the telephone office for F. C. Hall at Chickasha and found that he had left his home temporarily and was informed that he had gone to Wichita Falls, Tex. The county attorney then talked over the telephone to Mr. Hall at Wichita Falls, and Mr. Hall explained that he had intended to appear at the trial voluntarily, as promised, but that he had an important oil deal pending in Southern Texas, and that it would be impossible for him to be present on Tuesday, April 22d. The county attorney then appealed to the sheriff to do what he could to persuade Mr. Hall to come. The sheriff then telephoned to Wichita Falls and was informed that Mr. Hall had gone to Southern Texas.

No subpoena was ever issued to the officers of Grady county, where the witness resided. On the 16th day of April, 1919, a subpoena for F. C. Hall was issued, directed to the sheriff of Kay county, and the sheriff's return thereon showed, "F. C. Hall not found in Kay county." Upon this showing the court, over the objections of the defendant, permitted the testimony of F. C. Hall taken at the preliminary hearing to be read to the jury as his deposition.

We have no direct statute in this state with reference to the introduction of testimony of a witness given upon a former trial or preliminary hearing of a case. Section 5543, R. L. 1910, provides:

"The procedure, practice and pleadings in the courts of record of this state, in criminal actions or in matters of criminal nature, not specifically provided for in this Code, shall be in accordance with the procedure, practice and pleadings of the common law."

The common law in force in the United States can only be found in the text-books and in the decisions of the various courts of this country. We must therefore look to these sources to see whether or not the objections offered by counsel for defendant are well founded.

The Constitution of this state, section 20 of the Bill of Rights, provides that in all criminal prosecutions the accused shall have the right to be confronted with the witnesses against him. At common law it has been almost universally held that the chief and essential purpose of confrontation is to secure the opportunity for cross-examination.

Where the witness, after testifying at a former trial, has died, become insane, left the state, is sick and unable to testify, or his whereabouts cannot with due diligence be ascertained, it has been held that if the accused at a former trial once enjoyed his right to be confronted by the witness, his constitutional right to meet the witnesses against him face to face is not violated by the admission of the testimony of such a witness whose presence at a subsequent trial cannot be obtained. *Underhill on Criminal Evidence* (2d Ed.) § 265; 2 *Wigmore on Evidence*, § 1395; *Hawkins v. U. S.*, 3 *Okl. Cr.* 652, 108 *Pac.* 561.

It frequently happens that the cross-examination of a witness at a preliminary trial is more or less perfunctory, and that by the time the cause comes on for final trial the defendant is better able, by reason of more time and research, to conduct a thorough cross-examination. There is, of course, also the advantage to be obtained by the personal appearance of the witness in order that the judge and jury may be able to observe the witness' deportment while testifying, and a certain subjective moral effect is produced upon the witness. If the witness can be obtained at the final trial, it is the right of the defendant to require his presence. The question here presented is whether the county attorney, in this instance, under the circumstances above recited, exercised due diligence to produce the personal attendance of the witness F. C. Hall.

[2] The record discloses that Mr. Hall resided in Chickasha; that no subpoena was ever issued, directed to the sheriff of the county in which he resided, and that for nine days after the case was set Hall may have been at his home in Grady county, and that no compulsory effort whatever was made to obtain his attendance; that the county attorney and sheriff of Kay county relied wholly upon a verbal promise of this witness that he would appear when the case came on for trial. It seems probable that if a subpoena had been issued to the sheriff of Grady county within this period of nine days, service could have been had upon this witness and his attendance compelled.

We think that this court in former opinions has followed a rule sufficiently liberal in permitting testimony taken at a former trial or a preliminary hearing to be used in the absence of the witness, and that this court should not, by judicial construction, extend or enlarge upon the rule announced in former decisions. In many instances the prosecuting officer might prefer to have the testimony taken at a former hearing read to the jury rather than to run the risk of having the witness appear upon the witness stand to be subjected to a rigid cross-examination in the presence of the jury. To lay down the rule that a mere showing that

a resident witness is in another state and that no effort or diligence to produce the witness in open court need be shown might enable public prosecutors and others, if it appeared to their interest, to cause witnesses to absent themselves from the jurisdiction of the court to escape further cross-examination. To say that no diligence is required to produce the witness in open court, where it is possible to do so, is not in keeping with the spirit or the letter of the constitutional guaranty that a defendant in a criminal action has a right to be confronted face to face with the witnesses against him. *Warren v. State*, 6 *Okl. Cr.* 1, 115 *Pac.* 812, 34 *L. R. A. (N. S.)* 1121; *Baldock v. State*, 16 *Okl. Cr.* 203, 182 *Pac.* 265; *Temple v. State*, 15 *Okl. Cr.* 176, 175 *Pac.* 733. As to witnesses out of jurisdiction, see notes to 25 *L. R. A. (N. S.)* 874; *Motes v. U. S.*, 178 *U. S.* 458, 20 *Sup. Ct.* 993, 44 *L. Ed.* 1150.

We do not mean to say or intimate that the county attorney or those interested in this prosecution did not desire the presence of the witness Hall. What we do mean to hold is that it would be dangerous to relax the rule that a reasonable effort and diligence to produce the witness should be shown, where he and his place of residence were within the reach of the court's processes after the cause was set for trial, and in our opinion no such showing was made here. The defendant should not be deprived of the right to be confronted by the prosecuting witness at the final trial merely because the witness desired to transact important business in another state.

[3] In the case of *Motes v. U. S.*, cited above, Mr. Justice Harlan, speaking for the court said:

"We are of opinion that the admission in evidence of Taylor's statement or deposition taken at the examining trial was in violation of the constitutional right of the defendants to be confronted with the witnesses against them. It did not appear that Taylor was absent from the trial by the suggestion, procurement, or act of the accused. On the contrary, his absence was manifestly due to the negligence of the officers of the government. Taylor was a witness for the prosecution. He had been committed to jail without bail. We have seen that the official agent of the United States in violation of law took him from jail after the trial of this case commenced, and, strangely enough, placed him in charge, not of an officer, but of another witness for the government, with instructions to the latter to allow him to stay at a hotel at night with his family. And on the very day when Taylor was called as a witness, and within an hour of being called, he was in the corridor of the courthouse. When called to testify he did not appear."

Touching upon the second assignment of error herein considered, instruction No. 5 given by the court was as follows:

"The jury are instructed that the possession of stolen property recently after the larceny

thereof, when unexplained, may be sufficient to warrant the jury in inferring the guilt of the party in whose possession it is found. Whether such inference should be drawn is a fact exclusively for the jury."

Excepted to by the defendant.

The instructions of the court should be pertinent to the evidence produced at the trial. *Thornberry v. State*, 8 Okl. Cr. 88, 126 Pac. 590; *Cohn v. State*, 4 Okl. Cr. 494, 113 Pac. 217.

Here the defendant gave a plausible explanation of his possession of the stolen car. His possession, therefore, was not "unexplained," in any sense covered by this instruction.

The defendant requested an instruction, which was refused by the court, as follows:

"You are instructed that possession of recently stolen personal property alone is not sufficient proof of the crime charged in the information to warrant a conviction, when a reasonable explanation of the possession of same is made and the circumstances tend to support the explanation."

The court having given the instruction he did, relating to the inference to be drawn from the unexplained possession of recently stolen property, he should, in fairness to the defendant, have given a further instruction covering the defendant's theory of the case and the evidence tending to explain his possession of this property.

For the reasons stated, the cause is reversed and remanded.

DOYLE, P. J., and MATSON, J., concur.

THOMPSON v. STATE. (No. A-3000.)

(Criminal Court of Appeals of Oklahoma.
Nov. 25, 1921.)

(Syllabus by the Court.)

Chattel mortgages §230—Private sale of chattels by assignee of first mortgage, not punishable where second mortgagee not prejudiced.

Where there is a first and a second chattel mortgage, of record, covering the same property, and where the assignee of the first mortgage, by agreement with the mortgagor, authorizes and directs the sale of the mortgaged property at private sale, neither the assignee nor the mortgagor, acting for the assignee, will be punishable for the illegal disposition of mortgaged property under the provisions of section 2755, R. L. 1910, where it appears that there was no intention by either to defraud the holder of the second mortgage, and where the second mortgagee in fact suffered no harm by such informal foreclosure.

Appeal from District Court, Love County; W. F. Freeman, Judge.

J. W. Thompson was convicted of disposing of mortgaged property, and he appeals. Reversed and remanded.

G. V. Pardue, of Wilson, for plaintiff in error.

S. P. Freeling, Atty. Gen., and R. McMillan, Asst. Atty. Gen., for the State.

BESSEY, J. An information was filed in the district court of Love county on November 3, 1916, charging J. W. Thompson, plaintiff in error, herein referred to as the defendant, with having on or about the 1st day of January, 1916, unlawfully, willfully, purposely, and feloniously sold and disposed of mortgaged property. On this charge the defendant was tried and found guilty, and his punishment fixed at a fine of \$100 and costs, amounting to \$63.40.

The record discloses that the defendant, on February 3, 1914, executed a chattel mortgage in favor of James D. Freeman of the amount of \$500, covering three head of horses, six head of cattle, and their increase, together with a growing crop and some farm implements; afterwards, on the same day, the defendant executed another chattel mortgage of the amount of \$176.45, covering the same property, to J. W. Scanlan; and that J. W. Scanlan had actual and constructive notice of the prior mortgage executed in favor of Freeman.

On January 13, 1915, Mrs. T. C. Thompson, wife of the defendant, out of her own personal, separate estate, purchased the notes given by her husband to Freeman, and took an assignment of the notes and the mortgage securing the same. That soon after, as assignee of the mortgagee, Freeman, she took charge of the property covered by the mortgage, and at various times during the year 1915 she, by agreement with her husband and with his consent and assistance, sold portions of this property from time to time to various individuals, without the consent of J. W. Scanlan, holder of the second mortgage. There is evidence tending to show that the aggregate amount Mrs. Thompson received from these several sales was insufficient to satisfy the first mortgage, and from this fact it may be inferred that the holder of the second mortgage was not injured by this informal method of foreclosure. Under the circumstances there appeared to be no willful, felonious intent on the part of Mrs. Thompson and the defendant to defraud any one. Whether the property would have sold at public sale for more than enough to satisfy the first mortgage is of course a matter of speculation.

The state's testimony in chief, in our opinion, was not sufficient to warrant a conviction, for the reason that the evidence tend-

ing to show that certain portions of the property were sold was vague and indefinite as to the identity of the property; indefinite as to the time when sold, and as to whether or not the defendant had anything to do with the sales. At the close of the state's testimony the defendant demurred to the evidence, which amounted to a request for an instructed verdict in favor of the defendant. This demurrer was overruled. The defendant then introduced his testimony, in which he testified that in February, 1915, his wife had purchased the Freeman mortgage, and Mrs. Thompson admitted that she authorized her husband, the defendant, to dispose of some of the property at private sale from time to time during the year 1915, and that she herself disposed of other portions of it, with full knowledge that the Scanlan mortgage was in full force and effect and unsatisfied.

Section 2755, R. L. 1910, under which this prosecution was brought, is as follows:

"Any mortgagor of personal property, or his legal representative, who, while such mortgage remains in force and unsatisfied, conceals, sells, or in any manner disposes of such property, or any part thereof, or removes such property, or any portion thereof, beyond the limits of the county, or materially injures or willfully destroys such property, or any part thereof, without the written consent of the holder of such mortgage, shall be deemed guilty of a felony, and shall, upon conviction, be punished by imprisonment in the penitentiary for a period not exceeding three years or in the county jail not exceeding one year, or by a fine of not to exceed one hundred dollars: Provided, that the writing containing the consent of the holder of the mortgage, as before specified, shall be the only competent evidence of such consent, unless it appear that such writing has been lost or destroyed."

Where the written provisions of a contract are for the protection or exclusive benefit of one of the parties to a contract, that party may usually waive such provisions, orally or by conduct indicative of a waiver. A parol consent operates as a waiver even in the face of a provision in a mortgage requiring written consent. It has been held in many cases that the same rule applies where a statute makes it an offense to sell or dispose of mortgaged property without the written consent of the mortgagee. *Carr v. Brawley*, 34 Okl. 500, 125 Pac. 1131; 43 L. R. A. (N. S.) 302, and notes, pages 306 and 307, citing numerous cases.

We cannot see how any of the parties to a contract, where the state is not interested and no third person is aggrieved, could be punished criminally for mutually waiving a written covenant in a contract. It would amount to an absurdity to say that an act done according to a method prescribed by civil procedure might amount to a punishable offense under the Criminal Code.

By the provisions of our statutes and the decisions of our courts there are four ways in which a mortgagee may foreclose a chattel mortgage, to wit: (1) By suit in equity brought for that purpose. (2) In the manner and upon the notice prescribed for the sale of pledged property. (3) Upon notice as prescribed by section 4027, R. L. 1910. (4) By private sale by the mortgagee where the notice and manner of sale, as prescribed by statute or as prescribed in the power of sale contained in the mortgage is waived. Sections 4026 and 4027, R. L. 1910; *First National Bank of Ardmore v. Dougherty*, 31 Okl. 179, 120 Pac. 656, Ann. Cas. 1913D, 411.

It appears conclusively from this record that Mrs. Thompson, for an adequate and valid consideration, succeeded to all the rights of Freeman, the original first mortgagee. Our statute makes no provision for filing or recording an assignment of a chattel mortgage. In the absence of a statute requiring it in express terms or by necessary implication, it is not necessary for the assignee to record the assignment in order to protect his rights. *Wills v. Fuller*, 47 Okl. 720, 150 Pac. 693; *First National Bank v. National Livestock Bank*, 18 Okl. 719, 76 Pac. 130; 11 C. J. 664. From this it will be seen that Mrs. Thompson, assignee, had a right to take charge of the mortgaged property and foreclose the mortgage by any method and in the same manner that Freeman might have done prior to the assignment; and so long as such foreclosure is conducted fairly, without any intent to defraud and without in fact defrauding the holder of the second mortgage, such holder of a second mortgage has no cause for complaint.

Under the facts disclosed by this record, the defendant did not dispose of this mortgaged property—the disposition was made by Mrs. Thompson, assignee of the first mortgage with the consent of the mortgagor, the defendant here. The fact that the mortgagor and the assignee of the mortgage were husband and wife does not alter the situation, except that their conduct will be more closely scrutinized where the rights of third persons may be involved. Viewing all the circumstances together, it does not appear that it was the intention of either the mortgagor or the assignee to defraud the holder of the second mortgage nor that the rights of the holder of the second mortgage were in fact impaired.

Upon the question of whether it was the intention of the mortgagor to defraud the holder of the second mortgage, and whether as a matter of fact the mortgagee in the second mortgage was defrauded, this court, in the case of *Watson v. State*, 11 Okl. Cr. 542, 149 Pac. 926, said:

"We are inclined to the view that it must have been the purpose of the Legislature to

provide a statute which would give the mortgagee adequate and ample protection against fraud, annoyance, and unnecessary expense, and that therefore the intention of this act was to penalize any mortgagor who removed his property from one county to another, * * * and who by such removal either defrauded the mortgagee or intended to defraud him. In our judgment, the purpose of this law is accomplished when it is given this construction. Under this view, any mortgagor who removes mortgaged property, as prohibited, with the intent to defraud the mortgagee, would be guilty of a violation of the statute; or, if such mortgagor voluntarily removes such property and by reason of such removal fraud is actually perpetrated on the mortgagee, whether such fraud was conceived before the removal occurred or afterward, or whether such fraud was intended or not, such an act would be punishable as provided. It can hardly be said that a person should be sent to the penitentiary, deprived of his citizenship, and branded as a felon for the remainder of his life, who has done no act which injured any one and has done no act which was intended to injure any one."

Applying the doctrine announced in the Watson Case just quoted and keeping in mind the fact that Mrs. Thompson, assignee, and not the defendant, disposed of this property, so far as this record shows, fairly and for an adequate consideration, the defendant would be guilty of no crime in assisting his wife, the assignee of the first mortgage, in foreclosing the mortgage in the manner disclosed in this record.

The judgment of the trial court is therefore reversed and the cause remanded.

DOYLE, P. J., and MATSON, J., concur.

JOHNSON v. STATE. (No. A-3660.)

(Criminal Court of Appeals of Oklahoma. Nov. 22, 1921.)

(Syllabus by the Court.)

1. Rape \S 51(1)—Evidence sufficient to support conviction in first degree.

In a prosecution for rape, evidence held sufficient to support the verdict and judgment of conviction for rape in the first degree.

2. Rape \S 19—One assisting others may be convicted though having no intercourse with prosecutrix.

Where the evidence shows, or tends to show, that the defendant was present aiding and assisting others in committing a rape by force and violence, overcoming the resistance of the female, a conviction will be sustained, even though he did not personally have intercourse with her.

3. Criminal law \S 1150—Change of venue within sound discretion of trial court.

A petition for a change of venue is addressed to the sound discretion of the trial court, and, unless it clearly appears that there is an abuse of such discretion, this court will not reverse the judgment for the failure of the trial court to grant a change of venue.

Appeal from District Court, Delaware County; A. C. Brewster, Judge.

Forest Johnson was convicted of rape, and he appeals. Affirmed.

Hunt & Beaucamp, of Grove, John R. Leach, of Leach, and James S. Davenport, of Vinita, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. This appeal is from a judgment of conviction for rape in the first degree, the punishment having been assessed at imprisonment in the penitentiary for 20 years. The information charged that appellant, Forest Johnson, Dick Johnson, Raymond Scaggs, and Dan Scaggs, in Delaware county, on or about the 13th day of August, 1919, did unlawfully, feloniously, against the will of Lillie Hayes, and by force and violence, sufficient to overcome her resistance, have sexual intercourse with her, she, the said Lillie Hayes, not being the wife of either of the said defendants.

A motion to quash and set aside the information was interposed and overruled, and a general demurrer was interposed and overruled; the defendants then filed a petition for change of venue, which was denied. The defendants then asked and were granted a severance. Upon appellant's separate trial the jury returned their verdict as above stated.

The errors assigned are substantially as follows: That the court erred in overruling the motion to quash, and the demurrer to the information; that the court erred in refusing to grant a change of venue; that the verdict is contrary to law and the evidence; that the court erred in admitting incompetent and prejudicial evidence; that the court erred in giving certain instructions and in refusing to give two requested instructions; and that the court erred in permitting improper remarks by the county attorney. We will dispose of these assignments of error in the order stated.

The grounds of the motion to set aside the information are that—

"The original complaint was filed before S. R. Beck, justice of the peace in the town of Bernice; that on the defendant's application, and by agreement of the parties, the cause was transferred to S. C. Platt, justice of the peace in the town of Grove, and the defendants were

held to answer as the result of the preliminary examination before said justice, S. C. Platt; that the said S. R. Beck acted outside of the justice district for which he was appointed justice of the peace, and for this reason his acts were illegal and a nullity."

In support of the motion to set aside, the county clerk testified:

"The incorporated town of Bernice is in township No. 5, which township is in justice district No. 4; that said S. R. Beck was appointed justice of the peace to fill a vacancy caused by the resignation of E. T. Tompkins, justice of the peace of the town of Bernice, and that S. R. Beck, at the time he was appointed, was a resident of the town of Bernice."

It is apparent from the record that the motion to set aside does not state facts sufficient to set aside the information, and the proof offered does not support the grounds alleged in the motion. Upon the request of the defendants and by agreement of the parties the preliminary examination was held before S. C. Platt, the committing magistrate; this left nothing for the defendants to complain of. Upon the record before us the motion to set aside the information was properly overruled.

The sufficiency of the information is not questioned in appellant's brief, and we find that it is sufficient, and the demurrer thereto was properly overruled.

[3] The ground set up in the application for change of venue was:

"That the minds of the inhabitants of Delaware county are so prejudiced against each of the defendants that a fair and impartial trial cannot be had in said county."

The application was also supported by the affidavits of three other persons. The court overruled the application. It has been the uniform holding of this court that the granting or refusing of a change of venue is, under the statute, a matter resting within the sound discretion of the trial court, and, unless it clearly appears there is an abuse of such discretion, this court will not reverse the judgment for a failure of the trial court to grant a change of venue. *Browder v. State*, 18 Okl. Cr. 43, 180 Pac. 571; *Smith v. State*, 14 Okl. Cr. 348, 171 Pac. 341; *Gentry v. State*, 11 Okl. Cr. 355, 146 Pac. 719; *Edwards v. State*, 9 Okl. Cr. 306, 131 Pac. 956, 44 L. R. A. (N. S.) 701; *Sayers v. State*, 10 Okl. Cr. 234, 135 Pac. 1073; *Tegeler v. State*, 9 Okl. Cr. 138, 130 Pac. 1164; *Turner v. State*, 4 Okl. Cr. 164, 111 Pac. 988. Upon the record before us we are of the opinion that there was no error in refusing a change of venue.

The alleged rape was committed about midnight of the day alleged, at the home of prosecutrix in Delaware county, five miles south of Afton. The prosecutrix and her six

children occupied a two-room house; the oldest girl 14 years old, the next a girl 12 years old, the next a boy 10 years old, the next a girl 8 years old, the next a boy 4 years old, and a baby boy 20 months old. She testified:

"I had been asleep. Some one hollered, 'Hello.' I raised up and asked what they wanted. Some one said they were looking for a man by the name of O'Conner, and thought he was there in the house. I said, 'There is no men folks here.' They went away from the door, and I got up and dressed, and with my daughter began to search for a knife I had there, or piece of stove wood to protect ourselves. In 5 or 10 minutes they came back. They said they were lawyers. Dick Johnson had a little pistol. He pointed it at me, and told me to put the knife down. I laid it on the incubator. Then he called to the others and said, 'Come on; lets search the house.' Then he pointed the gun at us, and told us to throw up our hands; he was going to search all of us. As he said this he passed my little girl, who was standing near the door, and grabbed my arm and started on through the house. I tried to jerk loose from him, and held to the door. He jerked me through and kept dragging me on out towards the smokehouse. I began screaming, and he said he would shoot me if I hollered. but I kept on hollering. He took me around the smokehouse. Then he hit me with his fist and knocked me down. Then he said, 'Come on, boys, and hold her,' and the others came and held me fast on the ground while Dick Johnson ravished me. Then Dan Scaggs did the same thing. Then Forest Johnson ravished me, while I was begging, screaming, and fighting and doing all that was within my power to stop him. Then Raymond Scaggs started to perform the same thing. No one was holding me then; I was worn out and couldn't hardly move, and I said Mr. Jarvis was coming, and they all disappeared. My head was all bruised, and my clothes were all torn. When I came to myself I gathered up my children, and we went to Mr. Jarvis' place and stayed there until the next morning. It was a bright moonlight night."

Iva Smith, daughter of Lillie Hayes, testified:

"My age is 14. When the men came, I got up and put on my clothes. I know Forest Johnson; and he was there that night. Dick Johnson had a small pistol in his hand, and said he was going to search the house. Then he took hold of mamma's arm. When they came to the door, she told him she was not going any farther, and he jerked her into the kitchen. He told her to come on out; he wanted to ask her a question. She said she was not going, and he jerked her out into the yard. Forest Johnson and another man were in the kitchen; I heard mamma hollering, and said I was going on out; he said I was not. A man outside told him to come on, it was his time next, and Forest Johnson went out. After a while mamma fell into the door. We picked up the children and went over to Mr. Jarvis' place."

The testimony of Eva Smith was, in substance, the same as that of her sister, Iva.

As a witness in his own behalf appellant, Forest Johnson, testified:

"My age is 22 years. I have lived in Delaware county 12 years, except about 2 years that I was in the service. On the night of August 13th, we went to a charivari at Mr. Reed's. Then we got in buggies and went to Mrs. Hayes. When we got there Raymond Scaggs and Dick Johnson went up to the house; Dan Scaggs and myself stayed back, and I don't know what they did or said to this lady. Dick talked to her, and they went around the house. Dan Scaggs and myself walked up and stood behind a brick chimney. Dick Johnson and this lady locked arms and walked towards the smokehouse; I stepped into the house where the children were and talked to them; I knew the two oldest girls. I did not have a gun. One of the children said 'Where is mamma?' I said, 'She is outside the house.' Another said, 'Are they going to hurt her?' and I said, 'No, they are not going to hurt her; she will be back in a few minutes.' Raymond Scaggs came to the door and said, 'Let's go; there is nothing doing;' and I walked out of the house, and we went away. I did not ravish Mrs. Lillie Hayes, and I was not out in the back yard with her, and I did not know what happened out behind the smokehouse."

[1, 2] The testimony in the case is very voluminous, covering several hundred pages, but the foregoing excerpts suffice to show that the case was one for the consideration of the jury. The testimony on the part of the state, if credited as it was, was amply sufficient to sustain the verdict.

Some exceptions were taken during the course of the trial to the admission of evidence bearing upon the issues in the case, but we are of opinion that none of them were well taken.

No objection was made or exception taken to any of the instructions given by the court. Taken as a whole, the instructions correctly covered every phase of the case presented by the testimony.

During the argument of counsel for the prosecution, an assistant prosecutor made the remark, "These boys tell you that she walked out glibly, arm in arm with a stranger." Whereupon counsel for the defendant objected to the remark, and the court overruled the objection. The remarks of counsel must be considered and construed in reference to the evidence, and, considering the testimony in the case, the remark was not objectionable.

We have given this case our careful consideration, and find no error justifying a reversal. The judgment is therefore affirmed.

MATSON and BESSEY, JJ., concur.

JOHNSON v. STATE. (No. A-3659.)

(Criminal Court of Appeals of Oklahoma. Nov. 21, 1921.)

(Syllabus by the Court.)

Sufficiency of evidence.

In a prosecution for rape, evidence held sufficient to support the verdict and judgment of conviction for rape in the first degree, and that no material error was committed on the trial.

Appeal from District Court, Delaware County; A. C. Brewster, Judge.

Dick Johnson was convicted of rape, and he appeals. Affirmed.

Hunt & Beaucamp, of Grove, John R. Leach, of Leach, and James S. Davenport, of Vinita, for plaintiff in error.

S. P. Freeling, Atty. Gen., and W. C. Hall, Asst. Atty. Gen., for the State.

DOYLE, P. J. This appeal is from a judgment of conviction rendered upon the verdict of a jury, finding the defendant, Dick Johnson, guilty of rape in the first degree, and fixing his punishment at imprisonment in the penitentiary for 20 years. The information charges that Dick Johnson, Forest Johnson, Raymond Scaggs, and Dan Scaggs, did in Delaware county, on or about the 13th day of August, 1919, unlawfully, feloniously, and by force and violence overcoming her resistance, have sexual intercourse with Lillie Hayes, she, the said Lillie Hayes, not being the wife of either of said defendants. A severance was granted, and upon the defendant, Dick Johnson's separate trial, the jury returned their verdict as above stated.

This case is a companion case to that of Forest Johnson v. State, affirmed at this term, 201 Pac. 1006, but not yet [officially] reported. The testimony was, in substance, the same, and the assignments of error are the same. Counsel for the defendant, by agreement with counsel for the state, submitted the cause upon their briefs filed in the companion case of Forest Johnson v. State, wherein this court held adversely to the contentions made.

Upon consideration of the whole case we are satisfied that the substantial rights of the defendant have not been prejudiced by reason of any error of law appearing in the record. As shown by the record the defendant has had a fair and impartial trial and we think the testimony, without any doubt, is ample to sustain the conviction. The judgment of the district court of Delaware county is therefore affirmed.

MATSON and BESSEY, JJ., concur.

COMMERCIAL NAT. BANK OF GREAT FALLS v. THRASHER. (No. 4486.)

(Supreme Court of Montana. Nov. 3, 1921.)

Exceptions, bill of \S 39(1)—Delay in presentation of proposed bill and amendments held fatal.

Where, 172 days after plaintiff served on defendant appellant its proposed amendments to defendant's proposed bill of exceptions, the bill and proposed amendments were first presented to the trial judge for settlement, no excuse for the delay appearing, the delay was fatal, under Rev. Codes, \S 6788, and judgment must be affirmed; no error appearing in judgment roll.

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

Action by the Commercial National Bank of Great Falls against J. W. Thrasher. From judgment for plaintiff and order denying new trial, defendant appeals. Judgment and order affirmed.

Freeman & Thelen, of Great Falls, for appellant.

Peters & Smith, of Great Falls, for respondent.

SPENCER, C. This is an action to enforce payment of a promissory note. After issues joined by appropriate pleadings, trial resulted in a judgment in favor of the plaintiff. It appears from the record that the defendant served his proposed bill of exceptions in support of motion for a new trial upon the plaintiff within the additional time granted by the court, and that thereafter on November 14, 1918, within the time granted by stipulation, the plaintiff served upon defendant its proposed amendments to the bill; that on May 5, 1919, 172 days thereafter, the bill and amendments as proposed were first presented to the trial judge for settlement; that thereafter and before settlement (the exact date not being clear from the record) the plaintiff filed written objections to the settlement of the bill, urging violation of section 6788, Revised Codes, in support of its objection. The bill was settled May 28, 1919. Defendant's motion for a new trial was denied, and appeal is from the order denying the motion and from the judgment.

As the appeal from the order denying the motion must be disposed of by reason of a clear violation of the plain provisions of section 6788, Revised Codes, further statement of the facts becomes unnecessary. The record is wholly barren of any excuse for delay in the presentation of the proposed bill and amendments to the trial judge. Likewise it is undisclosed whether or not the proposed amendments to the bill were allowed. In the absence of an affirmative showing to excuse the delay, there is no presumption

to justify it. *Woodard v. Webster*, 20 Mont. 279, 50 Pac. 791.

Confronted with this condition in the record, the unexplained delay of appellant is fatal.

"A motion for a new trial is, in this state, a statutory remedy, and can only be invoked in the manner, within the time, and upon the grounds provided in the statute. The losing party must pursue the requirements of the statute, or else he cannot avail himself of the remedy." *State ex rel. Walkerville v. District Court*, 29 Mont. 176, 74 Pac. 414; *Ogle et al. v. Potter*, 24 Mont. 501, 62 Pac. 920.

A full discussion of the requirements of section 6788, Rev. Codes, is found in the following decisions, and leaves open to this court but one course, viz., disregard the bill entirely, together with all questions sought to be presented thereby. *Best Mfg. Co. v. Hutton*, 49 Mont. 78-88, 141 Pac. 653; *Canning v. Fried*, 48 Mont. 560, 139 Pac. 448; *Girard v. McClernan*, 39 Mont. 523, 105 Pac. 224; *State ex rel. Walkerville v. District Court*, supra; *Wright et al. v. Mathews*, 28 Mont. 442, 72 Pac. 820; *Power v. Lenoir*, 22 Mont. 169, 56 Pac. 106; *Woodard v. Webster*, supra.

With nothing before us but the judgment roll, in which we find no error, we recommend that the judgment and order appealed from be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

F. A. PATRICK & CO. v. McDONNELL. (No. 4489.)

(Supreme Court of Montana. Oct. 31, 1921.)

1. Assignments for benefit of creditors \S 236 —Business may be continued only by unanimous consent.

Continuance of business of assignor by assignee is justified where all the creditors consent thereto; but, in the absence of such an agreement, no creditor can be compelled to submit to a continuance of the business as a going concern.

2. Assignments for benefit of creditors \S 236 —Judgment, if construed as authorizing continuing business, held not warranted by statute because not limiting time.

Judgment refusing to enjoin assignor from continuing assignee's business, if construed as an authorization to continue the business, did not limit the time, and so was not within the authority conferred by *Seas. Laws 1919, c. 180*, authorizing continuation of business only for a limited time.

3. Assignments for benefit of creditors §=236 —Statute held not retroactive.

Sess. Laws 1919, c. 180, empowering the court to authorize continuance, by assignee for a limited time of business of assignor for benefit of creditors, does not apply to an assignment made before its passage; the assignment being, in effect, a contract, so that to give retroactive effect to the statute would be to destroy the validity of the contract or affect the obligations by it imposed upon the assignee.

Appeal from District Court, Cascadia County; J. B. Leslie, Judge.

Action by F. A. Patrick & Co. against L. M. McDonnell, assignee of P. A. St. Amour. From judgment for defendant and order overruling motion for new trial, plaintiff appeals. Judgment and order reversed.

T. F. McCue, of Great Falls, for appellant. Cooper, Stephenson & Hoover, of Great Falls, for respondent.

REYNOLDS J. Action was brought to enjoin defendant, as assignee of P. A. St. Amour, from continuing the business formerly conducted by his assignor and for an order requiring him to liquidate the estate, pay off the claims to the extent that the assets of the estate would pay them, and terminate his trust. Judgment was entered for defendant. Motion for new trial was overruled. Plaintiff appeals from the judgment and the order overruling the motion.

In February, 1918, P. A. St. Amour made an assignment for the benefit of his creditors to defendant McDonnell. With the consent of a majority of the creditors, the assignee, instead of liquidating the assets, continued the retail business of the assignor as a live and going concern. He employed the assignor to assist in the management of the business and, in fact, intrusted the assignor with most of its details. Clerks were employed and an active business was continued for a period of about one year prior to the commencement of this action. During that period the assignee, upon the advice of the assignor, purchased new stock to the extent of over \$50,000 and in the usual course of business extended credit to customers in excess of \$62,000. In addition to the assignee's salary, there was also incurred a general expense of about \$10,000. It seems that it was the intention of the majority of the creditors and the assignee that the latter should continue the business as a going concern until such time as its net income would be sufficient to defray the indebtedness. It is the contention of plaintiff, however, that in the absence of consent of all the creditors, the assignee has no right so to do, and we are satisfied that such contention must be sustained.

[1] This is not a question as to whether the creditors will receive a larger percentage by

a continuance of the business or such an arrangement in general would be beneficial to all parties concerned, but it is a question of the obligation of the trustee to each individual creditor. It may be conceded that if all creditors consent to such an arrangement, then the assignee would be justified in following out such a plan, for then no one would be in a position to make any objection thereto. However, in the absence of an agreement by all the creditors any one creditor is entitled to have his rights as a creditor recognized and observed and to have the assignee perform the duty enjoined upon him by law.

An assignment for the benefit of creditors is designed to terminate the business of the assignor in relation to the assigned property, and it is then the duty of the assignee, with reasonable dispatch, to collect all the assets and convert them into cash and, after paying the expenses of the trust, apply the moneys in hand to the payment of the claims proportionately, accounting to the assignor for any surplus that may remain after the claims have been paid in full. After the assignment is made, no creditor can be compelled to submit to a continuance of the business as a going concern, with the incidental risks of buying and selling on credit and the possible loss of assets actually in existence at the time of the assignment. The object of the assignment is not to enable any person to speculate with the property of the assignor, even though it be for the benefit of the creditors, but merely to use those assets to satisfy the claims. *Wilhelm v. Byles*, 60 Mich. 561, 27 N. W. 847, 29 N. W. 113; *Resenstein v. Coleman*, 18 Mont. 459, 45 Pac. 1081. Defendant, however, insists that in this case it appears by the correspondence between the plaintiff and defendant that plaintiff consented to the continuance of the business, and that therefore it is estopped now from objecting thereto. An examination of the correspondence shows that the plaintiff had some knowledge of the fact that the business was being conducted as a going concern, but, at most, the correspondence shows a mere acquiescence but not a consent. We do not believe that there is anything in the correspondence which estops the plaintiff from demanding a settlement of this trust.

[2, 3] Our attention has been called to chapter 180 of the Session Laws of 1919, in which it is provided as follows:

"E. *Power of Court.*—The court shall have power: (1) To authorize the business of the assignor to be conducted for a limited period by assignee, if necessary in the best interests of the estate, and allow additional compensation for such services."

This statute is inapplicable for two reasons: First, that it does not appear in this case that the court authorized a continuance of the business for a limited time. If the

judgment in the case is to be construed as implied authority to continue business—which is doubtful—it must be construed as authority to continue the business for an unlimited time, which is not within the provision of the statute. There was no other court order or judgment authorizing the continuance of the business at all. Second, the statute was not passed until about a year after the assignment was made. As the assignment is, in effect, a contract, the statute cannot be given retroactive effect so as to destroy the validity of the contract or effect the obligations by it imposed upon the assignee.

For the reasons herein given, the judgment and the order overruling the motion for new trial are reversed.

Reversed.

BRANTLY, C. J., and COOPER, HOLLO-WAY, and GALEN, JJ., concur.

SMITH v. CHRISTE et al. (No. 4442.)

(Supreme Court of Montana. Oct. 8, 1921.)

Vendor and purchaser ⇨ 117, 119—Buyer on rescission must act promptly and restore possession.

A buyer of land under contract, if he desires rescission on ground of fraudulent representations, must act promptly upon discovery of the facts, and restore possession to the seller, in view of Rev. Codes, § 5065.

Appeal from District Court, Fergus County; Jack Briscoe, Judge.

Action by Anthony J. Smith against Emil J. Christe and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Charles J. Marshall and C. W. Buntin, both of Lewistown, for appellant.

Belden & DeKalb, of Lewistown, for respondents.

REYNOLDS, J. Action was commenced for rescission of a certain land contract and consummated sale in fulfillment of the contract from defendant Christe to plaintiff. At the close of plaintiff's case, motion for judgment was made by defendants, which motion was granted. Judgment was thereupon entered in favor of defendants. Plaintiff has appealed from the judgment.

It appears from the proof that on or about the 19th of October, 1917, plaintiff entered into a certain written contract with defendant Christe to purchase certain land situate in Fergus county, Mont., consisting of approximately 480 acres, payment therefor to be made serially, and upon completion of payments he was to receive a deed. On or about the 22d of March, 1918, a portion of

the purchase price having been paid, a deed was given by defendant Christe to plaintiff and his wife covering the premises, and thereupon a note and mortgage were given by plaintiff and wife to defendant Bank of Fergus County to cover the balance of the purchase price. While the mortgage was taken in the name of the bank, it appears that defendant Christe was and is the owner of the same. Prior to the execution of the contract defendant Christe represented to plaintiff that the land in question was free of fan weed, with the exception of a few acres which he described. Plaintiff insists that he relied upon such representations, that they were false, and that he has been misled to his prejudice. Upon execution of the deed to the premises to plaintiff, he moved upon the land and made it his home. On or about the 5th of April he first discovered that the land was overrun with fan weed, and thereupon formed the intention of tendering back to defendant Christe a deed to the premises and demanding a return of the payments which he had made, with interest thereon, and the cancellation of the note and mortgage. At that time he was aware of his rights in the matter. On or about the 5th day of July he served upon defendant Christe a written notice in which he made the tender above mentioned, and demanded the return of his money, the interest thereon, the cancellation of the note and mortgage, together with damages resulting from defendant's breach of the contract. Although, as plaintiff testified, he knew on or about the 5th day of April, 1918, that the land was infested with fan weed, yet he continued to occupy the premises from that time until the trial of this action, which was held in March, 1919, and during that time made improvements upon the premises, employed labor upon the land and harvested and sold off the ranch a crop of over 800 bushels of wheat. The question is whether or not, under these circumstances, plaintiff is entitled to rely upon his attempted rescission of the sale and recover back the moneys paid, with interest thereon, and have decreed a cancellation of the note and mortgage given by himself and wife as part payment on the purchase price.

The rule is settled beyond controversy that in case a contract for the purchase of land is procured through false representations whereby the vendee has been deceived and defrauded, the latter has an election of remedies. He may stand upon the contract and bring an action for damages, or he may rescind the contract, returning all of value he has received, and receive whatever of value with which he may have parted. He may elect to pursue either course, but he cannot pursue both of them. In case he desires rescission of the contract, he must act

promptly upon discovery of the facts which entitle him to rescind and he is aware of his right to rescind, and "he must restore to the other party everything of value which he has received from him under the contract, or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so." Section 5065, Rev. Codes. If, then, in this particular case, plaintiff desired to rescind because of the alleged fraud, it was his duty to tender back to defendant Christe all that he had received by virtue of the sale and keep his tender good. He could not stand upon the contract and at the same time demand its rescission. Such conduct is illogical, inconsistent, and unfair to the vendor. Among other things that plaintiff received as a result of the sale was the possession of the property, and if he desired rescission, it was his duty to restore possession to defendant Christe, or, at least, vacate the premises so that Christe could resume possession at any time. Instead of doing this, however, plaintiff continued in possession of the premises, exercised dominion over the same up to and including the trial of this action, covering a period of approximately one year from the time of discovery of the alleged fraud, and enjoyed all the fruits of such possession for that period. It is our opinion that such conduct is inconsistent with any claim of rescission, and that, even though plaintiff served upon defendant Christe a notice of rescission, the sufficiency of which, however, is doubtful, yet by his conduct in retaining the possession of the ranch, exercising acts of ownership over it, and retaining the benefits of such possession, rescission was waived. Such a course is more in the nature of affirmation of the sale than of repudiation of it. *Ott v. Pace*, 43 Mont. 82, 115 Pac. 37. Under these circumstances the trial court was justified in granting the motion for judgment.

For the reasons hereinbefore stated, the judgment is affirmed.

Affirmed.

BRANTLY, C. J., and COOPER, and HOLLOWAY, JJ., concur.

GALEN, J., being absent, did not hear the argument, and takes no part in the foregoing decision.

BADER v. MILLS & BAKER CO. et al. (No. 995.)

(Supreme Court of Wyoming. Nov. 22, 1921.)

I. Appeal and error §500(2), 501(2) — Rulings and exceptions must be shown by journal entries in record.

Rulings on motions, as to pleadings, and exceptions thereto, must, under Comp. St. 1920,

§ 6406, be shown by journal entries in the record; and it is not enough that the clerk, as a part of his certificate of the record, state that the motions were overruled.

2. Trial §159—Motion for nonsuit not a substitute for motion to direct verdict.

A motion for peremptory nonsuit cannot take the place of a motion to direct a verdict; Comp. St. 1920, § 5879, enumerating the only grounds for dismissal.

3. Principal and agent §159(2) — Trespass §30—Agent liable for wrongful act.

One participating in a positive wrong, as a trespass, though as agent of another, is liable.

4. Pleading §67 — Plaintiff not required to plead inability to reduce damages.

It is not a plaintiff's duty to plead his inability to reduce the damages from defendant's wrongful act.

5. Damages §163(2)—Defendant has burden of proof on mitigation.

Defendant has the burden of proof on mitigation of damages.

6. Damages §62(3)—Failure of person injured to prevent or reduce damages not a complete defense.

That plaintiff did not take steps to repair injury to the banks of his irrigation ditch done by defendant, and so prevent loss of crops, is not a complete defense, but goes only to reduction of damages.

7. Damages §62(1)—Steps required by wronged party to reduce damages stated.

Only reasonable efforts and expenditures are required under the rules as to mitigating damages; the test being, What would an ordinarily prudent man do under the circumstances?

8. Damages §208(7)—Whether by required steps damages could have been prevented held question for jury.

Whether one whose irrigation ditch was injured by another could by steps required of him have repaired the injury, and that in time to prevent loss of his crops, *held*, under the evidence, a question for the jury.

9. Waters and water courses §172—Defendants liable if but for their wrongful weakening of plaintiff's ditch it would not have been broken by succeeding rains.

If but for defendants' wrongful weakening of the banks of plaintiff's irrigation ditch they would not have been broken by the succeeding rain, their acts are the proximate cause, rendering them liable, and the case is removed from the operation of the rules applicable to the acts of God.

10. Appeal and error §882(12) — Want of clearness in instructions given, having been in requested instructions, not ground of complaint.

Instructions, even if not stating as clearly as might be the thought that, if the damage would have been done by rains, though defendants' preceding acts had not been done, they would not be liable, may not be complained of by them; the language being as clear as that of their requested instructions.

11. Trial \Rightarrow 286 — Words, unlawfully and wrongfully in an instruction, considered with reference to the issue tried.

Where plaintiff, whose ditch was weakened by defendants taking sand from the banks thereof, resulting in succeeding rains breaking them, concededly gave defendants permission to go on his land and take sand therefrom, but the issue on which evidence was introduced by both sides was whether taking it from the banks was not only without his consent, but against his protest, the words "unlawfully" and "wrongfully" in the instruction, that if the jury find that defendants wrongfully and unlawfully entered on plaintiff's land and injured the ditch, are to be considered as referring to such issue.

12. Trial \Rightarrow 253(8)—Requested instruction had as ignoring evidence.

Requested instruction that damages to crops could not be recovered on account of injury to irrigation ditch, because, for causes for which defendants were not responsible, water could not have been obtained at the headgate, *held* properly refused, as ignoring evidence that it could have been obtained lower down from the river near which the ditch ran.

13. Appeal and error \Rightarrow 882(12)—Error in instruction following language of request invited.

Error in instruction following language of requested instructions invited.

14. Damages \Rightarrow 217—Preferable form of stating measure of damage for partial destruction of growing crop given.

In case of partial destruction of growing crop, statement that the measure of damages is the difference between the market value of the crop before and after the injury at the time and place thereof is clearer and preferable to one that the measure of damages for injury to or destructions of growing crops is the value thereof in the condition they were at the time and place of the injury or destruction.

15. Appeal and error \Rightarrow 1068(4) — Use of "could" in instruction as to determining damage for partial destruction of growing crop harmless, in view of evidence and amount of verdict.

Use of "could" in instruction as to damage for partial destruction of growing crop that in determining the market value of the crop destroyed the jury should find the difference between the value of the crop which plaintiff "would or could" have produced had he not been deprived of water by defendant, and the value of what he did produce, deducting necessary cost of production, harvesting, and marketing, while objectionable, *held* harmless in view of evidence, including reasonable certainty that the crop would have matured had it not been injured, and the amount of the verdict.

16. Trespass \Rightarrow 20(3) — Possession enough as against mere trespassers for damage to irrigation ditch.

Though the land from which defendants took sand, injuring the banks of plaintiff's irrigation ditch, belonged to the state, plaintiff's possession of his ditch was enough, as against

defendants, mere trespassers, to have the banks unmolested.

Appeal from District Court, Natrona County; Charles E. Winter, Judge.

Action by Charles Bader against Mills & Baker Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Floyd E. Pendell, of Casper, for appellants.
Hagens, Stanley & Murane, of Casper, for respondent.

BLUME, J. The plaintiff in this case, respondent herein, commenced an action against the defendants, appellants herein, for damages in trespass, claiming that defendant took gravel from or near the natural banks of plaintiff's irrigating ditch, thereby weakening such banks; that defendant, further, by driving across and in other ways, weakened a dam or dike built by plaintiff which adjoined the foregoing natural bank and was used for the purpose of forcing water further down into plaintiff's irrigating ditch; that as a result of these acts the high water of the Platte river in June, 1918, washed away part of the natural bank mentioned, and in turn and as a result thereof, the dike or dam mentioned; that by reason thereof plaintiff was unable to irrigate his land and he raised only a partial crop; that most of his alfalfa died out, and he was compelled to repair his ditch. At the close of plaintiff's evidence defendants moved for a nonsuit. At the close of the testimony they moved for a directed verdict. Both of these motions were overruled, and the jury returned a verdict in favor of plaintiff for \$2,000. Judgment was entered on the verdict, and the case is here on direct appeal.

[1] 1. The defendants made a motion in the court below to require the plaintiff to make his petition more definite and certain, and also a motion to strike certain parts of the petition. There are no journal entries in the record containing the ruling of the court thereon, or showing whether an exception was reserved to either ruling, as required by section 6406 of the statutes. The clerk certifies, at the end and as a part of his certificate authenticating the record, that these motions were overruled, but such certificate cannot take the place of the entries themselves. Further, that certificate does not show any exception to the rulings. We cannot, accordingly, consider assignments of error numbers 1 and 2.

[2] 2. The motions for nonsuit were properly overruled. Such motion cannot take the place of a motion to direct a verdict. The case of *Mulhern v. Union Pacific Railroad Co.*, 2 Wyo. 465, is decisive of the point. It fully discusses this subject, and holds that a case can only be dismissed in accordance

with the provisions of the Code of Civil Procedure, which are embodied in what is now section 5879 of the Statutes of 1920, and hence that the court has no authority to order a peremptory nonsuit against the will of the plaintiff.

[3] 3. It is the theory of the appellants that defendant Mills, as agent for Mills & Baker Company, and the latter as agents for the State Highway Commission, are not responsible in trespass unless they intentionally, or with knowledge of the wrong, committed the tort. On this theory a motion was made in the court below for a directed verdict for defendant Mills. An instruction on this subject was also offered, but not given. The principles of law on this subject apply equally to both defendants, and we need not discuss separately the assignments of error having reference thereto. There is evidence in the case to warrant a finding that the corporation actually took away the gravel which weakened the ditch bank, and that the defendant Mills, as president of the corporation, was its managing agent in the work, and fully understood what was done. The contention of appellants on this subject cannot be sustained. It is a fundamental rule of the law of tort, including trespass, that all who participate in the wrong are equally liable. 38 Cyc. 485, 1042. An agent is, generally, not liable to a third person for failure to perform a duty, and in such case is responsible, generally, only to his principal. So, too, it has often been held that if he receives property from one whom he is entitled to regard as the owner, and merely transports it to another, he is not liable; the reason being that possession of personal property is *prima facie* evidence of ownership, and hence to receive it from the possessor and to deliver it according to order is not to be regarded as a tort. *Burditt v. Hunt*, 25 Me. 419, 43 Am. Dec. 289. But where he commits a positive wrong, he cannot shield himself simply because he acts as agent for another, for no one can authorize him to commit a wrong. In *Crane v. Onderdonk*, 67 Barb. (N. Y.) 47, 56, the court said:

"Although an agent, for nonfeasance and omissions of duty, is not liable except to his principals, the rule is otherwise when the act complained of is misfeasance. In all such cases he is personally responsible, whether he did the wrong intentionally, or ignorantly by the authority of his principal; for the principal could not confer on him any authority to commit a tort upon the rights or property of another."

In the case of *Welsh v. Stewart*, 31 Mo. App. 376, the court said:

"In case of nonfeasance, an agent is liable only to his principal; but in cases of malfeasance, or trespass, he is liable to the person injured, and cannot shield himself by proving that he committed the trespass under a contract with some one else."

In the case of *Hazen v. Wight*, 87 Me. 233, 32 Atl. 887, the court said:

"And, surely, if Mrs. Wight had no authority to cut wood or timber upon the premises, she could confer none upon her servant. A stream can never rise higher than its fountain; and a servant, as such, can never have greater authority than his employer. And if Mrs. Wight was a trespasser * * * in directing the wood and timber to be cut, clearly the defendant was also a trespasser in executing her command."

In the case of *Lightner v. Brooks*, 2 Cliff. 287, Fed. Cas. No. 8,344, the court said:

"Undoubtedly all persons commanding, procuring, aiding, or assisting in the commission of a trespass are principals in the transaction, and stand responsible to answer in damages to the injured party. Both the master who commands the doing, and the servant who does the act of trespass, may be made responsible as principals, and may be sued jointly or severally for damages, as the injured party may elect."

Without quoting further from cases, we refer to *Reed v. Peck*, 163 Mo. 333, 63 S. W. 734; *Lane v. Cotton*, 12 Mod. 472, 88 Engl. Rep. 1458; *Marshall v. Eggleston*, 82 Ill. App. 52; *Walters v. Hamilton*, 75 Mo. App. 237; *Reber v. Telephone Co.*, 196 Mo. App. 69, 190 S. W. 612; cases collated in 50 L. R. A. 645; *Burdick on Torts*, 182, 183; *Robinson v. Mining Co.*, 178 Mo. App. 531, 163 S. W. 885.

[4-5] 4. Counsel for defendants contend that under the evidence it appears that plaintiff could, by a moderate expenditure of effort and money, not exceeding \$350, have repaired the damage done, and that hence plaintiff should not recover anything for the loss of crops. Several assignments of error based on this subject may be considered together. It is true, as counsel state, that plaintiff cannot recover for any losses which might have been prevented by reasonable efforts on his part. 17 C. J. 767. But this is a matter in mitigation, and it was not the plaintiff's duty to plead his inability to reduce the damages. 8 R. C. 618; *Indianapolis St. Ry. Co. v. Robinson*, 157 Ind. 414, 61 N. E. 936. And the burden of proof on this subject rested upon the defendant. 17 C. J. 1025. In *Costigan v. R. Co.*, 2 Denio (N. Y.) 609, 43 Am. Dec. 758, the court said in reference to this defense:

"But first of all the defense set up should be proved by the one who sets it up. He seeks to be benefited by a particular matter of fact, and he should therefore prove the matter alleged by him. The rule requires him to prove an affirmative fact, whereas the opposite rule would call upon the plaintiff to prove a negative, and therefore the proof should come from the defendant. He is the wrongdoer, and presumptions between him and the person wronged should be made in favor of the latter. For this reason, therefore, the onus must in all such cases be upon the defendant."

Where such defense is proven, it is not a complete defense, but would only reduce the

damages. *Belnap v. Widdison*, 32 Utah, 246, 90 Pac. 393, and hence the instruction asked on this subject would not have been proper. Only reasonable efforts and expenditures are required under this rule. The test is, What would an ordinarily prudent man do under like circumstances? 17 C. J. 770. There was evidence in this case tending to show that the repair of the ditch and dike, in order to save the water for the irrigating season of 1918, could have been made only during one day; that plaintiff did not have the teams or help in order to do this during that day, but that defendant did. Under this evidence, the question was, we think, one for the jury to decide. The court submitted it to them under proper instructions, and we think that this was right.

[9] 5. It was the theory of the plaintiff that the interference with the natural and artificial dike was the proximate cause of the damage, setting in motion the force of the flood that came on June 18, 1918; the defendants' theory was that the flood was an act of God, and therefore the proximate cause of the injury. It is the general rule that where the first cause sets the other in operation, it is the proximate cause. *The G. R. Booth*, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234; *Dickinson v. Boyle*, 17 Pick. (Mass.) 78, 28, Am. Dec. 281; *Cleveland Ry. Co. v. Carey*, 33 Ind. App. 275, 71 N. E. 244; *Derry v. Flitner*, 118 Mass. 131; *Scott v. Hunter*, 46 Pa. 192, 84 Am. Dec. 542. Hence, when the effect, the cause of which is to be considered, is found to be in part the result of the participation of man, whether it be from active intervention or neglect, or failure to act, the whole occurrence it thereby humanized, as it were, and removed from the operation of the rules applicable to the acts of God. 1 C. J. 1175. As was said in *Amend v. Railroad Co.*, 91 Neb. 1, 135 N. W. 235:

"It is pretty well settled that if a wrong or act of negligence is committed and that act contributes proximately to the injury, even though combined or in conjunction with the act of God, the wrongdoer will be liable."

In *Polack v. Ploche*, 35 Cal. 416, 95 Am. Dec. 115, the court said:

"Before an act can be considered the act of the elements it must appear that no human agency intervened, for if it did, the elements cannot be regarded as the cause, but only as the means. Had the waters in question broken through the embankment of the natural reservoir in which they had accumulated without the agency of man, the loss would have fallen within the exception contained in defendant's covenant. The case shows, however, that they would not have broken through the embankment but for the help of man."

In the case of *Dickinson v. Boyle*, *supra*, the defendant dug into the bank of a river near a dam that had been built across the river, took away some gravel, and under-

mined some trees. As a result thereof a flood, that came about three weeks later, washed away plaintiff's soil. The defendant was held liable.

[10] Not a great deal of contention, perhaps, is made as to these principles of law, but it is contended that the court should have pointed out to the jury that if the flood had been so overwhelming that the damages would have been caused without reference to the acts of the defendants, then that the latter should not be held liable. Apparently for that purpose an instruction was asked that the defendants could not be held responsible for damages caused by rains, cloudbursts, or high waters, nor by any cause other than the negligent acts of defendants. The court instructed the jury that, if the damage was caused solely by the high water, the defendants would not be held responsible. Again, in another instruction, the court told the jury that, where an injury is caused by the act of God, such as lightning, earthquake, hurricane, cloudburst, or other unusual calamity, the person receiving injury from such cause cannot recover damages by reason thereof, but rightly added that such acts of nature must be the sole cause, not aided or brought about by human agency. We think that these instructions sufficiently conveyed to the jury the thought that if the damage would have been done by these forces of nature, even in the absence of the acts of defendants, then that they could not hold the latter responsible. In any event, while the thought is not, perhaps, as clearly stated as might be done, the language of the instructions given by the court is as clear as that offered by the defendants, and no ground for complaint therefore exists.

[11] 6. Counsel for appellants complain of the following instruction given by the court:

"If you find or believe from the evidence, that defendants wrongfully and unlawfully entered upon the lands and premises in the possession or owned by plaintiff, and injured the irrigation ditch of plaintiff, then your verdict must be for the plaintiff."

Counsel object that the court thereby practically directed the jury to return a verdict for plaintiff, in face of the fact that defendants claimed that the plaintiff had given his consent to enter upon his premises and take the gravel. The plaintiff claimed that while he gave his consent to take gravel, that consent was subject to the qualification that his ditch should not be injured, and that the main damage to the ditch was done in the last two days before the flood, over his protest and against his objections. To sustain these respective theories evidence was introduced by the parties. We think that the words "unlawfully" and "wrongfully" should be construed as having reference, at least indirectly, to the injury to the ditch. If the defendants unlawfully or wrongfully entered

plaintiff's ditch and the banks thereof—which were part of the whole of his premises—and in so doing injured the ditch, or if they unlawfully or wrongfully injured the ditch, without reference to the entering, then the plaintiff was entitled to at least nominal damages. The court here made reference to unlawful and wrongful acts; not to acts lawfully done with the consent of plaintiff, and no acts of the latter class were therefore thereby excluded from the consideration of the jury. We see no error in the instruction.

[12] 7. Counsel for defendants contend that the ditch of plaintiff was destroyed at a certain point of rocks, the location of which we cannot determine from the evidence, except that it is above the dam destroyed by the flood; and they further contend that plaintiff could in no event have obtained water through the ditch in the summer of 1918, and hence defendants should not be held responsible for the value of the crops. They offered the following instructions, which the court refused to give:

"The court instructs the jury that if you should find from a fair preponderance of the evidence that the ditch of the plaintiff was washed away by the high flood water of the Platte river above the dam owned by the plaintiff so that water could not have been run through said ditch, even though available, then and in that event you are instructed that the plaintiff could recover no damage for his crops."

The difficulty with the instruction, as well as the argument of counsel on this point throughout, is the fact that there was evidence in the case that plaintiff was able to take water from the river not only at the headgate, but at various points along the course of the ditch, which ran at many points close to the river. The defendants are not in position to dispute the right of plaintiff to change the point of diversion. The witness Veitch testified that this water could have been taken out of the river at or near the so-called upper dam, which was below the point of rocks, just as well as at the headgate. Other evidence of similar effect appears in the record. Hence the condition of the ditch at the point of rocks could not make any difference whatever, and the instruction offered, in view of this state of the record, would have been, therefore, misleading.

[13, 14] 8. Defendants complain of the refusal to give an instruction asked, on the measure of damages, and of that given thereon. The instruction asked is as follows.

"The court instructs the jury that the measure of damages for the partial destruction of growing crops is the market price of the crops at the time of its destruction."

The instruction given, after stating that plaintiff would be entitled to the actual damages sustained, in case defendants damaged the crops of plaintiff, proceeds as follows:

"The measure of damages for the injury to or destruction of growing crops is the value of the crops in the condition they were in at the time and place of the injury or destruction."

The language quoted as given by the court is taken from *Hatch Bros. Co. v. Black*, 25 Wyo. 110, 121, 185 Pac. 518, which deals with a total destruction, while in the case at bar there was only a partial destruction. This court had before it an instruction dealing with such partial destruction in *Wyoming Central Irr. Co. v. Laporte*, 26 Wyo. 249, 258, 182 Pac. 485, where, however, the instruction given in that case was neither approved nor disapproved. The quoted portion of the instruction here given closely follows the language of the instruction offered, and whatever error it contains is therefore invited error, for which we would not reverse the case. While the phraseology used by the court is at times found in authorities, still it, as well as the instruction offered, may be construed to mean that the whole value of the crop may be recovered, though it is only partially destroyed, or where it is only "injured." A much better and clearer expression is that, in case of partial destruction, the measure of damages is the difference between the market value of the crop before and after the injury at the time and place thereof. 17 C. J. 887. 888.

[15] We think perhaps, though counsel have not made it clear, that the main objection is to that portion of the instruction given which follows that above quoted, and which instructs the jury in substance that in determining the market value of the crop destroyed they should find the difference between the value of the crops which plaintiff "would" or "could" have produced, had he not been deprived of irrigating water by defendant, and the value of what he actually did produce, deducting therefrom the additional necessary cost of producing, harvesting, and marketing the full crop, and taking into consideration the testimony of the market value of like crops during the season of 1918.

The value of a growing crop consists of more than the mere sprouts or blades from the seed sown, which often would be worth little even for feed. Such a crop has a potential value, a value as a growing crop, which, under reasonable cultivation, will generally be brought to maturity by the forces of nature. In case that such a crop is destroyed by another, wholly or in part, it would be unjust to ignore these elements of value. Still that value must be fixed as of the time of the injury, and the value at maturity cannot serve as the standard. There may arise many contingencies under which the crop would not come to maturity. Hail, excessive rains, drouth, or other forces of nature might interfere, whereby it might be totally or partially destroyed. A person buy-

ing a crop for instance in the month of June would take into consideration these various elements, as well as the cost and expenses necessary in order to ultimately get the crop to market. The method, however, of proving the market value of the crop at the time of the destruction, or the difference in the value before and after the injury, in case of partial destruction, is not always easy. In the case of *Colorado Cons. L. & W. Co. v. Hartman*, 5 Colo. App. 150, 38 Pac. 62, it was fixed by witnesses in a direct manner, and, as there said, if the witnesses are competent, it would seem that that is the easiest and best method. But it probably could not often be determined in that way, nor would a market value at the time and place of injury always exist. Hence courts allow evidence as to what kind of crops the land in question will ordinarily produce, as to what may be the state of growth of the crop when destroyed or injured, the average yield per acre of similar land in the neighborhood, the probability of maturing the crop in question, the market value of the crop injured and the market value of the probable crop without the injury at the time of maturity, the reasonable cost and expenses that would have been incurred, after the injury, in fitting for and hauling the crop to market, and other evidence from which the jury will be allowed to determine what the actual market value of the crop destroyed, or the difference in value before and after the injury, actually is. *Teller v. Dredging Co.*, 151 Cal. 209, 90 Pac. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779; *Int. Agric. Corp. v. Abercrombie*, 184 Ala. 244, 63 South. 549, 49 L. R. A. (N. S.) 415; *Sayers v. Missouri Pac. Ry. Co.*, 82 Kan. 123, 107 Pac. 641, 27 L. R. A. (N. S.) 168; *U. S. Smelting Co. v. Sisam*, 191 Fed. 293, 112 C. C. A. 37, 37 L. R. A. (N. S.) 976; *Smith v. Hicks*, 14 N. M. 560, 98 Pac. 138, 19 L. R. A. (N. S.) 938; *Ft. Worth, etc., Ry. Co. v. Speer* (Tex. Civ. App.) 212 S. W. 762; *Colo. Con. L. & W. Co. v. Hartman*, supra; *Roberts v. Lehl*, 27 Colo. App. 351, 149 Pac. 851; *Hoover v. Shott*, 68 Colo. 385, 189 Pac. 848; *Naylor v. Floor*, 51 Utah, 382, 170 Pac. 971.

In the case of *Roberts v. Lehl*, supra, the court, speaking of one method of arriving at the damages, said in part:

"If the crop has no market value at the time and place of the loss, and there is a reasonable certainty that it would have matured if the breach of the lease had not occurred, the jury should be told to ascertain what such crop, considering its condition immediately before the destruction, would ordinarily have brought on the market, with ordinary care in maturing, harvesting and marketing, considering the average yield of such crops, in the same season and locality, on similar land, under similar circumstances; and then to deduct from such market value what the ordinary and prudent expense would be to mature, harvest and market such a crop; and that such difference would be the

value of the crop destroyed, or the damage sustained."

In the case of *Candler v. Ditch Co.*, 28 Nev. 151, 80 Pac. 751, 6 Ann. Cas. 946, the court said:

"From an examination of many authorities we are convinced that a just and reasonable rule for the measure of damages for the loss of growing crops in cases like the one now before this court, where it appears that the crops have been entirely destroyed, or nearly so, and where there appears to be a reasonable certainty that they would have matured but for the wrongful act of the defendant, would be to allow the plaintiffs the probable yield of the crops under proper cultivation, the value of the yield when matured and ready for market, and deducting therefrom the estimated expense of producing, harvesting, and marketing them, and also deducting the value of any portion of the crops that may have been saved."

In the case of *Naylor v. Floor*, supra, the court approved of the following instruction as substantially correct:

"The measure of damage is the difference between the market value of the crop before the alleged damage was done and the market value of the crop after the alleged damage was done. This may be calculated by finding the market value the entire crop would have at maturity if no injury thereto had been done, and deducting therefrom the entire market value of the crop at maturity in its alleged injured state. The difference, if any, will enable you to calculate the amount of damage. From this amount so found, if you so find, you must deduct its proportion of the cost of harvesting, marketing, and bringing the crop to maturity."

One of the important facts which accordingly should be made to appear is that the crop would have been reasonably certain of maturity if it had not been injured or destroyed. That being shown, we see no reason why the maturity value, together with the other elements above mentioned, should not be considered in fixing, according to the method pointed out, the amount of damages. We do not here determine the sole measure of damages that should govern in such cases, but simply whether the instruction given in this case by the lower court is substantially correct. Tested by the rules here mentioned, while the word "could" in speaking of the amount of crop to be raised is not to be commended, we think that on the whole the jury were not misled as to the method of determining the damages, and we think that no prejudice occurred by reason of the instruction given, especially in view of the fact that no claim is made that the verdict is excessive, and because, further, there appears to be ample evidence in the record to sustain the amount of damages, and ample facts are shown from which to determine the market value, costs of production, marketing, and harvesting the crops, and the probability of maturing them.

[16] 9. Several assignments of error are not argued a great deal; for instance, that in relation to the testimony of the plaintiff as to the statements of the foreman of defendants. No ruling was insisted on, and none made by the court, nor were any exceptions reserved. Again, counsel say that the gravel was taken from the land belonging to the state. We cannot see that this makes any difference. Possession by plaintiff of his ditch was sufficient, as against the defendants, to entitle him to have the banks thereof unmolested. 38 Cyc. 1017. Counsel also say that there is no evidence that plaintiff had water available for irrigation. But we fail to discover any grounds for this claim, since plaintiff, at least, testified that he would have been able to have irrigated his lands, and that he would have had at least 10 days irrigation during high water but for the trespass of defendants. We fail to see why the availability of water should have been pleaded herein. These assignments of error are accordingly not well taken.

We have carefully examined the record in this case, and have fully considered all of the assignments of error and the arguments relating thereto. We find no reversible error, and the judgment of the lower court should accordingly be, and the same is hereby, affirmed.

Affirmed.

POTTER, C. J., and KIMBALL, J., concur.

HINES, Director General of Railroads, v. SWEENEY. (No. 1007.)

(Supreme Court of Wyoming. Nov. 22, 1921.)

1. Negligence ⚡59—Proximate cause of injury defined.

One is liable for all the natural consequences proximately resulting from his negligence, without the intervention of an efficient intervening cause, although the injuries actually resulting could not have been foreseen.

2. Master and servant ⚡247(1)—Employé's negligence constituting sole proximate cause of injury.

In order that the acts of an employé can be held to constitute the sole proximate cause of the injury, so as to absolve the railroad from liability under the Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), it must appear, not only that the employé was negligent, but also that the employer was not guilty of negligence contributing to the injury.

3. Master and servant ⚡289(39)—Contributory negligence as sole proximate cause of injury to trackman hit by train held for jury.

In action under the Employers' Liability Act (U. S. Comp. St. §§ 8657-8665), for death

of a trackman riding on a motor car, the question whether his act in pulling the lever the wrong way on approach of locomotive at the rate of 20 miles an hour was the sole proximate cause of the collision, or whether negligence of engineer in operating locomotive at such speed after warning that the car was ahead contributed thereto, held for the jury.

4. Negligence ⚡1—"Negligence" defined.

"Negligence" consists of a violation of duty owing by one to another.

Error to District Court, Sheridan County; James H. Burgess, Judge.

On petition for rehearing. Petition denied.

For former opinion see 201 Pac. 165.

Goddard & Clark, of Billings, Mont., and Charles A. Kutcher, of Sheridan, for plaintiff in error.

Brome & Hyde, of Basin, and E. E. Enterline, of Denver, Colo., for defendant in error.

BLUME, J. For the facts, see 201 Pac. 165. Counsel for defendant have filed a petition for rehearing herein, alleging in general that we erred in the rule of law applied in the case. Other exceptions taken we shall mention in the course of the opinion. It is apparent, judging from the arguments of counsel, that we have not made our position clear in many respects, and have, perhaps, not sufficiently covered the grounds taken by defendant. On account of the importance of the principles involved in this case, and in justice to the learned and able counsel for defendant, we shall at greater length than we would ordinarily do, but as briefly as possible, go over the main contentions herein made. Much of what we shall say would have been said in the original opinion, but for the fact that we thought we had covered the subject sufficiently and did not desire to make the opinion too long.

Counsel think that we have not considered the authorities cited by them, and now particularly again refer to Keefe v. Ry. Co., 92 Iowa, 182, 60 N. W. 503, 54 Am. St. Rep. 542; Louisville Ry. Co. v. Jolly's Adm'x (Ky.) 90 S. W. 977; Vizacchero v. Rhode Island Co., 26 R. I. 392, 59 Atl. 105, 69 L. R. A. 188; Southern Ry. Co. v. Gray, 241 U. S. 333, 36 Sup. Ct. 558, 60 L. Ed. 1030; Cohen v. Ry. Co., 14 Nev. 376; and one other case hereinafter mentioned. We had read the authorities cited. Without attempting here to analyze the above cases separately, we may say in general that they fairly support the doctrine that ordinarily an engineer does not need to put his train under control, and that he is entitled to indulge in the presumption of a clear track. We have no fault to find with that doctrine, and gave it our approval in the original

opinion. The Vizacchero Case lays down the rule that only sufficient time need be given for the persons on the track to get out of the way, and counsel contends that this rule should be applied here. We also gave that rule our approval as applied in the ordinary case where section men are on the track. The Jolly Case presents many facts very similar to those in the case at bar, and counsel in their first argument herein contended that the case should control here. But there was absent in that case the one vital factor which controls this case, namely, the warning given of the peril of deceased, and that factor was not present in any of the cases cited by counsel for defendant and we cannot, therefore, see how those cases can be said in any way to be applicable to, or be decisive of, the case at bar.

We stated the rule of law in this case to be that the engineer, among other things, when he received the warning, should have put his train under reasonable control, leaving the fact as to whether or not he had done so for the jury to determine. We cited in support of our holding the cases of *R. Co. v. Evans*, 170 Ky. 536, 186 S. W. 173, and *Ry. Co. v. Jones' Adm'rs*, 171 Ky. 11, 186 S. W. 897. Counsel for defendant contend that these cases do not apply, pointing to the fact that in both of them the engineer completely ignored the warning there given and that in one of them the person injured was not negligent. We do not think that sufficient to distinguish the cases. Contributory negligence on the part of the injured person can neither establish the negligence of a defendant nor freedom therefrom. Further, to partially ignore a warning may be just as fatal and result in just as great detriment as to entirely ignore it; hence the principle cannot be shaken by that argument.

We have found no other cases than those above cited exactly in point. We think, however, that they find some support in cases arising out of analogous situations, namely, where the injured person is killed or injured at a place much frequented and where his presence therefore was to be anticipated. Both classes of cases are based on knowledge of danger. See cases collated in 11 L. R. A. (N. S.) 352. In the case of *Missouri Pac. Ry. Co. v. Hansen*, 48 Neb. 232, 66 N. W. 1105, cited by counsel for defendant, the deceased was a trespasser injured while walking on the track in a region outside of the city limits, not shown to have been unusually heavily settled. The court held that a speed of 25 miles could not be held to be negligent. We think it is apparent that much greater knowledge of the presence on the track of the deceased in the case at bar was conveyed to defendant's engineer. In addition thereto the deceased in this case was not a trespasser. In the case of *Haley v. Ry. Co.*, 197 Mo. 15, 93 S. W. 1120, 114

Am. St. Rep. 743, the court announced the following rule:

"It is the duty of a railroad running its train through a street of a populous city to use ordinary care to regulate the speed of the train so as not to injure any one, and failure to use such care is negligence at common law."

In *Northern Alabama Ry. Co. v. Guttery*, 189 Ala. 604, 66 South. 580, the syllabus on this question is as follows:

"Where trainmen know that a track at a certain point is commonly used by pedestrians, it is their duty to keep their train in control at that place so that they may avoid injuring pedestrians after discovering them upon the track."

In the case of *Cincinnati, etc., Ry. Co. v. Carter*, 180 Ky. 765, 203 S. W. 740, the court seems to lay down the rule that, in all cases where there is a lookout duty due to any person, the duty of the railroad company is as follows:

"In such cases the company owes to persons thus using its track the duty to give warning of the approach of its train, to keep a lookout, and to operate its train at such a speed as may enable the engineer to stop it before injury has been inflicted."

Similar language was used in *Illinois Central R. R. Co. v. Murphy's Adm'r*, 123 Ky. 787, 97 S. W. 729, 11 L. R. A. (N. S.) 352, and in *Blackburn v. Ry. & N. Co.*, 144 La. 520, 80 South. 708. See, also, *Georgia R. Co. v. Cromer*, 106 Ga. 296, 31 S. E. 759; *Shaw v. R. Co.*, 127 Ga. 8, 55 S. E. 960.

So we think that the rule applied in the case at bar is amply sustained by both reason as well as authority. We believe, however, that the exception taken by counsel for defendant to the phraseology, such as used in the *Jones Case*, that the control must be such as to be able to stop the train if necessity appears, or, as expressed by some of the other cases above cited, that the train must be able to be stopped before injury occurs, is well taken. While we do not know that the courts meant to so hold, the language may be construed to mean that that duty exists as a matter of law. We think that the only requirement that should be made, as a matter of law, of an engineer in a case like that at bar, is to keep a lookout, give warning, and put the train under such control as a reasonably prudent person would have done under like circumstances, leaving it to the jury to say, unless the case warrants the court to do otherwise, as to whether or not the rate of speed which would make it impossible to prevent injury, after actually and definitely discovering the dangerous position of the persons in peril, was in fact negligent. See *Illinois Central R. R. Co. v. Murphy*, supra; *Shaw v. R. Co.*, supra; *Georgia R. Co. v. Cromer*, supra;

Tober v. R. Co., 210 Mich. 129, 177 N. W. 385. We applied the rule as so construed in the case at bar.

Counsel fear that this rule would seriously interfere with railroad operation. But we do not think so. We cannot deviate from the wholesome doctrine that the law has a high regard for human life, and must apply a rule of law that will effectuate that doctrine. The rule announced by us does not apply unless the engineer has reason to believe that persons on the track ahead of him are in peril; in all other cases he is entitled to indulge in the presumption of a clear track, and does not need to put his train under control further than to give men whom he has reason to believe to be ahead of him sufficient time to get out of his way. We do not think that such a doctrine puts too great a burden upon railroad operation.

Counsel claim that under the holding of this court the engineer was required to anticipate the negligence of Sweeney as well as unusual and extraordinary conditions. But that is a very inexact deduction. We held that, in order to make defendant responsible, it should only be able to anticipate some injury from its acts; that the jury were justified in finding that, with the conditions actually confronting the engineer, some injury might reasonably be anticipated by him, unless he reduced the speed so that it would not be negligent; that as to whether he did so was a question for the jury; that since the jury found that he did not, but was negligent, they were further justified in holding that the injuries in question were within the reasonable field of anticipation, or, as expressed generally, that these injuries were the natural and proximate result of the negligence, for which the defendant was liable, although occurring under unusual circumstances.

Let us briefly, even at the risk of repeating some of the things stated in the original opinion, make our position clearer. In the first place, the situation as it was at the time when the engineer received the note, "Motorcar just ahead," could clearly be found by the jury to have been fraught with peril and danger. The fact that the note could be construed to mean that the motorcar was just ahead in the cut, the obstruction to vision, the noise of the motorcar making hearing difficult, the train running out of time, the possible, perhaps probable, sense of security of the men on the motorcar ahead, and other circumstances indicated in the original opinion warranted them in doing so. And what would seem very persuasive, the station agent of the defendant thought so, and demonstrated that by the very act of handing the note to the engineer; the latter thought so, and showed that fact by sounding the whistle and reducing the speed. It is clear, therefore, that, in

face of all this, we could not be asked to hold the fact to be otherwise. Counsel, accordingly, would probably agree with us that, if the engineer had paid no attention whatever to the danger warning and had entirely ignored it, then he should have reasonably anticipated some injury, and that then his conduct would rightly have been considered reckless and negligent, without regard to the conduct of the deceased. It is therefore reasonable to hold that he should, under the circumstances, put his train under control. This in fact he did, to the extent of reducing the speed to about 20 miles an hour, and the only point remaining is whether that was sufficient as a matter of law, or whether the jury had a right to pass upon that question. As we stated before, to ignore a duty partially may be just as fatal, just as deadly, as to ignore it entirely. Counsel think that no danger whatever was left after such reduction of speed, and the circumstances to the contrary are not exceedingly strong. But we think that reasonable minds might come to a different conclusion on that question. And the case was therefore properly submitted to the jury.

[1] When, accordingly, the jury found, as they evidently did, that to run the train at the rate of 20 miles an hour had a tendency, and was likely, to result in some kind of injury, and that this constituted negligence, then the fact that the injury happened under peculiar circumstances, such as could not have been reasonably anticipated, would not necessarily make any difference. See cases cited in the original opinion. Counsel attempt to distinguish some of the cited cases from the case at bar. The facts in those cases, it is true, are different from the facts in the case at bar, but the rule therein stated is applicable nevertheless, because based on or consonant with the principle that the law will not permit a defendant to excuse himself from the natural and proximate consequences of his wrong. Where negligence has once been found to exist, the defendant is liable for all the natural consequences proximately resulting therefrom, without the intervention of an efficient intervening cause, although the injuries actually resulting could not have been foreseen. *Galveston, etc., Ry. Co. v. Cook* (Tex. Civ. App.) 214 S. W. 539; *San Antonio & A. P. Ry. Co. v. Behne* (Tex. Civ. App.) 198 S. W. 680; *Christianson v. Ry. Co.*, 67 Minn. 94, 69 N. W. 640; *Ry. Co. v. Parry*, 67 Kan. 515, 73 Pac. 105; *Mesa City v. Lesueur*, 21 Ariz. 532, 190 Pac. 576; *Salmi v. R. R. Co.*, 75 Or. 200, 146 Pac. 819, L. R. A. 1915D, 834; *Pullman Palace Car Co. v. Laask*, 143 Ill. 242, 32 N. E. 285, 18 L. R. A. 215; *Hellan v. Supply Laundry Co.*, 94 Wash. 683, 163 Pac. 9; *Stevens v. Dudley*, 56 Vt. 158; *Hill v. Winsor*, 118 Mass. 251. The consequences

of negligence are almost invariably surprises. *Clifford v. Railroad*, 9 Colo. 338, 12 Pac. 219; *Colorado Mtg. & Inv. Co. v. Giacomini*, 55 Colo. 540, 136 Pac. 1039, L. R. A. 1915B, 364; *Stevens v. Dudley*, supra. A contrary doctrine would give every wrongdoer a chance to escape by showing that the consequences could not reasonably have been anticipated, and would often lead to most unjust results, but under the law as laid down by the courts, so long as the results are natural and proximate, or, as otherwise expressed, not so unnatural and remote as to be beyond the reasonable field of anticipation, the defendant guilty of negligence is held responsible. This question is generally, as we held it to be in this case, for the jury to decide. With the question of negligence of the party injured we shall deal separately.

[2-4] Counsel for defendant have conceded from the beginning—a fact which we fully understood and which, in justice to them, we should probably have distinctly stated—that if defendant was guilty of any negligence proximately contributing to the injury, then, in view of the Employers' Liability Act, a verdict for plaintiff was properly found. But, in addition to the contention that defendant was not negligent, of which we have already disposed, they further vigorously insist that the acts of deceased became the sole proximate, the sole producing, cause, because the decedent was reckless and negligent, and that such negligence was not to be anticipated by defendant. We have, perhaps, not heretofore sufficiently treated this point of view. There are at least two conclusive answers to this contention:

First. In determining as to whether or not the acts of decedent constituted the sole proximate cause of the injury, the acts of both parties must be considered; it must appear not only that decedent was negligent, but also that the defendant was not guilty of negligence contributing to the injury. And we have already stated that the jury were justified in finding the defendant negligent. As to whether this negligence contributed to the injury was also for them to decide. Hence the decedent's negligence is not sufficient to establish counsel's contention. We do not suppose that counsel would dispute the proposition that the mere fact that decedent was negligent does not necessarily prove, in a case like this, that defendant was not negligent. Negligence consists of a violation of duty owing by one to another. Whether or not defendant violated such duty can evidently not be established in a case like this by showing merely that decedent was also guilty of a violation of duty. This seems to be a truism. Further, it is true that defendant is not required to anticipate the negligence of the injured party, and he

is not held responsible therefor, even under the Employers' Liability Act (U. S. Comp. St. §§ 8657-8665). Because of this fact, recovery is barred in a common-law action whenever such negligence, commonly called contributory, is established. But if we call it the sole proximate cause, when shown, then we can conceive of no case where, when such negligence of the injured party is established, a recovery could be had under the Employers' Liability Act, and the law would be but a phantom and a delusion. Hence the contention must, of course, be unsound. To say that a defendant is not required to anticipate another's negligence is, we think, a different proposition from saying 'that a man is responsible for the natural and proximate consequences of his wrong, as he is held to be under the Employers' Liability Act. But whether it is or not, or whether the latter proposition should in a case like this be considered a modification of the former, is to no purpose. The very reason of the act was to get away from the common-law rule referred to, that contributory negligence, or, if it pleases, the inability to anticipate the injured party's negligence, bars recovery, and intends to make a defendant responsible for the natural and proximate consequences of his wrong, and no further, though these consequences could not have happened except only in combination with or because of the negligence of the injured party.

Second. We cannot agree with counsel, as we indicated in the original opinion, as to the nature of the acts of deceased in connection with the motorcar. The moment no doubt was tense, as is shown by the circumstances, including the exclamation of decedent, and the fact that the Mexicans jumped instantly. Decedent no doubt was impelled by emotions to save the motorcar and himself from being discharged; but a train moving at 20 miles an hour compelled instant action or meant, perhaps, death; that he, under the excitement of the moment, should pull the lever of the motorcar the wrong way, is not entirely surprising, and cannot be considered so unusual as to be beyond the reasonable field of anticipation, even though, as counsel say, section men do not usually "lose their heads." We do not think that we should judge too harshly of conduct under such circumstances, and do not believe it to be consonant with humane feelings to declare such conduct, as a matter of law, reckless and the sole proximate cause of the injury. See *Dickinson v. Granbery* (Okla.) 174 Pac. 775, where three Mexicans escaped but the section foreman was killed. We think it was for the jury to say whether this conduct of deceased constituted contributory negligence or not, and to what extent, if any, it contributed to, or brought about, the injury; and if they found that he

then acted with ordinary care, then, it would seem, they could have found for plaintiff, even under the rule of law contended for by defendant, namely, under the rule that time enough should have been given to deceased to get off the track while in the exercise of ordinary care. The preceding negligence, if any, of being there at all on account of not heeding the warning not to go, should not, we think, be determinative of that point, for if it were, the rule itself, or for that matter any rule relating to the care of defendant whatever, would be of no value to a person situated as was the deceased, and this is the view which the lower court doubtless took in view of instruction No. 14.

Counsel for defendant take exception to what we said on the subject of the nonproduction of the speed recorder. We do not believe that anything we said could be construed as affecting the rule of the burden of proof. Inasmuch, however, as the point was not necessary to be decided in the case, we deem it best, in view of the fact that the point may in the future arise more directly, not to decide as to what, if any, conclusions the jury had a right to draw from the circumstances mentioned, and the original opinion is modified accordingly.

We find no reason why a rehearing should be granted, and the same is accordingly denied.

Rehearing denied.

POTTER, C. J., and KIMBALL, J., concur.

NORTH LARAMIE LAND CO. v. HOFFMAN et al. (No. 967.)

(Supreme Court of Wyoming. Nov. 22, 1921.)

1. Appeal and error §781(1)—Moot questions not reviewed.

If it is made to appear to an appellate court that the questions involved are no longer of any practical importance to the parties, the case will not be reviewed on the merits merely to determine who shall pay the costs.

2. Injunction §189—Court may give relief though thing sought to be restrained has been done pending suit.

If defendant in an injunction suit, though not acting in violation of any temporary restraining order, does the thing against which the injunction is asked, the court is not thereby deprived of authority whenever justice requires it to deal with the parties as they stood at the commencement of the suit, and to require the defendant to make restitution to undo what he has wrongfully done, or to answer in damages.

3. Appeal and error §801(4) — Merits not considered on motion to dismiss.

Where defendant in an injunction action, though not acting in violation of any temporary restraining order, did the thing against which the injunction was asked, and judgment was for defendant, and plaintiff brings error, the Supreme Court will not decide whether or not justice requires that the parties be dealt with as they stood at the commencement of the suit on motion by defendant to dismiss the proceeding in error, where such question is so involved in the merits of the case that its determination will require a consideration of the relative equities of the parties, as such questions should be left until final hearing, especially where it is not shown that dismissal would be without prejudice to another action for damages.

4. Appeal and error §781(5) — Change in membership of defendant board of county commissioners not ground for dismissing injunction proceeding.

Where injunction was sought against board of county commissioners and members thereof, individually and as commissioners, and judgment was for defendants, and plaintiff brought error, it was no ground for dismissal of the proceeding in error that the membership of the board of county commissioners had changed, under Comp. St. 1920, §§ 1301, 1304.

Error to District Court, Platte County; William C. Mentzer, Judge.

Action by the North Laramie Land Company against Albert E. Hoffman and others, individually and as constituting the Board of County Commissioners of Platte County, and another. Judgment for defendants, and plaintiff brings error. On motion to dismiss. Motion denied.

See, also, 26 Wyo. 327, 184 Pac. 226, 195 Pac. 988.

Pam & Hurd, of Chicago, Ill., and William A. Riner, of Cheyenne, for plaintiff in error. Kinkad & Henderson, of Cheyenne, for defendants in error.

KIMBALL, J. The plaintiff below, plaintiff in error here, sought by this action to enjoin the defendants from establishing a public road across the lands of the plaintiff. The defendants were the board of the county commissioners, and the members of that board individually and as such commissioners. The prayer of the petition was that—

The defendants "be perpetually restrained from taking any further proceedings or doing acts with respect to locating said proposed road, * * * and particularly from confiscating or appropriating any of the rights, properties or lands of the plaintiff" for that purpose.

Shortly after the commencement of the action a temporary injunction was granted upon the giving by plaintiff of an undertaking

in the sum of \$1,500. The trial of the action resulted in findings for defendants, the dissolution of the temporary injunction, a denial of a perpetual injunction, and judgment for defendants for their costs. Thereafter the plaintiff took the steps necessary to bring the case here for review, but did not attempt to obtain an injunction during the pendency of the case on error.

The case has been heard on the motion of defendants in error to dismiss the proceeding in error. It is shown by affidavits filed in support of the motion that at considerable expense to the county the road in question has been constructed across plaintiff's land, and is now a part of an important highway traveled by the public. There is a statement in one of the affidavits that plaintiff has acquiesced in the construction and use of said road, but this statement seems to be based solely upon the facts that plaintiff has fenced its land along the sides of the road, and that since the dissolution of the injunction it has not interfered with the construction or use of the road. The plaintiff insists that it has never ceased to contend that the location, construction, and use of the road is unlawful, and for the purposes of this motion we hold that there has been no sufficient showing of acquiescence.

[1, 2] The principal contention in support of the motion is that, the action being for injunction only, and the act sought to be enjoined having been done, there now exists no actual controversy requiring a review of the judgment. If it be made to appear to an appellate court that the questions involved are no longer of any practical importance to the parties, the case will not be reviewed on the merits merely to determine who shall pay the costs. The cases cited by defendant in error illustrate the application of this principle to many different situations, but among them there is no case where it was claimed that the acts sought to be enjoined, and afterwards accomplished, constituted a trespass upon, or appropriation of, the property of the other party. And we understand that counsel concede that if the defendant in an injunction action, though not acting in violation of any temporary restraining order, do the thing against which the injunction is asked, the court is not thereby deprived of authority, whenever justice requires it, to deal with the parties as they stood at the commencement of the suit, and to require the defendant to make restitution—to undo what he has wrongfully done—or to answer in damages. *Mills v. Green*, 159 U. S. 651, 654, 16 Sup. Ct. 132, 40 L. Ed. 293; *Green v. Okanogan County*, 60 Wash. 309, 111 Pac. 226, 114 Pac. 457; *Bonnewell v. Lowe*, 80 Kan. 769, 104 Pac. 853; *New Haven Clock Co. v. Kochersperger*, 175 Ill. 383, 395, 51 N. E. 629, 632; *Pennsylvania Co. v. Bond*, 99 Ill. App. 535; *Ranzau v. Davis*, 85 Or. 26

158 Pac. 279, 165 Pac. 1180; *Lynch v. Union Institution*, 159 Mass. 308, 34 N. E. 364, 20 L. R. A. 842; *Ives v. Edison*, 124 Mich. 402, 83 N. W. 120, 50 L. R. A. 134, 83 Am. St. Rep. 329; 16 A. & E. Enc. Law, 242, 243; 22 Cyc. 742, 743.

[3] But it is argued that this is not a case where justice requires that the appeal be entertained for the purposes above stated. We do not think this question should be decided now, for it is so involved in the merits of the case that its determination, which will require a consideration of the relative equities of the parties, should be left until the final hearing. *United Real Estate & Trust Co. v. Barnes*, 157 Cal. 515, 108 Pac. 306.

It will be noticed that many of the authorities, holding that an appeal or proceeding in error will not be heard on the merits, where it is shown that the relief asked cannot then be granted, assume that the dismissal is without prejudice to another action. 2 High, *Injunctions* (4th Ed.) § 1701a; *Meyn v. Kansas City*, 91 Kan. 29, 136 Pac. 898; *McWhorter v. Northcut*, 94 Tex. 86, 58 S. W. 720; *People v. Board of Cannassers*, 50 Hun. 601, 2 N. Y. Supp. 561; *Hicks v. Pearce*, 158 Mich. 502, 122 N. W. 1087; *Henderson v. Hoppe*, 103 Ga. 684, 30 S. E. 653; *Texas & P. R. Co. v. Interstate T. Co.*, 155 U. S. 585, 15 Sup. Ct. 228, 39 L. Ed. 271; *Lockwood v. Wickes*, 75 Fed. 118, 123, 21 O. O. A. 257. In other cases where the relief asked has been denied by the trial court, and it appears on appeal that the exact relief cannot then be granted, yet, if the judgment below denying the relief be an adjudication of any substantial right, which might be the basis of some future action, it is held that the judgment should be reviewed. *Kaufman v. Mastin*, 66 W. Va. 99, 66 S. E. 92, 25 L. R. A. (N. S.) 855; *Postal Tel.-Cable Co. v. Montgomery*, 193 Ala. 234, 69 South. 428, Ann. Cas. 1918B, 554; *Central, etc., Co. v. Highland Park*, 164 Mich. 223, 129 N. W. 46, Ann. Cas. 1912B, 719; *Clarke v. Beadle Co.*, 40 S. D. 597, 169 N. W. 23; *Independent School Dist. v. Pennington*, 181 Iowa, 933, 165 N. W. 209; *Livesley v. Jonston*, 45 Or. 30, 76 Pac. 13, 946, 65 L. R. A. 783, 106 Am. St. Rep. 647; *Winsor v. Hanson*, 40 Wash. 423, 82 Pac. 710; *Hampton v. Lynch*, 54 Okl. 249, 153 Pac. 1119; *State v. Public Service Com.* 110 Wash. 130, 188 Pac. 7; 2 R. O. L. 170; 4 C. J. 576.

In the case at bar, the dismissal of the proceedings in error would have the same practical effect as an affirmance of the judgment of the lower court; and, while we do not deem it advisable, in deciding the motion to dismiss, to make an investigation of the issues sufficient to determine what matters would upon dismissal become *res judicata*, we think it at least probable that the plaintiff in error would, by the judgment, be estopped from asserting, in another action,

substantial rights, which, if the judgment be erroneous, should be preserved.

The operation of the judgment below as an adjudication fixing or affecting the liability of plaintiff in error for damages in a possible future suit on the injunction bond is not urged as one of the reasons for denying the motion to dismiss. Perhaps, for some reason not called to our attention, the judgment, in respect to that matter, is not material or effective. There is good authority for holding that, in similar cases, because of the possible liability upon the bond, the proceedings for a review of the judgment which has determined the right to the injunction is of such practical importance as to require a decision upon the merits. *Postal Tel.-Cable Co. v. Montgomery*, *supra*; *Williams v. Montgomery*, 148 N. Y. 519, 43 N. E. 57; *Sackett, etc., Co. v. National Ass'n, etc.*, 61 Misc. Rep. 150, 113 N. Y. Supp. 110; *Clisck v. Sample*, 73 Ark. 194, 88 S. W. 932; *Crom v. Frahm* (Idaho) 193 Pac. 1013; *Morrison v. Hess* (Mo.) 231 S. W. 997. *Contra: Horrabin v. Iowa City*, 160 Iowa, 650, 130 N. W. 150, 142 N. W. 212; *Geinger v. Krein*, 103 Kan. 176, 173 Pac. 298; cases cited *Crawford v. Le Fevre*, 78 W. Va. 73, 88 S. E. 1067.

[4] It is further shown, in support of the motion, that those defendants who, when the action was commenced, constituted the board of county commissioners, are no longer members of that board, and it is contended, therefore, that a judgment for plaintiff would be ineffectual. Upon this point the defendants in error cite *People v. Clark*, 70 N. Y. 518, where the right to incorporate a village was questioned. Pending the action the village was incorporated, and as the village itself or its trustees, held to be necessary parties, were not made defendants, it was clear that a decree for plaintiffs could have no practical effect. In the case at bar, if it be conceded that a judgment now rendered against the former members of the board could not be enforced, still, we think, the proceedings in error should not, for that reason, be dismissed, for the board of county commissioners as an entity is a defendant also, and it is not claimed, nor could it be successfully claimed under our statutes (*Wyo. C. S. 1920, §§ 1301, 1304*), that the change in its membership affects the accountability of the board itself, or the county.

We are of opinion that the case should not now be concluded in the summary manner suggested by the motion, as it does not appear clearly that there is no substantial right depending upon a decision as to whether or not the judgment below shall stand. A further consideration of this point, after a hearing upon the merits, may lead to a different opinion, making it then proper to dispose of

the case without deciding the questions raised by the petition in error.

The motion is denied, and the defendants in error are given 45 days from this date to serve and file briefs upon the merits.

POTTER, C. J., and BLUME, J., concur.

MOUNTAIN STATES TELEPHONE & TELEGRAPH CO. et al. v. CITY & COUNTY OF DENVER. (No. 9888.)

(Supreme Court of Colorado. Nov. 7, 1921.)

1. Telegraphs and telephones \S 263 $\frac{1}{2}$, New, vol. 7A Key-No. Series—Charges during federal control and readjustment period held not within bond to refund overcharges.

Where a city claiming control over telephone rates accepted a bond obligating a telephone company to refund overcharges if it was finally determined that the company had no right to charge increased rates prescribed by the State Public Utilities Commission, and the company collected a higher rate prescribed by the Postmaster General during federal control under Act Cong. July 16, 1918, and during the four-month readjustment period granted in surrendering control by Act Cong. July 11, 1919, the company continued to charge the higher rate, and thereafter charged a reduced rate prescribed by the commission, which was adjudged illegal, the sums collected during federal control and the readjustment period were not within the terms of the bond; the company having no control over the charges during federal control, and the readjustment privilege granted by Congress being paramount to the bond.

2. Constitutional law \S 113—Congress not limited by contract clause.

Congress is not restricted by the clause in the Constitution against the impairment of contracts.

Error to District Court, City and County of Denver; Charles C. Butler, Judge.

Action by the City and County of Denver against the Mountain States Telephone & Telegraph Company and others. Judgment for plaintiff, and defendants bring error. Affirmed as to first, second, and fourth periods and reversed as to third.

See, also, 67 Colo. 225, 184 Pac. 604.

Milton Smith, Charles R. Brock, and W. H. Ferguson, all of Denver (Elmer Brock, of Denver, of counsel), for plaintiffs in error.

Mr. James A. Marsh and Norton Montgomery, both of Denver, for defendant in error.

DENISON, J. June 14, 1918, the Public Utilities Commission of the State of Colorado prescribed rates to be charged by the plaintiff in error in the state, including the

city and county of Denver. The city claimed that it and not the state commission controlled the city rates. The plaintiffs in error thereupon executed a bond to the city conditioned—

"that if it shall be finally adjudged that the said telephone company has no right to charge the rates prescribed by the said Public Utilities Commission, and if immediately after it has been so adjudged the telephone company shall refund to each and every telephone subscriber in the city and county of Denver the excess collected from such subscriber above the rate that was being charged immediately prior to June 14, 1918, then this obligation shall be void, otherwise to remain and be in full force and effect."

April 6, 1917, the Congress declared war on Germany, and on the 16th of July, 1918 (40 Stat. 904) it authorized the President to assume control of all telephone systems and to operate the same, and on the 31st of that month the government took possession and continued in possession until midnight, July 31, 1919, when by an act of Congress of July 11, 1919, possession was surrendered to the company. This act provided:

"That the existing toll and exchange telephone rates as established or approved by the Postmaster General on or prior to June 6, 1919, shall continue in force for a period not to exceed four months after this act takes effect, unless sooner modified or changed by the public authorities—state, municipal, or otherwise—having control or jurisdiction of tolls, charges, and rates or by contract or by voluntary reduction." 41 Stat. 157.

For the four months after taking possession, which ended December 1, 1919, the company continued the rates prescribed by the Postmaster General, which were in excess of the rates charged immediately before June 14, 1918; and those rates were not modified by the public authorities or changed by contract or voluntary reduction. In November, 1918, the Public Utilities Commission of the state of Colorado reduced the telephone rates from those prescribed by the Postmaster General to the rates which said commission had previously prescribed in June, 1918; and from December 1, 1919, to February 7, 1920, the telephone company continued to charge the rates so prescribed. February 7, 1920, it was finally adjudged that the company had no right to charge the rates prescribed by the said Public Utilities Commission.

[1, 2] The city brought suit on the bond. The company admitted its liability for the first period, i. e., from June 14, 1918, to July 31, 1918, but pleaded and proved payment, and was held not further liable for that period. The court below held that for the second period, i. e., while the government had possession, the city could recover

nothing, but that it might recover for the third period above mentioned, viz., from the termination of the government's possession, July 31, 1919, till the expiration of the four months provided in the congressional resolution, that is, to December 1, 1919, and for the fourth, that is from December 1, 1919, to February 7, 1920. We think this judgment was correct, with the exception of the third period. As to the first period there is no question. As to the second, the company had no control over the charges, and therefore is not responsible, even if, as is claimed, the strict terms of the bond make it so. As to the fourth period the company is manifestly liable and had no right whatever to make the charges. As to the third there is great doubt, but a majority of the court is of the opinion that, since the act of Congress returning the telephone properties to the owner provided that the company might make the charges which it did make, subject only to conditions which were never fulfilled, in making them it was exercising a privilege granted by the act which is paramount to the bond, the Congress not being restricted by the clause of the Constitution against the impairment of contracts. This conclusion is somewhat supported by the suggestion of the equity of such a privilege, because, the property having been out of the owner's control for a considerable time, a short period of readjustment was not unreasonable, and may be fairly said to be the object of the Congress in granting the privilege.

These considerations, we think, are an answer to the claim that, immediately upon the surrender by the government, the regulations of the city, which, we have held, controlled the rates in question, took effect, and amounted to a fulfillment of the condition in the joint resolution "unless sooner modified or changed by the public authorities." Moreover this expression seems rather to refer to a future modification than a past one.

The judgment should be affirmed as to the first, second, and fourth periods, and reversed as to the third.

TELLER, J. (concurring specially). I concur in so much of the opinion as affirms the judgment as to the first, second, and fourth periods, but cannot agree that it should be reversed as to the third.

This is an action on an obligation, which is simply that if the company collects more than the rate charged immediately prior to June 14, 1918, it will refund such collections, if it is finally determined that it has no right to charge those rates. Manifestly a charge which plaintiff in error collects of its free will, when at liberty to collect less, comes within the obligation of the bond. To escape from this obligation plaintiff in error

must show that it was not responsible for the higher rate charged. While the government was in control the company was not responsible for the rate, but it is responsible for the rate during the third period because it was not compelled to charge it. The resolution, in terms, gives the right to reduce rates during the third period.

The privilege to continue charging the war rate does not affect the agreement to refund under the stipulated conditions. Plaintiff in error could have charged less than it did, and all sums voluntarily collected are within the plain terms of the bond.

BARRETT v. BOOK CLIFF R. CO. (No. 9796.)

(Supreme Court of Colorado. Oct. 8, 1921.
Rehearing Denied Dec. 5, 1921.)

1. Sales —32—Defendant held to have recognized letters as constituting sale contract.

In an action for damages for alleged breach of a contract for sale of coal, facts held to show that the defendant had given to negotiations through letters a contemporaneous construction amounting to a recognition of the contract.

2. Sales —32—Contract inferred from parties' correspondence.

It is not important that all the terms of an agreement be set out in one instrument, and where, from the correspondence, the intent of the parties to contract for a sale may be clearly inferred, it is sufficient.

Department 2.

Error to District Court, City and County of Denver; Francis E. Bouck, Judge.

Action by C. W. Barrett against the Book Cliff Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed.

Archibald A. Lee and Wm. H. Loughridge, both of Denver, for plaintiff in error.

Pershing, Nye, Fry & Tallmadge, of Denver, for defendant in error.

TELLER, J. The plaintiff in error brought an action against the defendant in error to recover damages for an alleged breach of a contract for the sale of coal. The complaint set up a contract resulting from correspondence between the parties, and failure of the defendant to fill plaintiff's orders made under it. The answer denied that there was a contract.

The trial court held that the evidence did not establish a contract, and directed a verdict for the defendant.

[1] We find from the record that the plaintiff in the action, under date of May 11, 1917, wrote to the defendant asking for a price on

coal, and as to the number of cars that the defendant could ship. On May 22d the defendant wrote to the plaintiff the following letter:

"Gentlemen: Referring to your letter of May 11th to which I replied on May 16th, I now feel that I am in position to offer to ship you about 250 tons of coal per week at a price of \$2.60 for net and \$2.85 for lump f. o. b. Grand Junction, beginning next week. This price is subject to change without notice.

"If you are interested, let me hear from you.

"Your truly,

D. B. Wright,
"General Manager."

Under date of the 26th the plaintiff wrote in reply as follows:

"Dear Sir: Yours of the 22d inst. received and contents noted. Referring to the statement, that price is subject to change without notice, under the circumstances my customers demanded some assurance as to the length of time price quoted them would hold good, together with the probable tonnage they might expect. This required prompt action on my part, as it would delay matters using the mail, and wiring would be unsatisfactory. I trust you will appreciate my action in taking this matter up with your Mr. Fry, my sole idea being to expedite matters and arrive at a mutually beneficial arrangement.

"Upon Mr. Fry's assurance to me that it was his understanding that the prices you quote would be in effect until September 1st, 1917, also his statement that he would write you on this matter and clear up a slight misunderstanding, after having had this understanding with Mr. Fry, I wired my customers.

"I am this day in receipt of a telegram asking that one sample car of lump coal be shipped immediately. As previously stated, this being a sample car, on its preparation, its freedom from foreign matter, impurities, and a minimum quantity of car bottoms, will depend the future volume of business that can be secured and held in southern California.

"Please enter order, and ship one thirty-five ton or more (box car) lump coal to the order of C. W. Barrett, Los Angeles, Calif., via D. & R. G. care of the S. P., Ogden.

"I trust you will give this your personal attention, thereby assuring perfect preparation and prompt shipment.

"My plans now are to leave this coming week for San Francisco and Los Angeles, and if I do, will arrange to stop over in Grand Junction between trains and meet you and go out to the mine and see your coal. I will write you a day or two before I leave.

"Will you kindly confirm Mr. Fry's statement that these prices quoted by you will be in effect until September 1st, 1917, thus keeping my records clear?

O. W. Barrett."

Three days later the defendant's manager acknowledged receipt of the letter of May 26th, and asked for instructions as to the shipment and billing of the coal. On May 31st the plaintiff wrote the following letter:

"Denver, Colo., May 31, 1917.

"D. B. Wright, General Manager, The Book Cliff R. R. Co., Grand Junction, Colo.—Dear

Sir: Your favor of the 29th inst. received. Referring to your letter of May 22d, I will take the 250 tons of lump and nut coal per week until September 1st, 1917, at price agreed upon.

"The amount of coal I would be able to handle between now and September 1st depends upon the quality and preparation. I can assure you I will be able to sell all you can produce. To establish a market for a new coal requires a product free from slate, foreign matter and minimum quantity of car bottom.

"I explained to Mr. Fry that all settlements would be made thirty days from date of shipment but the prospects were that payments would be made sooner than that. * * *

"I wish you would kindly change routing on car to be shipped to myself at Los Angeles, D. & R. G. S. P. Ogden to D. & R. G. S. P. L. A. & S. L. at Salt Lake.

"Unless I wire you to the contrary I will see you in Grand Junction on Saturday afternoon.

"Your very truly, C. W. Barrett."

Soon thereafter, the defendant company shipped to the order of the plaintiff three carloads of coal, and was paid therefor. On failure of the company to fill further orders, the plaintiff made complaint, in answer to which the company made various excuses for the delay in delivery, but never denied the obligation to fill the orders.

We think the plaintiff in error is right in his contention that the defendant has thus given to the negotiations a contemporaneous construction which amounts to a recognition of the contract.

[2] Objection is made that there is no single instrument in writing constituting a contract; but it is well settled that a contract may result from a series of letters determining the various matters, step by step. It is not important that all the terms of the agreement be set out in one instrument. If, from the correspondence, the intent of the parties to contract may be clearly inferred, it is sufficient. We are of the opinion that the minds of the parties met, and that there was a contract for the delivery of coal.

The trial court erred in directing a verdict for defendant. and the judgment is, accordingly, reversed.

BAILEY, J., sitting for DENISON, J.

STATE v. COHEN. (No. 2525.)

(Supreme Court of Nevada. Dec. 2, 1921.)

1. Criminal law — 1026—One who served sentence cannot prosecute appeal.

Where one was sentenced to jail and perfected appeal, but failed to obtain a stay of execution pending the appeal under Rev. Laws, § 7294, and obtained a writ of habeas corpus after serving one month, and was released upon the ground that the remainder of his sentence was void, he cannot further prose-

cute the appeal to have the stigma removed from his good name.

Appeal from District Court, Washoe County; Thomas F. Moran, Judge.

Samuel Cohen was convicted of wife and child desertion, and appeals. Appeal dismissed.

H. V. Morehouse, of Reno, for appellant.

L. D. Summerfield, Dist. Atty., and Harlan L. Heward, Deputy Dist. Atty., both of Reno, for the State.

DUCKER, J. This is a motion to dismiss the appeal which came on to be heard in advance of a hearing on the merits, by stipulation of the parties. Appellant was found guilty by a jury in the Second judicial district court, in and for Washoe county, upon a charge of wife and child desertion; said wife and children being in necessitous circumstances. He was thereafter, on the 27th day of June, 1921, sentenced to be punished by imprisonment in the county jail for a term of not less than 1 month, nor more than 12 months, and remanded to the custody of the sheriff for the execution of sentence. Appellant in due time made a motion for a new trial and moved in arrest of judgment. From the judgment and order denying a motion for a new trial this appeal is taken.

It appears from the certificate of the clerk of the court in which the conviction was had, annexed to the notice of motion to dismiss the appeal, that no application for a certificate of probable cause to stay the execution of judgment was ever made.

After appellant had served one month of his imprisonment, and on the 26th day of July, 1921, he applied to the court in which judgment was rendered for a writ of habeas corpus. It was alleged that the illegality of his confinement consisted in this:

"That no definite period of time was fixed for the punishment and imprisonment of the said Samuel Cohen under said sentence, and that there is no law in this state authorizing or empowering the aforesaid district court to pronounce an indeterminate sentence in a case of misdemeanor against the said Samuel Cohen, and that the said offense for which he was prosecuted was and is a misdemeanor, and that he, the said Samuel Cohen, has now served the said period of 1 month, fixed in the said sentence and judgment of the court, and is entitled to his discharge from custody, for the reason that the remainder of said sentence over and above the said 1 month is illegal and void, and that the said confinement and restraint and deprivation of liberty of the said Samuel Cohen by the sheriff is now illegal, and he, the said Samuel Cohen is entitled to his discharge from custody."

The writ was granted and the petitioner released from custody on said 26th day of July, 1921.

Upon these facts counsel for the state urges that all questions presented on the appeal have become moot questions, and insists that it should be dismissed.

Appellant contends, and the affidavit of his counsel sets forth, that the appellant's guilt or innocence, the jury's disregard of the instructions of the court, as well as the disregard of its own instructions by the court, are questions involved in the motion for a new trial and in arrest of judgment; that these questions are presented by a duly settled bill of exceptions; and that, as the appeal from the order denying the motion for a new trial herein is a distinct and separate appeal from the judgment, the said questions are squarely before the court on appeal, and affect the substantial rights of this appellant, and also the state of Nevada, and are therefore not moot questions. While we are unable to perceive why the fact that these questions are brought before this court on an appeal from the order denying a new trial has any bearing on the motion before us, it is plain that their determination could have no practical result in the case.

Assuming that a decision on the merits would result favorably to appellant, the most that could be determined is that the evidence was insufficient to establish his guilt of the offense charged, or at least that he was illegally convicted by reason of erroneous instructions.

A reversal of the case by this court on any or all of the errors claimed could afford him no relief from the judgment. He has satisfied that by the term of imprisonment served, and has been discharged from custody. Consequently the controversy between the state and appellant involved in this appeal has been terminated as effectually as though a verdict of not guilty had been rendered. There is nothing material to be accomplished—nothing on which the judgment of this court can act effectively and work an advantage to the appellant. *People v. Leavitt*, 41 Mich. 470, 2 N. W. 812.

While there are cases to the contrary, the weight of authority is to the effect that an appeal or writ of error will be dismissed when there has been a voluntary payment by the defendant of the fine imposed. *Brown v. Atlanta*, 123 Ga. 497, 51 S. E. 507; *State v. Westfall*, 37 Iowa, 575; *State v. Conkling*, 54 Kan. 108, 37 Pac. 992, 45 Am. St. Rep. 270; *Eustler v. Com.*, 154 Ky. 35; *People v. Leavitt*, 41 Mich. 470, 2 N. W. 812; *Washington v. Cleveland*, 49 Or. 12, 88 Pac. 305, 124 Am. St. Rep. 1013; *Commonwealth v. Gipner*, 118 Pa. 379, 12 Atl. 306; *Batesburg v. Mitchell*, 58 S. C. 564, 37 S. E. 36; *Payne v. State*, 12 Tex. App. 160; *Madsen v. Kenner*, 4 Utah, 3, 4 Pac. 992; *State v. Pray*, 30 Nev. 207, 94 Pac. 218; 17 C. J. 193.

In the case of *Trapp v. State* (Okla. Cr. App.) 186 Pac. 737, an appeal was taken from

a judgment of conviction. It was dismissed on motion of the Attorney General. The court stated as one of its reasons for the dismissal:

"That each defendant having been committed to jail under said judgment, they have long since served their respective terms of imprisonment, any legal question involved in this pretended appeal is moot."

There can be no real distinction which might call for the application of a different rule, in a case where a fine has been imposed and one where the term of imprisonment adjudged has been served. This was pointed out in *State v. Westfall et al.*, *supra*, in which the court said:

"By voluntarily paying a fine imposed upon them, they [appellants] stand in the same relation to the law as they would have done if they had served their period of imprisonment. All that can be said for them is that they have paid money in mistake of their legal rights. If the money need not have been paid they have clearly made a mistake of law. If, upon this appeal, the judgment should be reversed, they could not recover it, and hence they could derive no benefit from the appeal. The judgment of the court, upon appeal, would determine a mere abstraction."

An appeal was dismissed by this court in the case of *State v. Pray*, *supra*, on the following facts: Pray and his codefendant, Langdon, were convicted of a felony, and appealed from the judgment and order denying their motion for a new trial. The former paid his fine under protest, and attempted by stipulation of his counsel with the district attorney to reserve the right of appeal. The attempted reservation was declared void by the court. In the course of its opinion upon this phase of the case, the court said that it fell within a class of cases referred to in 2 Cyc. 648, 649:

"Where an order appealed from is of such a nature that its execution has left nothing upon which a judgment of reversal can operate, the appeal will be dismissed, unless such right was specially reserved"

—and pointed out that upon a reversal of the case no effective relief could be granted for the reason that neither this court nor the trial court had power to direct that the fine paid by Pray be restored to him. As previously stated, there can be no distinction between the voluntary payment of a fine and serving a term of imprisonment. Both satisfy the judgment of the lower court and leave nothing upon which a decision on appeal could operate. Counsel for appellant would distinguish the *Pray* Case, and referring to the summary of the briefs preceding the opinion, urges that, as it appears a fine was imposed instead of a sentence of imprisonment, at the request of the defendants, and the appeal taken after the payment of the fine, it was deemed waived by the appellate

court. Whereas, in the instant case, he insists there could be no waiver of appeal, for the reason that the appeal was perfected and pending before appellant was released on habeas corpus. The opinion in the Pray Case speaks for itself, but, be that as it may, the effect is the same in either instance. The voluntary payment of a fine or serving a term of imprisonment in a criminal action operates as a final disposition of the case, and precludes the defendant from prosecuting an appeal or proceeding further with an appeal already commenced.

If this appeal should be maintained, the appellant can derive no benefit in point of law from the judgment of this court. It is insisted that the conviction is erroneous for the reasons given, and casts a stigma upon appellant's good name, which he is entitled to have removed by a judgment of reversal. We agree with counsel for appellant, and the poet and authorities he quotes, and are also mindful of the scriptural assurances that a "good name is better than riches." Its loss or impairment is a melancholy disaster to any one who values it. But we do not perceive how we can revive a dead judgment for the purpose of quieting title to a good reputation. Appellant's opportunity to relieve himself of any odium that may have attached to his name on account of his conviction was lost by his failure to avail himself of the procedure provided for staying execution of judgment, pending an appeal. See section 7294, Rev. Laws.

The authorities cited and quoted by appellant (*Com. v. Fleckner*, 167 Mass. 13, 44 N. E. 1053; *Barthelmy v. People*, 2 Hill [N. Y.] 248; *People v. Marks* [Gen. Sess.] 120 N. Y. Supp. 1106; *Roby v. State*, 96 Wis. 667, 71 N. W. 1046), in which the right to maintain an appeal, notwithstanding the payment of the fine imposed, on account of the disgrace attaching to the defendant's good name by reason of the conviction, belong to a class of cases which form the minority rule. See note Ann. Cas. 1913E, p. 300. The doctrine advanced was not recognized in *State v. Pray*, and we cannot sanction it.

A defendant who has taken an appeal in a criminal action is entitled to a reversal only when there is prejudicial error in the record, and an existing judgment upon which the decision of this court can operate.

Appellant served 1 month of the sentence imposed, and applied for a writ of habeas corpus to be released from further imprisonment, upon the ground that the remainder of his sentence was void. His petition was granted, and he was discharged from custody. He cannot now be heard to contend that the judgment has not been satisfied.

The appeal is dismissed.

SANDERS, C. J., and COLEMAN J., concur.

PICKERING v. INDUSTRIAL COMMISSION OF UTAH. (No. 3708.)

(Supreme Court of Utah. Nov. 7, 1921.)

1. Master and servant \S 369—Compensation recoverable for injuries occurring in another state.

Under the Industrial Commission Act (Comp. Laws 1917, \S 3126), which provides that a workman hired within the state, who receives injury in employment outside of the state, is entitled to compensation, a resident of the state who was employed by a copartnership engaged in the contracting business within the state, but was thereafter sent by them to take charge of work in another state, is entitled to compensation for injuries received in the course of his employment in the other state, though the employer had taken out insurance against such injuries under the Compensation Act of that state.

2. Constitutional law \S 70(3) — Courts not concerned with the wisdom of statutes.

If the constitutionality of the provision of the Industrial Commission Act, giving it extra-territorial effect by authorizing compensation for injuries received outside the state, is not attacked, the courts are not concerned with the wisdom of the Legislature in giving its provisions such effect.

Proceedings under the Workmen's Compensation Act (Comp. Laws 1917, $\S\S$ 3061-3165), by L. B. Pickering, as employé, to recover compensation for injuries while in the employ of Pickering Bros., a copartnership. From a decision of the Industrial Commission denying compensation, the employé brings the proceedings before the court for review. Decision vacated.

Pierce, Critchlow & Marr, of Salt Lake City, for plaintiff.

H. H. Cluff, Atty. Gen., and J. Robert Robinson, Asst. Atty. Gen., for defendant.

CORFMAN, C. J. Plaintiff commenced these proceedings May 18, 1921, as claimant before the defendant, Industrial Commission of Utah, to obtain compensation under the provisions of chapter 100, Laws of Utah 1917, as amended by chapter 63, Laws of Utah 1919, commonly known as our Industrial Commission Act. Compensation was denied plaintiff by the Commission, and he has brought the proceedings here for review in the usual way and as provided that he may do under the provisions of said act.

It appears that the plaintiff, a resident of Salt Lake City, Utah, was, some time prior to January 1, 1919, employed as an engineer and superintendent by Pickering Bros., a copartnership engaged in a general contracting business. The Pickering brothers were also residents of Salt Lake City, where they employed the plaintiff, and where they at all times maintained their place of business. Up

until the year 1921, they took no contracts in outside states, but confined their operations exclusively in the performance of construction work awarded them in the carrying out of Utah projects, in which work the plaintiff had been continuously engaged in the ordinary duties of an engineer and superintendent until about March 1, 1921, when Pickering Bros. took a contract for the construction of a public highway in the state of Colorado and placed the plaintiff in charge of said project as superintendent of the work to be performed. While engaged in these duties, he became disabled in Colorado by reason of an accident arising out of and in the course of his said employment, for which he claims compensation. It further appears that Pickering Bros. carried compensation insurance in the Utah state insurance fund and also under the provisions of the Colorado Compensation Law for the protection of their employees while operating in said state.

Upon the foregoing facts, which are not disputed, our Commission by a majority decision refused to make an award.

After plaintiff applied for and was denied a rehearing, the case was brought here for review.

The majority of the Commission seem to have taken the position, as reflected by their findings and decision, that to allow the plaintiff compensation under the facts and attending circumstances stated would be giving the provisions of our act an extraterritorial effect not contemplated by our Legislature. In part the decision reads:

"The place of employment is not controlling in the question of jurisdiction, neither is the place of residence of the applicant, nor the place of the accident. The controlling element is to be found in the industries being developed. The jurisdiction in such cases must be the jurisdiction of the industry that is being promoted. * * * In this case it is quite clear that Pickering Bros. went beyond the jurisdiction of this Commission and engaged in employment not even remotely connected with Utah industry, that L. B. Pickering [plaintiff] was to initiate and carry to conclusion an enterprise exclusively within the state of Colorado, and that the employees engaged in this particular employment were covered by the workmen's compensation insurance in the Southern Surety Company (Colorado), * * * and for this reason the relief sought is hereby denied."

[1] Our Industrial Commission Act, section 3126, Comp. Laws Utah 1917, without qualification, provides:

"If a workman who has been hired in this state receives personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state, * * * even though such injury was received outside of this state."

Under the admitted facts in this case, it would seem that the plaintiff here has met

all the requirements of the foregoing provision of our statute. Although he received an injury outside of this state, he was hired in this state. Not only was he hired in this state, but he was a resident of Utah, employed in a business or enterprise being conducted in Utah and by Utah residents. The plain and express wording of our statute permits of no other construction or interpretation than that under the showing here made by the applicant, it was intended by our Legislature that the beneficial purposes of our act should be given extraterritorial effect and compensation allowed.

It would appear from the expressions made in the majority opinion that the Commission has not only disregarded the plain provisions of our statute in refusing to make an award, but that it has also misconceived the very purposes of the act, viz., to protect the employé and those dependent upon him, so that in case of accident and injury they may not become subjects of public charity. *Scranton Leasing Co. v. Industrial Commission of Utah*, 51 Utah, 368, 170 Pac. 976; *Chandler v. Industrial Commission of Utah et al.*, 55 Utah, 213, 184 Pac. 1020, 8 A. L. R. 930.

[2] The constitutionality or validity of the statute is not here questioned. As a court we are not concerned with the wisdom of the Legislature in giving its provisions extraterritorial effect. That it did do in plain and unmistakable terms.

Under the facts and circumstances disclosed by the record in this case, we are of the opinion that the plaintiff is entitled to compensation, as in the act provided, and that the Commission, in not making an award, misconceived its jurisdiction.

It is therefore ordered that the decision of the Commission denying the plaintiff compensation be, and the same is hereby, vacated and set aside. Plaintiff to recover costs.

WEBER, GIDEON, THURMAN, and FRICK, JJ., concur.

STATE v. CRAWFORD. (No. 3714.)

(Supreme Court of Utah. Nov. 7, 1921.)

1. Criminal law §561(2)—Identity of property in possession of accused must be established beyond reasonable doubt.

In a prosecution for burglary, where the prosecution relies principally on possession of recently stolen property, the identity of such property must be established beyond a reasonable doubt, but not necessarily beyond the possibility of a doubt.

2. Burglary §45—Identity of property in defendant's possession with that stolen held for jury.

In a prosecution for burglary, where prosecuting witness identified jewelry found in de-

fendant's room as that taken from her house, but on cross-examination was not positive, the identity of such property was a question for the jury.

3. Burglary \S 37—Tools found in defendant's room admissible, though not shown to be adapted to commission of offense.

In a prosecution for burglary, where certain marks and abrasions found on the door of the burglarized house, for aught that appeared in the evidence, might have been made with tools found in defendant's room, such tools were admissible in evidence, though it was not shown they were adapted to the commission of the burglary.

4. Burglary \S 42(1)—Evidence held insufficient to establish defendant's possession of stolen articles.

In a prosecution for burglary, evidence held insufficient to show that defendant had such possession of the stolen articles found in a room occupied by him and another as to connect him with the crime.

5. Criminal law \S 369(7)—Witnesses \S 337(5)—Defendant's admission of prior term of imprisonment no evidence of guilt, going to credibility only.

In a prosecution for burglary, defendant's admission that he had served a term of imprisonment in another state went to his credibility only, and did not tend to show that he had committed the offense charged.

6. Burglary \S 42(1, 2)—Possession of stolen articles to warrant inference of guilt, must be recent and exclusive, but "exclusive possession" need not be separate.

To convict of burglary on the ground of defendant's possession of stolen articles, such possession must not be too remote in time, and must be personal and exclusive, or, if joint with another, there must be other evidence to connect defendant with the offense; but "exclusive possession" does not necessarily mean that the possession must be separate, for it may be the joint possession of two or more, as where they are acting in concert.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Exclusive Possession.]

7. Criminal law \S 351(3)—Defendant's attempt to escape while charged with robbery does not indicate guilt of burglary.

Where one charged with robbery, the penalty for which may be life imprisonment, attempted to escape, this was not a circumstance indicating guilt of offense of burglary, for which he was afterward tried.

8. Criminal law \S 552(3), 561(1)—Circumstantial evidence must exclude every reasonable hypothesis except that of defendant's guilt.

Defendant must be accorded the benefit of every reasonable doubt, and, in cases dependent solely on circumstantial evidence, the circumstances must be such as to exclude every reasonable hypothesis except that of guilt.

Appeal from District Court, Salt Lake County; M. L. Ritchie, Judge.

Cyril Crawford was convicted of burglary in the third degree, and he appeals. Reversed and remanded.

Wm. Reger, of Salt Lake City, for appellant.

H. H. Cluff, Atty. Gen., and W. Hal Farr, Asst. Atty. Gen., for the State.

THURMAN, J. Defendant was convicted by the verdict of a jury in the district court of Salt Lake county of the crime of burglary in the third degree, and sentenced to a term of imprisonment in the state prison. From the judgment so entered, defendant appeals, and assigns as error the admission of certain evidence over his objection, insufficiency of the evidence to sustain the verdict, and error in refusing a directed verdict.

The evidence at the trial tends to show that on May 10, 1921, the residence of Mrs. Frank Angell, in Salt Lake City, was broken into in the daytime, and a cameo brooch, an opal ring, and a small amount of money was taken therefrom. Mrs. Angell left home about 2 o'clock in the afternoon of the date mentioned and returned about 4:30. She left the doors locked and saw the articles in question just before leaving her residence. On her return she entered at the front door, and passed through to the rear, where she found the transom over the rear door down and the fastener broken. She also found the door unlocked, but the key was in the door on the inside as she had left it on leaving the house. There were marks on the door, outside, above the lock. The paint and some of the wood was off. It looked as if a screw-driver or similar instrument had been used. The above facts were reported to the police. On the morning of May 17, seven days after the burglary occurred, the police, while investigating an alleged robbery of the night before, knocked at the door of a room occupied by defendant and one Austin in the Hotel Hampton, Salt Lake City, and were admitted. Both occupants were in their nightclothes, not having dressed for the day. The officers proceeded to search the room. Under a dresser in the southeast corner of the room they found two or three revolvers and some articles of jewelry wrapped in a paper. All of the articles were shoved back against the wall of the room. The officers also found a chisel and other tools in a drawer of the washstand. Both defendant and Austin disclaimed any knowledge or ownership of the articles so found. Mrs. Barrett, proprietress of the hotel, testified that Austin registered at the hotel on May 2, and on May 3 told her he had a friend who would room with him, and asked concerning the price. She told him to register, and he said, "All

right." On May 16, the day before the officers searched the room, she was housecleaning and moved everything in the room. She discovered the articles under the dresser, examined them, and put them back. She found nothing in the washstand drawer except bits of soap. She put in clean paper and left it in that condition.

At the conclusion of their search on the 17th of May, the officers arrested both Austin and defendant, and filed a complaint against them for burglarizing the premises of Mrs. Angell. They were held to answer to the district court. Austin having escaped, defendant was tried separately, and convicted as heretofore stated.

During the course of the trial Mrs. Angell, on direct examination, identified the jewelry found in the room occupied by defendant and Austin as that taken from her premises on May 10. On cross-examination she was not positive. She said it looked like hers and hers was gone, but she had no marks by which to identify it. The jewelry was admitted in evidence over defendant's objection that it was not sufficiently identified as the property of Mrs. Angell. In support of his objection defendant cites the following authorities: 4 R. C. L. p. 446; Cannon v. State, 12 Ga. App. 637, 77 S. E. 920; Love et al. v. State, 58 Tex. Cr. R. 270, 124 S. W. 932; Rayfield v. State, 5 Ga. App. 816, 63 S. E. 920; Bundick v. Commonwealth, 97 Va. 783, 34 S. E. 454.

[1] Some of these cases appear to lend considerable support to defendant's contention. There can be no question in a case of this kind, where the prosecution relies principally on possession of recently stolen property, but that the identity of the property so possessed and the property stolen should be established beyond a reasonable doubt, but to hold that the identity must be established beyond the possibility of a doubt would be to establish a rule utterly impracticable in the administration of justice. Mrs. Angell at first testified positively that the jewelry was that which had been taken from her residence, but afterwards, on cross-examination, being reminded that there might be other jewelry of the same kind, she declined to be absolutely positive. She appeared to be a fair witness.

[2] We are of the opinion that the matter of identity, under the facts in this case, was a question for the jury. 9 C. J. 1081, cited by the state, and cases referred to in the note.

[3] The tools found in the washstand drawer were also admitted over defendant's objection. The particular contention made by defendant in support of this exception appears to be that it was not shown that the tools admitted were adapted to the commission of the burglary in question. The marks and abrasions found on the door, for aught that appears in the evidence, may have been

made with the instruments found in the room occupied by Austin and defendant. We feel amply justified in holding that there is no merit in this assignment.

[4] A question far more serious, however, is presented in defendant's contention that the evidence is insufficient to sustain the verdict, and that the court erred in not directing a verdict for defendant. We have stated the substance of all the evidence produced at the trial on the part of the state. The defendant himself was sworn as a witness and protested his innocence. We are unable to find in the record a scintilla of evidence tending to connect defendant with the burglary unless it be held that the finding of the articles mentioned in the room occupied by him and another establishes a connection. There was nothing tending to show a conspiracy between him and Austin. There was nothing to show that the articles in question were in his exclusive possession or that he ever saw them until they were discovered by the officers. It must be remembered that, as far as the jewelry was concerned it was shoved back under the dresser, against the wall of the room, and was only discovered by the proprietress of the hotel when she removed the dresser in cleaning house. As concerns the tools in the washstand drawer, they were not in the drawer on the day before they were discovered by the officers. None of the articles were found in a suit case, grip, or other receptacle exclusively used by defendant, and, as far as the jewelry is concerned, there is nothing whatever to suggest a reason why the defendant should have even known it was there, much less that he had such possession as will meet the requirements of the law in cases of this kind.

[5] Defendant admitted he had served a term of imprisonment in California. This went to his credibility only. It in no sense tended to show that he had committed the offense for which he was tried and convicted. There was no evidence whatever tending to contradict any statement he made respecting his lack of knowledge concerning the articles found in his room, nor were the circumstances such as to do more than create a bare suspicion of his guilt.

[6] In these circumstances defendant's counsel vigorously contends that the verdict is not sustained by the evidence. He relies on the following declaration of the rule in 9 C. J. at page 1081:

"Possession must not be too remote in point of time and must be *personal and exclusive*, or, if joint with another, *there must be something else in the evidence to connect defendant with the offense.*" (Italics ours.)

The cases cited in the note appear to support the text. Counsel for defendant also cites and quotes at considerable length from State v. Warford, 106 Mo. 55, 16 S. W. 896,

27 Am. St. Rep. 322, and Wharton's Criminal Law (11th Ed.) § 1027.

Of course, when the authorities speak of "exclusive possession" it does not necessarily mean that the possession must be separate, for such exclusive possession may be the joint possession of two or more, as where they are acting in concert. *State v. Stutches*, 163 Iowa, 4, 144 N. W. 597; *State v. Wright*, 22 Del. (6 Penn.) 251, 66 Atl. 364; *Cogshall v. State* (Tex. Cr. R.) 58 S. W. 1011; *Moncrief v. State*, 99 Ga. 295, 25 S. E. 735. These cases, however, are all cases in which, although possession was joint, there was other evidence tending to connect defendant with the offense.

[7] The state makes no attempt whatever to answer this contention of defendant. It passes the question by without comment or citation of authority. It contends, however, that, inasmuch as defendant attempted to escape from the officers, this circumstance was indicative of guilt, and, in connection with other evidence, was sufficient to sustain the verdict. If defendant had not been charged with another offense, and one more serious than the one for which he was tried and convicted, there would be more force in the state's contention. But the record discloses that at the very time he made the attempt to escape he was charged with the crime of robbery, the penalty for which may be imprisonment for life. In such circumstances the authorities seem to hold that no presumption of guilt arises as to the offense for which the accused is being tried.

In *Underhill on Criminal Evidence* (2d Ed.) p. 220, we find the following:

"An attempt by a prisoner in jail, awaiting trial for two distinct crimes to escape is not relevant to show that he is guilty of either. It may be impossible to determine which charge he fled, or attempted to flee, to avoid. He may have fled because conscious that he was guilty of the one for which he is not on trial."

In *People v. McKeon*, 64 Hun. 504, 505, 19 N. Y. Supp. 486, 487, cited by the defendant, the court says:

"* * * Where the defendant is held under two distinct charges, how can the fact of an attempt to escape be said to raise any presumption of guilt of either of the crimes charged rather than the other? It is plain that the motive of escape may have been furnished wholly by his fear of prosecution for the other crime with which he was charged, and thus the act proved have been entirely consistent with consciousness of innocence of the crime in question."

[8] While the contention of appellant does not appear to be supported by an abundance of authority, it is nevertheless controverted

by none within the scope of our investigation. The contention, however, is in line with certain rules of evidence generally recognized in this country as elementary and fundamental. It is consistent with the rule that accords to a defendant charged with an offense the benefit of every reasonable doubt. It is consistent with the rule applied in cases dependent solely upon circumstantial evidence, as in the case at bar, that the circumstances must be such as to exclude every reasonable hypothesis except that of the defendant's guilt of the offense charged that every circumstance constituting a necessary link in the chain of evidence must be consistent with the defendant's guilt and inconsistent with his innocence. In the instant case, as we have already shown, under the rules of law controlling in cases of this nature, there was absolutely no evidence connecting defendant with the burglary in question unless it be the fact that defendant attempted to escape. This circumstance, therefore, became a necessary link in the chain of evidence relied on to convict. The circumstance, being entirely consistent with defendant's innocence of the burglary for which he was being tried, should have been eliminated from consideration. If the jury had taken into consideration the fact that defendant was also charged with robbery, and was being held for that offense, the conclusion that he attempted to escape to avoid conviction for burglary would, as matter of law, have been impossible.

On the matter of attempting to escape, the court instructed the jury as follows:

"The evidence concerning an attempt to escape is received on the theory that the defendant is in fear of the result of the prosecution herein, and is attempting to escape therefrom; in other words, upon the supposition that guilt may be inferred from the fact of his attempt to escape from custody. You are instructed that the inference that may be drawn, as to its strength or weakness, depends upon the facts surrounding the defendant at the time. An attempt to escape is not of itself sufficient to establish the guilt of the defendant of the crime charged. While such acts are indicative of fear, they may spring from other causes than conscious guilt, and you should take into consideration any facts that explain or qualify or limit the drawing of the inference of guilt, or that show the acts in question to be consistent with innocence."

It is manifest the jury did not follow that instruction. The court ought to have directed a verdict of acquittal. The judgment is therefore reversed, and the cause remanded to the district court, with directions to grant the defendant a new trial.

CORFMAN, C. J., and WEBER, GIDEON, and FRICK, JJ., concur.

UTAH FUEL CO. v. INDUSTRIAL COMMISSION OF UTAH. (No. 2716.)

(Supreme Court of Utah. Nov. 7, 1921.)

1. Master and servant \S 398—Compensation award against employer appearing without formal application and notice held valid.

Though the proceedings in a workmen's compensation proceeding were irregular where no application for compensation was filed with the Commission, and the only notice served on the employer respected the amount of the employee's earnings, yet, where the employer at the hearing conceded that the relation of employer and employé existed, and that the employé was injured in its mine in the course of his employment, and was entitled to some compensation, the Commission had jurisdiction to make an award.¹

2. Master and servant \S 385(1)—"Average weekly wage" of compensation claimant defined.

Where employment in a mine was irregular and intermittent, and varied at different seasons of the year, but fairly averaged 222 days each year, and employes desiring to continue in the employment were required to be where they could be called when wanted, an employee's weekly wages should be computed for the purpose of determining the compensation for injuries by multiplying his daily wages by 222 and dividing by 52.²

Proceedings under the Industrial Commission Act, for compensation for injuries to Clyde Parry, opposed by the Utah Fuel Company, employer. Compensation was awarded by the Industrial Commission, and the employer obtained a writ of review. Application for writ of review dismissed.

Ferdinand Erickson and H. J. Binch, both of Salt Lake City, for plaintiff.

H. H. Cluff, Atty. Gen., and J. Robert Robinson, Asst. Atty. Gen., for defendant.

FRICK, J. The plaintiff owns and operates a coal mine in this state. One Clyde Parry, on the 25th day of March, 1921, while employed by the plaintiff in its coal mine, and in the course of his employment, sustained personal injuries by reason of which he was prevented from continuing his employment.

The plaintiff and said Parry both were subject to the provisions of our Industrial Commission Act (Comp. St. 1917, \S 3061 et seq.), the plaintiff being what is called a self-insurer under the act.

On the 22d day of June, 1921, the Commission, by some means not disclosed by the record, having taken jurisdiction of Parry's case without a formal application on his part, served notice upon the plaintiff that a hear-

ing would be had on the 6th day of July, 1921, respecting the injuries sustained by said Parry to determine the amount of his earnings. The plaintiff, through its counsel, appeared at the hearing aforesaid, and, upon the evidence produced by it and other evidence, the Commission made an award to said Parry of \$16 per week, beginning on the 29th day of March, 1921, and ordered that the plaintiff pay the amount awarded as aforesaid to said Parry during the continuance of his inability to work.

The plaintiff, in due time, filed its application for a rehearing as provided by said act, and, the hearing having been denied, the plaintiff made application to this court for a writ of review which was issued pursuant to the provisions of said act.

The Attorney General, as counsel for the Commission, and said Parry, filed a general demurrer to plaintiff's application, and the cause was submitted to this court upon the demurrer.

The plaintiff, in its application, alleges that the Commission exceeded its powers or jurisdiction in making said award in two particulars: (1) That, in view that no application for compensation was made to the Commission by said Parry either in person or by some one on his behalf, the Commission did not acquire jurisdiction of the case, and hence it exceeded its jurisdiction in making said award; and (2) that the award of the Commission is without support in the evidence, and hence should not prevail.

[1] In regard to the first ground stated above it is only fair to counsel for plaintiff to state that at the hearing they frankly stated that they do not seriously contend that the Commission was wholly without jurisdiction because no formal application was made by said Parry, but they insist that the proceedings were grossly irregular in that no application of any kind, was made. No doubt the Commission should insist that every applicant comply with its rules by which he is required to file a written application. Such an application should be filed in every case in which at least the jurisdictional facts should be stated. As pointed out by this court, however, in the case of *North Beck Min. Co. v. Industrial Commission*, 200 Pac. 111, the proceedings before the Commission are very informal and in some respects "sui generis." Nor does the act require any particular thing to be done by an applicant in order to confer jurisdiction upon the Commission where both the employer and the employé are subject to the provisions of the act. It is necessary, however, in each case, that due notice be given to the employer that an application for compensation is made by some person who asserts that he has suffered injury, that he sustained the relation of employé to such employer at the time of the injury, and that

¹ *North Beck Min. Co. v. Industrial Commission*, 200 Pac. 111.

² *Distinguishing State Road Commission v. Industrial Commission*, 190 Pac 544.

the injury arose through an accident which occurred in the course of his employment. When that is done the employer is given an opportunity to defend against the claim if for any reason it should not be well founded, and if it be well founded he may, nevertheless, be heard upon the question of the amount of compensation that should be awarded. As before stated, however, in this case notice was given to the plaintiff that a hearing would be had respecting the amount of Parry's earnings, at which hearing plaintiff appeared, and in which it took part without objection. If it be conceded, therefore, as it must be, that in view that no application of any kind for compensation was filed with the Commission, and that the only notice that was served on plaintiff was with respect to the amount of the earnings of Parry, and therefore the proceedings were very irregular, yet, in view that at the hearing aforesaid plaintiff conceded that the relation of employer and employé existed between it and the said Parry at the time he was injured, that he was injured in its mine in the course of employment, and that he was entitled to some compensation, the Commission clearly had jurisdiction to make an award in favor of said Parry.

The first objection therefore cannot be sustained.

[2] In recurring to the second ground of objection, namely, that there is no evidence in support of the award, it becomes necessary to state as briefly as possible the controlling facts, practically all of which appear from plaintiff's admissions or from the testimony of its employes. It was made to appear that at the time of the injury Parry was employed as a driver in plaintiff's coal mine; that as such driver he earned \$7.95 per day; that he worked part of the time as a driver and part of the time as a coal miner; that when he was employed as a miner he was paid by the ton; that he went to work for plaintiff on the 8th day of February, 1921, and continued in its employ until injured as before stated; that during the month of February he earned \$63.50 and during the month of March up to the time of the injury \$58.25, making a total of \$121.75 during February and March; that during the entire period aforesaid Parry worked 46 days, or $6\frac{4}{7}$ weeks; that in view of the foregoing conditions Parry's average weekly wage during the time he worked amounted to \$18.55 per week; that under the provisions of the act he would be entitled to 60 per cent. of that amount, which would amount to \$11.13 per week and no more.

The Commission, however, refused to limit Parry's compensation as contended for by plaintiff, and, as before stated, awarded him compensation at the rate of \$16 per week, the maximum allowance under the act. The Commission arrived at its conclusion as follows: It determined Parry's daily earnings

at the time of the injury to be \$7.95 and allowed him 300 working days in the year, which gave his yearly earnings to be \$2,385. In order to arrive at his weekly average the Commission divided the annual earnings by 52, the number of weeks in a year, which made his weekly average somewhat in excess of \$45, 60 per cent. of which would exceed \$16 per week, the maximum allowed by the act, and hence the Commission awarded him the maximum amount as before stated.

It is strenuously insisted that the amount allowed by the Commission is contrary to both the law and the evidence. The evidence on the part of the plaintiff showed that, in view that the demand for coal was irregular and intermittent, the mine could not be operated every day in the year, and that there were many weeks during the year when the mine could only be operated for a few days in each week, some weeks more some less. It was made to appear, however, that during four winter months the demand for coal was more uniform and during which period the mine was worked practically every day; that during the spring and fall months it could be operated only from 3 to 5 days per week, while during the summer months the operation was even less than that, so that the yearly average that the mine was worked was 222 days. It was also shown that that average was a fair yearly average for a number of years, and that the operation of other coal mines in this state was practically in the same condition, some perhaps operating some days in excess of plaintiff's average while others operated a few days less during the year. The evidence is clear, however, that the average number of days that plaintiff's mine was being operated during the year was practically a permanent condition, so that it can well be assumed that the average number of days plaintiff's mine was operated in each year was 222 days, as before stated. We are confronted, therefore, with a condition where the employment is necessarily irregular and intermittent.

Plaintiff's evidence is to the effect that its employes must remain in attendance at the mine if they desire to continue in its employ; that is, if a miner or other employé should fail to report for work on a day the mine is to be operated, and that should occur for a number of days, he would be stricken from the rolls and would thus lose his job. The employes must therefore be in attendance at the mine so that, when notice is given that the mine will be operated (which is done by the blowing of a whistle in the evening preceding the day the mine will be operated), they may report for work on the following morning. It is clear, therefore, that although plaintiff's employes, by reason of conditions over which it has no control, cannot be continuously employed, yet they must be where they can be called at any time when they

may be wanted if they desire to continue in the employment. Under such circumstances it must be apparent to all that plaintiff's method of arriving at the average weekly earnings is necessarily faulty, while, upon the other hand, it is, we think, equally clear that the Commission's method of arriving at the average weekly wage is likewise unsound.

In view of the circumstances, therefore, the question is: What is the proper weekly average and how shall it be ascertained?

We shall assume that Parry's daily wage at the time of the injury was \$7.95, because both the plaintiff and the Commission have assumed that to have been his wage, although, under the evidence, his earnings when engaged as a miner were somewhat less. The difference, however, was not sufficient to have reduced the weekly allowance, and hence it is of no significance in this case. As before stated, the yearly average number of days the mine was operated was 222. Plaintiff thus operated its mine 222 days in each year, and its employes knew that that was the number of days that they would be given an opportunity to earn the wages paid by plaintiff in operating its mine, and voluntarily accepted those conditions. That being so, Parry had the opportunity to work 222 days in the year. His daily wages must thus be multiplied by 222, which will give the amount of his yearly earnings. If, therefore, we multiply 222 by \$7.95, his daily wage, his earnings would have amounted to \$1,764.90 during the year. If we divide that amount by 52, the number of weeks in a year, it will give us a weekly average of somewhat in excess of \$33. Sixty per cent. of \$33 is in excess of \$16 per week, the amount allowed by the Commission. The award is therefore not excessive, as contended for by plaintiff.

The only question is whether the basis for the foregoing computation is the correct one. As we have pointed out, the basis contended for by plaintiff cannot be correct. Neither can the one adopted by the Commission be successfully defended under the circumstances of this case. The basis assumed by plaintiff is not just in that the period of employment is too restricted while the basis adopted by the Commission is unfair because it assumes that Parry could have worked 300 days in the year while under the undisputed evidence he could only have worked 222 days. Under the plaintiff's theory Parry's average weekly wage was too low, while under the Commission's theory it was too high, since it assumed that Parry would earn wages during 300 days, which he could not do. Nor, in view of the circumstances, is there any other method of arriving at the average weekly wage which is just and fair to both employer and employe than the one adopted by us. If, for example, the four winter months during which the mine was operated practically

continuously were taken as a basis to ascertain the average weekly wage of the employe, the basis would be too favorable to such employe, while if the summer months were taken as the basis, when the mine was operated less, but during which time the employe must nevertheless be in attendance if he desires to continue in his employment, the basis would be too favorable to the employer. We are persuaded, therefore, that the only method to ascertain the true weekly average is the one we have adopted.

While neither plaintiff's counsel nor the Attorney General has found any American cases which are directly in point, and while we have found none, yet the Attorney General has called our attention to several English cases where, under circumstances similar to this case, the method adopted by us was approved and applied. See *Perry v. Wright*, [1908] 1 K. B. 441; *White v. Wiseman*, [1912] 3 K. B. 352; *Anslow v. Cannock-Chase Colliery Co.*, [1909] Appeal Cases, 431, 5 *Butterworth's Workmen's Compensation Cases*, 634. We shall not pause here to review those cases nor quote from them. It must suffice to say that they clearly sustain the theory upon which we have proceeded in this case.

Plaintiff's counsel, however, insist that this court is committed to the doctrine contended for by them by what was said in the case of *State Road Commission v. Industrial Commission*, 190 Pac. 544. A mere cursory reading of the opinion in that case will disclose that it has no application here. That was a case where the employment in its very nature was merely occasional, and where the employe could devote his time to other remunerative employment. The employment in that case was not even what is known as seasonal employment. While the employment in this case somewhat partakes of the nature of a seasonal employment, yet it is not such in fact. It is merely an intermittent or irregular employment which continues in that way more or less throughout the entire year. The whole year must therefore be considered in order to arrive at a fair average of the employe's earnings. If the employe is injured and is thus prevented from earning wages, he loses precisely what he could have earned, and is entitled to 60 per cent. of his earnings unless the 60 per cent. exceeds the maximum allowed by the act.

In this case, therefore, although the Commission's method of arriving at the average weekly wage was clearly unsupported by the evidence, yet, in view that the evidence as clearly supported the amount that was actually allowed, the award is not excessive, and must therefore stand.

The application must therefore be dismissed, with costs.

CORFMAN, C. J., and WEBER, GIDEON, and THURMAN, JJ., concur.

FRITCHER v. KELLEY et al. (No. 3376.)

(Supreme Court of Idaho. Oct. 29, 1921.)

1. Crops \Leftrightarrow 2—Belong to one growing and severing while possessing the land.

Fructus industriales, grown and severed by one while in possession of land, belong to him, although his possession was without right as against the true owner.

2. Crops \Leftrightarrow 2—Belong to grower if severed between quieting of title and owner's taking possession.

This holds good as to such crops, although not severed before judgment is entered quieting title in the true owner, so long as they are severed before he takes possession.

Appeal from District Court, Twin Falls County; Wm. A. Babcock, Judge.

Action by Glenn F. Fritcher, administrator of the estate of John Allen, deceased, against John H. Kelley and wife and others, and from an order dissolving a temporary injunction, the plaintiff appeals. Affirmed.

See, also, 201 Pac. 1037.

E. M. Wolfe and J. F. Martin, and L. A. Wade, all of Twin Falls, and A. W. Ostrom, of Buhl, for appellant.

Walters, Hodgin & Bailey, of Twin Falls, for respondents.

MCCARTHY, J. This is an action to enjoin respondents from removing crops grown on a certain 80 acres. The complaint alleges that on June 28, 1918, a judgment of the district court for Twin Falls county was entered decreeing that plaintiff was the owner and entitled to the possession of the 80 acres in question and that the respondents, John H. Kelley and Laura B. Kelley, had no interest therein. The complaint goes on to allege that at the time of said judgment certain crops were growing upon the premises which belonged to appellant by virtue of the decree; that the respondents threatened to remove the crops and would do so unless restrained by the court; and that on September 3, 1918, appellant caused to be served upon respondents John H. Kelley and Laura B. Kelley a certified copy of the above-mentioned judgment, and they have refused to deliver up the premises. While it is not directly alleged that said respondents were in possession of the premises, it so appears by necessary inference from the last-mentioned allegation. Upon this complaint a temporary injunction was issued. Respondents moved to dissolve it. A hearing was had on affidavits and the complaint, and the motion was granted. From the order dissolving the injunction, this appeal is taken.

The uncontradicted affidavits, filed by respondents in support of the motion to dis-

solve the injunction, show that respondents John H. Kelley and Laura B. Kelley rented the land in question to respondents Earl Kelley and John Tash for the season of 1918, under an agreement by which the former were to have one-half the crop and the latter one-half; that prior to June 17, 1918, the first crop of hay grown upon said land was entirely cut; that prior to September 3, 1918, the grain grown upon said land was cut and stacked; that prior to September 3, 1918, a second crop of alfalfa grown on about 8 acres of said land had been cut and stacked. The affidavit of respondent John H. Kelley also alleges that when a certified copy of the decree was served on September 3, 1918, he and his wife, Laura B. Kelley, removed from said premises.

[1, 2] Appellant claims that the crops were part of the realty and as such belonged to him. They were all fructus industriales; that is, crops produced by labor and industry. We approve the rule that fructus industriales belong to one who, while in possession of the land, has raised them and severed them from the land itself, though it turn out that his possession was without right as against the true owner of the land. Wakefield v. Dyer, 14 Okl. 92, 76 Pac. 151; Faulcon v. Johnston, 102 N. C. 284, 9 S. E. 394, 11 Am. St. Rep. 737; Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462; Johnston v. Fish, 105 Cal. 420, 38 Pac. 979, 45 Am. St. Rep. 53; 8 R. C. L. Subject Crops, § 11, p. 363. We conclude that this rule holds good, even as to that part of the crops which were not severed before the judgment, so long as they were severed while respondents were in possession of the land. Phillips v. Keysaw, 7 Okl. 674, 56 Pac. 695; Aultman, etc., Co. v. O'Dowd, 73 Minn. 58, 75 N. W. 756, 72 Am. St. Rep. 603.

The order dissolving the temporary injunction is affirmed. Costs to respondents.

RICE, C. J., and BUDGE, DUNN, and LEE, JJ., concur

FRITCHER v. KELLEY et ux. (No. 3513.)

(Supreme Court of Idaho. Oct. 29, 1921.)

1. Pleading \Leftrightarrow 8(16), 369(1)—Denying motion that plaintiff elect not error, where complaint shows only one cause; facts constituting undue influence must be alleged.

Where a complaint contains a valid statement of but one cause of action, an order denying a motion to elect is not error.

2. Appeal and error \Leftrightarrow 1046(1)—Permitting improper tender held not reversible error in trial before advisory jury.

On the trial of an equitable action to set aside a conveyance on the ground of mental

incompetency, a jury having been called to act in an advisory capacity, the fact that the court permitted an improper tender to be made is not reversible error, where it appears that the judgment of the court on the material issues could not have been influenced thereby.

3. Deeds \Leftarrow 203—In action to set aside a conveyance, grantor's denial of its execution held admissible on question of his mental capacity.

In such action statements of the grantor, made shortly after the execution of the deed, to the effect that he had not executed it, are admissible as circumstances bearing on the question of his mental competency at the time of the execution.

4. Appeal and error \Leftarrow 971(2)—Qualification of lay witnesses to testify of grantor's mental capacity rests in court's discretion.

The question as to the qualifications of lay witnesses who testify as to their opinion of the mental competency or incompetency of the grantor is addressed to the sound discretion of the trial court, and its ruling thereon will not be reversed unless it appears that it was an abuse of discretion.

5. Appeal and error \Leftarrow 1050(1)—Admission of document, otherwise inadmissible, to fix a date, held not reversible error.

In such case, admission of a document, the contents of which are not admissible, is not reversible error, where it clearly appears that the trial court admitted it solely for the purpose of fixing a date, which was relevant in connection with certain oral testimony.

6. Witnesses \Leftarrow 211(2)—Physician's knowledge of condition of patient's mind held privileged information.

Under C. S. § 7937, subd. 4, if a physician is called to attend a patient for a certain ailment, and, in examining and observing the patient for the purpose of treating and prescribing for him, necessarily obtains information in regard to his mental condition, such information is privileged.

7. Appeal and error \Leftarrow 847(2)—In equity case, instructions to an advisory jury will not be reviewed.

In an equity case, in which the jury acts in a purely advisory capacity, the action of the court in giving or refusing instructions will not be reviewed.

8. Appeal and error \Leftarrow 1011(1)—Judgment on conflicting evidence must be affirmed.

If there is a conflict in the evidence and there is evidence in the record which, if uncontradicted, would support the judgment, it must be affirmed on appeal.

Appeal from District Court, Twin Falls County.

Action by Glenn F. Fritcher, administrator of the estate of John Allen, deceased, against John H. Kelley and wife. Judgment for plaintiff, and the defendants appeal. Affirmed.

See, also, 201 Pac. 1037.

Walters, Hodgins & Bailey, of Twin Falls, for appellants.

E. M. Wolfe, J. M. Martin and L. A. Wade, all of Twin Falls, and Ostrom & Green, of Buhl, for respondent.

MCCARTHY, J. This is an action by respondent, as administrator of the estate of John Allen, deceased, to set aside a deed of 80 acres of agricultural land executed and delivered by said deceased to appellants on July 18, 1915. The complaint alleges that deceased was at the time of said conveyance incapable of comprehending and understanding, and in fact did not comprehend or understand, its character, nature, or effect, and that he was wholly incapacitated from attending to business matters. This is an allegation that deceased did not have mental capacity to execute the conveyance. The complaint also alleges:

"That the said defendants exercised undue influence over the said John Allen, and persuaded him to make, execute, and deliver said deed to them, and induced him to execute said deed which, in the free exercise of his deliberate judgment, he would not have executed. * * *

"That the said defendants had acted as agents for the said John Allen in many matters; that they had written letters for him; that they had drawn his money at the bank for him; that they had paid his taxes and maintenance for him; that they had cared for him at times during periods of illness or physical disability; that they had taken charge of and looked after many of his business matters, and that a fiduciary and confidential relationship existed between the defendants and the said John Allen; that they had employed counsel to look after and take care of the business of the said John Allen, and had employed counsel on their own behalf to look after and take care of the business of the said John Allen, and had employed counsel to help, aid, and assist in procuring and influencing the said John Allen in conveying land to the said defendants."

The court impaneled a jury to act in an advisory capacity. The jury found in answer to interrogatories that appellants were not living in a close confidential relationship with deceased on July 18, 1915; that they paid no consideration for the deed; that deceased did not fully understand and fully appreciate what he was doing when he executed the deed; and that he did not make it of his own free will and volition and did not understand the effect of his act. The court adopted the findings of the jury and made the following additional finding:

"That on the said 18th day of July, 1915, and at the time of the signing of said deed, the said John Allen, was about eighty (80) years of age, very infirm and ill, weak in body and mind, laboring under delusions and hallucinations all to such an extent and degree that he was wholly incapacitated and entirely without understanding sufficient to conduct the or-

inary business transactions of life; and that because of such mental condition he did not understand the purpose or effect of his signing of the said deed.

"That no substantial consideration passed from the defendants to the said John Allen for the execution of said deed.

"That the defendants fraudulently took advantage of the mental weakened condition of the said John Allen and procured the deed from him without any consideration for him therefor.

"That the signing of the said deed by said John Allen was not his free exercise of his deliberate judgment, but was the result of his inability to understand the effect of his act."

From a judgment setting aside the conveyance appellants appeal.

Of the many errors assigned, we will discuss those which we think worthy of special notice.

[1] Appellants contend that the complaint states two causes of action, one based on mental incompetency and one on undue influence. They interposed a motion to elect, which was denied, and contend that it should have been sustained on the authority of *Kelly v. Perrault*, 5 Idaho, 221, 48 Pac. 45. Assuming, but not deciding, that the rule in *Kelly v. Perrault* should be followed, it does not appear that the complaint states two causes of action. It states a good cause of action on the ground of mental incompetency. The allegations concerning undue influence are mere conclusions. The facts constituting undue influence, like those constituting fraud, must be pleaded; it not being sufficient to aver undue influence which is a legal conclusion. *Kelly v. Perrault*, supra. There being but one good cause of action stated in the complaint, it was not error to deny the motion to elect.

[2] The complaint alleges that the respondent has offered, now offers, and is ready, willing, and able to pay appellants any and all sums of money which are due them from the deceased or his estate. Responsive to this allegation, the court permitted respondent's attorneys to make a tender to appellants. No money judgment could have been rendered in the action. The allegation in the complaint was surplusage and the court should not have permitted the tender. The cause was tried by the court, however, and the findings of the jury were purely advisory; we do not think the tender could possibly have influenced the judgment of the court as to whether the deceased was competent or incompetent. Therefore we conclude that it was not reversible error.

[3] Appellants complain that the court permitted respondent to prove by several witnesses that, after executing the deed, deceased told them that he had not executed it. The point made is that declarations of a grantor against the title of his grantee, made after parting with title, are not admissible. *Josslyn v. Daly*, 15 Idaho, 137, 98

Pac. 568. If the statements had been admitted as declarations of the grantor impeaching the title of the grantee, the point would be well taken. They were admitted, however, on an entirely different ground, viz., that they had a bearing on the question of the mental condition of the deceased within a short time after he executed the deed in question, and were therefore probative as to his mental condition at the time he executed it. On this ground they were properly admitted as relevant circumstances.

[4] Appellants complain that the court permitted various nonexpert witnesses to state their opinions as to whether deceased was mentally competent or incompetent, without first requiring them to detail the facts and circumstances upon which their opinions were based. Even in jurisdictions in which the rule contended for by appellants is upheld, the question whether the opinion of a nonexpert witness is based upon sufficient observation is addressed to the sound discretion of the trial court, and its ruling will not be disturbed unless that discretion has been abused. See note in 38 L. R. A. 721, 733, C. Each of the witnesses testified to the facts and circumstances within his observation upon which his opinion was based, and in each case we think that these facts and circumstances were sufficient to justify the court in exercising its discretion, and admitting the opinion testimony. Conceding, though not deciding, that the rule is as contended for by appellants, we find no error.

[5] Appellants complain that the court admitted, over their objection, the finding and order of the probate court of Union county, Or., made in October, 1915, adjudging that the said deceased was an incompetent person at that time. These were first offered by respondent generally for the purpose of showing incompetency, and the court sustained an objection. Later on they were offered for the purpose of fixing a date about which a witness was questioned. We do not commend the practice of admitting an entire document, the contents of which were not admissible, in order to show a date. The correct practice would be merely to refer to it for the purpose of fixing the date. However, as the ultimate decision of the case was for the court, and it is apparent that it admitted the document only for the purpose of fixing the date, we do not find reversible error here.

[6] Appellants complain that the court refused to permit Dr. Weatherbee to give testimony as to his opinion of the mental condition of the deceased shortly before the execution of the deed. After an objection had been sustained, appellants offered to prove that the doctor was called to treat the deceased for a cold, that the information which he acquired concerning the deceased's mental condition was based upon his observation, and was not necessary to enable him to

prescribe for the patient. The court sustained an objection on the ground that the information was based on confidential relations and communications. C. S. § 7937, subd. 4, reads as follows:

"A physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient."

In most of the cases cited by appellants, the information was based upon voluntary statements of the patient which had no possible connection with the professional relation existing between the physician and patient. It is well settled that information based upon observation comes within the statute as well as information based upon statements made by the patient. 4 Wigmore on Evidence, § 2384. It has been held that where a physician treated a patient for a stroke of apoplexy he cannot testify to the mental capacity of the patient. In *Re Nelson's Estate*, 132 Cal. 182, 64 Pac. 294. Past decisions of this court show an inclination to liberally interpret the words "information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient." In *Jones v. Caldwell*, 23 Idaho, 467, 130 Pac. 995, a ruling of the trial court was upheld sustaining an objection to a question asked a surgeon as to the condition of a certain part of the human body which had been removed; he having assisted in the operation but having made his examination of the part in question some time after it was removed. Strictly speaking the doctor's information based on the observation of this part of the body was not necessary to enable him to prescribe or act for the patient. Admitting this to be true, the court said:

"Literally and technically speaking, this may be true; but such a construction of the statute would rob it of its true spirit and the purpose and intent thereof. Had the physician not been called upon to perform this service in his professional character, he would never have been able to acquire the information about which appellant sought to have him testify. He acquired it as a physician and surgeon and in no other capacity, and he acquired it as physician and surgeon for this respondent and by reason of his employment in his professional capacity to serve the respondent."

Again in *Brayman v. Russell & Pugh Lumber Co.*, 31 Idaho, 140, 169 Pac. 932, the court held:

"Under the statute forbidding a physician to be examined as to any information acquired in attending his patient, the acquisition of which is necessary in order to enable the former to prescribe or act for the latter, all statements made to a physician by his patient while the former is attending the latter in that capacity, for the purpose of determining his

condition, are privileged, although they have nothing to do with the patient's treatment, or the determination of his injuries."

Upon the authority of these decisions we conclude that the opinion of the doctor as to the mental capacity of the deceased, based upon his observation of him at a time when he was treating him, was properly rejected by the trial court.

[7] Appellants assign certain instructions of the court as error. In an equity case, in which the jury acts in a purely advisory capacity, the action of the court in giving or refusing instructions will not be reviewed. *Kelly v. Perrault*, supra; *Daly v. Josslyn*, 7 Idaho, 657, 65 Pac. 442; *Gordon v. Lemp*, 7 Idaho, 677, 65 Pac. 444; *Hayes v. Fleisher*, 34 Idaho, —, 198 Pac. 678.

[8] Finally, appellants assign as error that the evidence is insufficient to sustain the finding that deceased was incompetent at the time he executed the deed and the judgment of the court based thereon. It is well settled that if there is a conflict in the evidence and there is evidence in the record which, if uncontradicted, would support the judgment, this court must affirm it. *Nell v. Hyde*, 32 Idaho, 578, 186 Pac. 710. There is a substantial conflict in the evidence as to the mental condition of the deceased. The notary who took his acknowledgment to the deed testified that, in his opinion, the deceased was competent. In *Kelly v. Perrault*, supra, this court held that the testimony of a notary who takes an acknowledgment to a deed is entitled to great weight. See, also, *Curtis v. Kirkpatrick*, 9 Idaho, 629, 75 Pac. 760; *Turner v. Gumbert*, 19 Idaho, 339, at 349, 114 Pac. 33. The notary also testified to the facts and circumstances upon which he based his opinion that the deceased was competent. We are not prepared to say that these facts and circumstances so clearly support the inference that the deceased was competent as to necessarily negative the contrary inference. At best, they are equivocal. The testimony of the notary as to the facts and circumstances at the time of the execution of the deed, and the evidence showing his condition, shortly prior and subsequent thereto, are, in our judgment, sufficient to sustain the findings and judgment, in spite of the opinion testimony of the notary that the deceased was competent. If the language used at page 240 of *Kelly v. Perrault*, supra, is to be understood to mean that, if the only testimony available as to the condition of the grantor, at the exact moment of the execution of the conveyance, is that of the notary, and he gives it as his opinion that the grantor was competent, he must be so adjudged in absolute disregard of evidence as to his condition shortly prior and subsequent to the conveyance, we do not approve such a rule. Conceding that the testimony of the notary is entitled to great weight, we do not think

it can be said as a matter of law that it must prevail in all cases. Each case must be decided on its own facts.

As to other assignments of error not specifically mentioned, we do not find them to be well taken.

The judgment is affirmed. Costs to respondent.

RICE, C. J., and BUDGE, DUNN, and LEE, JJ., concur.

ARCHBOLD et al. v. HUNTINGTON, Sheriff.
(No. 3410.)

(Supreme Court of Idaho. Oct. 31, 1921.)

1. Officers §74—Quo warranto §14—Proceeding to oust sheriff held quasi criminal.

Summary proceedings under C. S. § 8684, are not criminal proceedings, and are not intended as a punishment for crime, and, while such proceedings in some respects resemble a criminal action, they are only quasi criminal, and negative the idea of their being criminal.

2. Officers §74—Individuals affected in same manner may join in information against officer; each of several acts alleged in one cause, should be stated distinctly.

Where the acts complained of affect a number of individuals in the same manner, they may all join in the information; and the non-feasance complained of may consist of one or more acts stated in one cause of action, although each several act relied upon should be stated as a distinct and independent division, so that it may be answered or demurred to without confusion.

3. Officers §86—In a prosecution to oust, corrupt intent or motive need not be shown.

It is not necessary in a prosecution under this section to show that the officer acted with an evil or corrupt intent or motive, but it is sufficient if it appears that the act done or omitted was done intentionally, designedly, without lawful excuse, and therefore was not accidentally done.

4. Sheriffs and constables §6, 98(5) — Protected by warrant of arrest when complying with requirements.

Where the proceedings to establish a quarantine district were so improperly taken and irregular that no district was in fact established, and therefore the charge upon which appellant arrested complainants and placed them in jail for violating such regulation was void, the warrant of arrest, if regular on its face, will protect such officer in its due execution, in so far as he complied with its requirements, but will not protect him if he violates its command.

5. Sheriffs and constables §6—Facts held to constitute "willful and intentional neglect to perform official duty."

The fact that appellant and the health officer under whose direction he was acting honestly believed that such officer had authority su-

perior to orders emanating from the courts is not a justification for his refusal to obey the court's orders, and his placing complainants in jail under a pretense of placing them in quarantine as directed by the health officer, instead of taking them before the court that issued the warrant, held to constitute a willful and intentional neglect to perform an official duty pertaining to his office, under C. S. § 8684.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Willful Neglect.]

6. States §9—Constitutionality of territorial statute, continued in force by Constitution, cannot be challenged on the ground that it was not enacted as a separate bill.

The constitutionality of C. S. § 8684, cannot be challenged on the ground that it was never enacted as a separate bill, where such provision was incorporated into the Revised Statutes of 1887 by the Code Commission and adopted by the territorial Legislature, and continued in force by article 21, § 2 of the state Constitution.

7. States §9—Provisions of Constitution as to enactment of laws do not apply to territorial laws continued in force by Constitution.

Art. 8, § 15, which provides that no law shall be passed except by bill, and section 16, which requires that every act shall embrace but one subject, has no application to laws passed by the territorial Legislature, which were continued in force by the Constitution.

Budge and McCarthy, JJ., dissenting.

Appeal from District Court, Custer County; Robert M. Terrell, Judge.

Summary proceedings by D. V. Archbold and others against W. K. Huntington, Sheriff of Custer County, Idaho, to oust the defendant from the office of sheriff. From verdict and judgment of ouster, defendant appeals. Affirmed.

E. W. Whitcomb, of Blackfoot, and Holden & Holden, of Idaho Falls, for appellant.

Clark & Brodhead, of Hailey, George L. Ambrose, of Mackay, and D. E. Rathbun, of Idaho Falls, for respondents.

LEE, J. This was a summary proceedings, commenced by respondents, complainants below, citizens of Custer county, Idaho, for the removal of appellant W. K. Huntington from the office of sheriff of said county, under the provisions of C. S. § 8684, and to recover the statutory penalty therein prescribed.

The amended complaint alleges that W. K. Huntington was the duly elected, qualified, and acting sheriff of said county, and that while so acting he arrested complainants upon a warrant of arrest issued by the probate court of said county, and took them to Challis, the county seat, and immediately lodged them in the county jail, where he kept them from about 8 o'clock in the afternoon of November 5, 1918, until 11 o'clock of the following day; that he denied their request

to be taken before said probate court or any magistrate, as required by C. S. §§ 8719 and 8720, and refused to permit them to consult with their attorney, or to give them an opportunity to be informed of the charge against them, or to give bail for their appearance; and that they were responsible persons and citizens of said county, and were able and willing to give bail for their appearance before any court at any time or place that might be required.

The information further charges that thereafter appellant refused to obey a writ of habeas corpus issued by the judge of the Sixth judicial district, which commanded the said sheriff to immediately release said complainants, and that at a later date he attended upon a public highway an unlawful assembly that had congregated for the purpose of delaying and stopping the judge of said court and other officials, including a representative of the United States Department of Justice, and failed, neglected, and refused to disperse the said assembly, after having been directed so to do by the said judge.

To this information appellant demurred generally, and specially upon the grounds that several causes of action had been improperly united, that the information was barred by C. S. §§ 8670, 8671, and that it was ambiguous, unintelligible, and uncertain in numerous particulars pointed out, and he also moved for a separation of the several causes of action. The demurrer and motion were overruled as to the first, second, third, and fifth grounds, and sustained as to the others, the court holding that there was not a misjoinder of parties or causes of action, that it was not barred by C. S. §§ 8670, 8671, and that the information stated a cause of action, and also denied the motion for segregation.

Appellant then answered in confession and avoidance, admitting the arrest of complainants, and that he had placed them in jail, but pleaded by way of justification that there was at this time a quarantine regulation, established by the county board of health, which prohibited all persons from entering or passing through any portion of said county within the designated quarantine district, and that said arrest and detention was, by virtue of a warrant placed in his hands for execution, issued upon an information filed in said court, charging a violation of said quarantine regulation.

Upon trial had before the court, it found against appellant upon the charge relating to the arrest and detention of the complainants, and for him upon the charges relating to his refusal to obey the writ of habeas corpus and to disperse the unlawful assembly. Conclusions of law were that appellant should be deprived of his office as sheriff of said county, and that informants should

have judgment against him for the sum of \$500 and the costs of this action. Judgment to this effect was entered therein as of January 11, 1919, two days before the expiration of appellant's term of office. From this judgment he appeals.

It will not be necessary to consider serially each of the several specifications of error relied upon by appellant for a reversal of this judgment. They relate to errors of the trial court in overruling appellant's demurrer, to denying his motion to segregate the several causes of action, in finding that all of the wrongful acts had been done willfully, knowingly, and intentionally, in removing him from office and entering judgment in favor of informants in the sum of \$500 and costs, to certain alleged errors in admitting opinion evidence, in striking from the record all evidence pertaining to the minutes of the Custer county board of health relating to the quarantine regulation, and to the refusal of appellant's offer to prove the establishment of a quarantine by the said board of health; and appellant challenges the validity of C. S. § 8684, under which these proceedings were had.

[1] Proceedings under this section are in the nature of quo warranto proceedings, and are quasi criminal. *Daugherty v. Nagel*, 27 Idaho, 511, 149 Pac. 729. That is, a proceeding under this statute in some respects resembles a criminal action, but, being only quasi criminal, negatives the idea of identity. *Bouvier's Law Dictionary*, 2780. They are not criminal proceedings, and are not intended as a punishment for crime. *Rankin v. Jauman*, 4 Idaho, 53, 36 Pac. 502; *Hays v. Simmons*, 6 Idaho, 651, 59 Pac. 182. Therefore the provisions of C. S. § 8829, which require that an indictment or information shall charge but one offense, which may be set forth in different forms under different counts, do not relate to a proceeding for the removal of a public officer under this statute, and *Territory v. Guthrie*, 2 Idaho (Hasb.) 432, 17 Pac. 39, and *State v. Gruber*, 19 Idaho, 692, 115 Pac. 1, relied upon by appellant in support of his contention, have no application to an information of this kind.

[2] The information charges that appellant refused and neglected to perform his official duty with respect to three distinct and separate acts: First, that he placed informants in the Custer county jail without taking them before the probate court that issued the warrant, or any other, and refused to allow them an opportunity to give bail or to see their attorney; secondly, that he refused to release them upon a writ of habeas corpus issued by the district court; and, thirdly, that he neglected and refused to disperse an unlawful assembly. Appellant complains of this, and claims that it is a commingling of several causes of action. These three distinct acts complained of might

have been stated as separate causes of action, but an information under this statute does not require that each several act complained of be stated as a separate cause of action, provided that each is stated in a distinct and independent division, so that it can be answered or demurred to without confusion. *Pomeroy's Code Remedies* (4th Ed.) § 836. In this case the several acts are stated in separate paragraphs. Nor is it necessary, where the acts complained of affect a number of individuals in the same manner, that they must each severally file a separate information. Appellant cannot be prejudiced by a single judgment of ouster and penalty of \$500 prescribed by the statute because the several complainants joined in said action and recovered a single judgment. The trial court found for the defendant upon the second and third accusations of the complaint, inaccurately termed "counts" in the findings, so that these charges were in effect surplusage.

The statute specifies two grounds for the removal of a public officer: First, where he is guilty of charging and collecting illegal fees for services rendered or to be rendered in his office; secondly, where he has refused or neglected to perform official duties pertaining to his office. *Corker v. Pence*, 12 Idaho, 152, 85 Pac. 388; *McRoberts v. Hoar*, 28 Idaho, 163, 152 Pac. 1046. The information should state the specific acts of omission or commission, for which such removal is sought, with clearness and certainty. *Smith v. Ellis*, 7 Idaho, 196, 61 Pac. 695.

[3] Appellant contends that before he could be ousted and penalized as provided by this statute, it must be shown that he willfully, knowingly, and intentionally failed to perform an official duty; that is, that he corruptly refused to perform such duty. This provision of our statute was taken from the California Code by the Code Commission of 1887, being R. S. § 7459, and the courts of this state have uniformly held, following the decisions of that court, that the refusal or neglect to perform an official act must be done knowingly, willfully, and intentionally, but that this statute should be distinguished from the proceedings authorized under C. S. § 8670, which applies to cases of misfeasance in office as distinguished from nonfeasance, which is intended to be denounced by the section under consideration. Accusations under C. S. § 8670, must be commenced by the prosecuting attorney or by an indictment found by a grand jury, while accusations under this section may be commenced by any informant. *Daugherty v. Nagel*, supra; *Corker v. Cowen*, 30 Idaho, 213, 164 Pac. 85.

It is not necessary, however, as appellant contends, for the complainants, in an action charging an officer with refusing and neglecting to perform an official duty, to show an evil or corrupt motive. "Willfully," as

used in this information, is used in the same sense in which it is defined in C. S. § 8074, subd. 1; that is, when applied to the intent with which an act is done or omitted, it implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law, in the sense of having an evil or corrupt motive or intent. It does imply a conscious wrong, and may be distinguished from an act maliciously or corruptly done, in that it does not necessarily imply an evil mind, but is more nearly synonymous with "intentionally" "designedly" "without lawful excuse," and therefore not accidental. *Bouvier's Law Dictionary*, 3454; *Miller v. State*, 9 Okl. Cr. 55, 130 Pac. 813. When this information is construed in this sense, we think the evidence fully supports the findings of the court.

[4, 5] Without attempting to review all of the evidence, it appears that two of the county commissioners, one being a physician, and he with the other members having at some former time designated himself as county health officer, made some effort or took some steps toward establishing a quarantine district, to prevent the introduction of a communicable disease known as Spanish influenza, and thereby attempted to prohibit all persons from entering such quarantine district, unless first detained in quarantine for such time as said health officer should determine was necessary.

We do not understand that counsel for appellant contend that the proceedings taken were sufficient to establish a quarantine district. At any rate, it is clear from the record that a quarantine district was not established. The complaint upon which the warrant of arrest was issued charged respondents with the crime of having willfully violated quarantine regulations, and the warrant issued thereon commanded appellant to forthwith arrest respondents and bring them before the probate court that issued the same, or before some other magistrate. This warrant of arrest was regular in form, and issued by a court of competent jurisdiction, and was sufficient to protect appellant in its due execution, if he had complied with its requirements. He arrested complainants with sufficient promptness, but, according to his own testimony, as well as his return to the warrant, he failed and neglected to take them before the said probate court or any magistrate, as the writ commanded him to do. On direct examination he testified:

"Q. And was it the county jail you put them in? A. It was. Q. What reason had you for putting them in the county jail rather than any other place? A. No other place for them. Q. What was your purpose when you arrested these men? (After objection and ruling.) A. Well, I put them there to hold them until their quarantine period was up, because Sunday afternoon Dr. Kirtley came out of town six miles

where I was, and said a bunch had run the quarantine."

Again, counsel asked:

"Q. How did you happen to liberate them; what was the reason for their liberation? A. They asked me how long they would have to stay, and I told them they would have to stay there between three and four days—that was my understanding from the doctor—from the time they went through the quarantine line, and I left it to them to virtually figure up the time they went in, and they told me, and I counted it up, and I said, 'Well it would be some time to-morrow.' Q. Well, explain the circumstances of their liberation. What was the cause of your liberating them? A. The doctor turned them loose—out of quarantine. He said they could go."

In his return to the warrant of arrest, after naming the complainants, he states that he "placed the above named in quarantine this 5th day of December, 1918." In his answer, he alleges with reference to his action under this warrant of arrest that the informants attempted to violate such quarantine regulations, as did also the judge of the district court, by attempting to enter the said quarantine district without submitting themselves to the requirements and rules of said county board of health; that the said county board of health, at a meeting lawfully called prior to the commission of any of the acts set forth and described in the amended information, had duly determined upon said quarantine, had adopted the rules and regulations of the State Board of Health, and had otherwise fully met the requirements of the law as provided in chapter 140 of the Session Laws of 1913, state of Idaho; that the acts of this defendant were in all respects in accordance with the requirements of said law as carried out by the said county board of health of said county of Custer; and that the said informants were placed in the county jail of said county of Custer for a certain length of time, for the reason that there was no other suitable place in Challis or within the said quarantined district within which they could be suitably and properly confined until it should first be ascertained whether they were afflicted with said contagious and infectious disease, all of which said acts were done in conformity to the rules and regulations of said county board of health of said county of Custer; and that in no respect has this defendant violated any of the laws of the state, or failed, refused, and neglected to perform his duties as the sheriff of said county of Custer, within any of the times set forth and described in said amended information, or otherwise; that at all times mentioned in said amended information, and while said informants were in the care and custody of this defendant, he endeavored to meet their requests and wants with reference to their having com-

munication with their attorney so far as possible without violating any of the provisions and regulations of said established quarantine, and was ever willing to take said informants before the probate court of said county of Custer and to permit said informants to go wherever they pleased, after being detained and quarantined the length of time required by the rules and regulations made by said county board of health, and established in said county of Custer.

The complainant Swauger testified, and his testimony is not controverted, in answer to the questions as follows:

"Q. Please detail any conversation you had with the sheriff at that time, either you had yourself or other members of the party had with the sheriff in your presence and hearing. A. Yes, sir; I asked Mr. Huntington, I says: 'We would like to talk to our attorneys.' He says: 'You can't talk to nobody.' Then I says: 'Huntington, I demand we be taken before a judge.' He says: 'You will be taken no place. You will be taken to jail. You will be taken to the jail.' That is the words he used, 'You will be taken to jail.' Q. State whether or not in that conversation, Mr. Swauger, there was reference, either by yourself or any other member of the party, or by the sheriff, with reference to bail? A. I asked him for bail, too, for the whole bunch. When I got out of the car, I says: 'Mr. Huntington, can we give bail?' He says: 'No, sir.' I asked him, I says: 'Can we be taken before the judge?' He says: 'No, sir.' I demanded that we be taken, and he says: 'No, sir.' And then I asked him if we could talk to Chase Clark, and he says: 'No, sir; you can't talk to nobody; you will be taken to jail.'"

It is therefore apparent that appellant failed and neglected to obey the directions contained in the warrant, which commanded him to forthwith arrest the complainants and bring them before the probate court at his office in Challis, or, in case of the absence or inability of said court to act, then to take them before the nearest and most accessible magistrate. It may be that appellant and Dr. Kirtley, the county health board officer, acted under a mistaken notion that it was within their authority to arrest and place in jail all persons who entered this pretended quarantine district, but, however this may be, it cannot be urged even as an extenuating circumstance, much less as a defense, on behalf of appellant. He was a court officer of long experience, and had taken complainants into custody by virtue of a warrant issued by a court of competent jurisdiction, commanding him to take said complainants forthwith before such court. They demanded that this be done, and he contumaciously refused to obey the order of the court, but, acting either upon his own volition or upon the direction of the said health officer, placed these parties in jail for what he or the health officer determined was the proper quarantine period for which they should be held, and

it appears from the record that the district judge, a federal official and other court officers, whose official duties required them to go into this so-called quarantine district, narrowly escaped being placed in jail by appellant, acting at the behest of this health officer. Manifestly, ministerial officers cannot usurp the functions of courts in this manner, and escape the consequences of their wrongful acts. Appellant's placing the complainants in jail without taking them before the court or a magistrate was a willful and intentional neglect to perform an official duty pertaining to his office, for which he should be ousted therefrom and penalized as provided by said statute.

[§, 7] The last assignment relied upon by appellant charges that this section of the statute is unconstitutional, on the ground that it was never adopted or passed by the Legislature in the manner required by the Constitution, that is, by bill introduced in the Legislature, and cites in support of his contention, among other cases, those of *Lewis v. Dunne*, 134 Cal. 291, 66 Pac. 478, 55 L. R. A. 833, and note, 86 Am. St. Rep. 257; *Daugherty v. Nagel*, supra; *Libby v. Pelham*, 30 Idaho, 614, 166 Pac. 575; and article 3, § 16, of the Constitution. Appellant challenges the constitutionality of this statute on the ground that it was incorporated into the revision known as the Revised Statutes of 1887 by the Code Commission, and claims that it was never lawfully enacted by the Legislature. The question of whether or not a complete revision and compilation of all or any considerable portion of the statute law of a state can be lawfully enacted by the adoption of a complete revision, under the limitations in this provision of the Constitution cited, is not before us for determination. California, in the well-considered case of *Lewis v. Dunne*, supra, holds that a constitutional provision that provides that every act shall embrace but one subject, which subject shall be expressed in the title, is an inhibition against the adoption of an entire code as a single bill, and the great weight of authority in the states having a similar provision in their organic law supports this view. But this provision was placed in the revision of 1887 by the Code Commission, and adopted by the territorial Legislature when its power to enact laws was not restricted by any limitation other than that placed upon it by the Congress and federal Constitution, and all laws that were in force at the time of the adoption of our Constitution, and which were not repugnant thereto, were continued in force by that instrument, until they expired of their own limitation or were altered or repealed by the Legislature. Article 21, § 2. Therefore the constitutional limitation found in article 3, §§ 15, 16, providing that no law shall embrace more than one subject, which subject shall be embraced

in the title, has no application to the manner in which C. S. § 8684, became a part of our statute law.

We find no error in the record, and the judgment of the court below is affirmed, with costs to respondents.

RICE, C. J., and DUNN, J., concur.

BUDGE, J. (dissenting). The appellant at and prior to the date upon which the charges herein were filed was the duly elected, qualified, and acting sheriff of Custer county. A quarantine had been established in a portion of the county, radiating out from Challis, the county seat, for the purpose of preventing persons living without the boundaries of the district designated from coming therein, and thereby preventing the introduction of Spanish influenza into that locality. From the record it clearly appears that the people, particularly in and about Challis, were panic-stricken, even to the extent that they barricaded themselves against officers of the federal and state government entering the town. Their wire entanglements quite equalled, if they did not surpass, those constructed by the powers opposed to the allies during the great war. While this condition was at its height, respondents entered the restricted district, and a warrant was placed in the hands of appellant, as sheriff, to apprehend them.

There is no question raised here involving the regularity or validity of the warrant, or its proper service, but the sole question is whether the facts disclosed constitute nonfeasance in office, or a refusal or neglect on the part of appellant to perform the official duties pertaining to his office, within the provisions of C. S. § 8684.

Dismissing all consideration as should properly be done of all charges contained in the information which were found by the trial court not to be sustained by the evidence, and directing our attention only to the charges which were sustained and set out in the findings of fact, the record shows that the court found that on November 5, 1918, the appellant arrested the respondents at or near Clayton, Custer county, pursuant to a warrant issued out of the probate court, and conducted them to Challis, arriving there about 3 o'clock, p. m., and immediately lodged them in the county jail; that he failed and refused to take them before the probate judge before locking them up in the county jail; that they demanded of appellant that he permit them to consult counsel; that he take them before the probate court or judge, and give them an opportunity to give bail, all of which he refused to do, and refused and neglected to take them before any other magistrate; and that all of the said acts were done knowingly, willfully, and intentionally.

Upon the foregoing facts, the court found as conclusions of law that the defendant refused and neglected to perform the official duties pertaining to his office as sheriff; that he should be deprived of his office as sheriff; and that the said informers have judgment against him for \$500 and costs of suit.

C. S. § 8720, provides that:

"The defendant must in all cases be taken before the magistrate without unnecessary delay, and any attorney at law entitled to practice in courts of record of the state of Idaho may, at the request of the prisoner after such arrest, visit the person so arrested."

The respondents were taken before the magistrate who issued the warrant, but it is insisted that they were not taken before such magistrate "without unnecessary delay," and that the appellant is therefore subject to removal from office, under the provisions of C. S. § 8684, for having refused or neglected to perform official duties pertaining to his office.

With this position we are not in accord, for the reason that appellant, as shown by the record, took the respondents before the officer who issued the warrant. A refusal or neglect to perform an official duty is a nonfeasance. Misfeasance is a default in not doing a lawful act in a proper manner, omitting to do it as it should be done; while malfeasance is the doing of an act wholly wrongful and unlawful. *Coite v. Lynes*, 33 Conn. 109.

If appellant had not taken respondents before the magistrate, he would have been guilty of a failure to perform an official duty pertaining to his office. The fact that he did not proceed "without unnecessary delay" may have constituted misfeasance or malfeasance, depending upon the particular facts which should be submitted to and ultimately found by a jury, in that he did not do a lawful act in a proper manner, or in wrongfully and unlawfully confining the informers in the county jail, instead of taking them without unnecessary delay before a committing magistrate.

We think the oldest and one of the leading cases in point upon this question, and most frequently cited, is the case of *People ex rel. v. Burnside*, 3 Lans. (N. Y.) 74. In that case certain commissioners were removed from office upon the ground that they had willfully neglected or refused to perform their duties in selling and disposing of stock held by the town, on credit, although they had disposed of the stock. In construing the provisions of chapter 384 of the Laws of New York of 1859, section 5, which reads as follows:

"In case any commissioner under the said act * * * shall refuse or willfully neglect to perform any part of the duties specified therein, or required by this act, his office shall thereupon become vacant, and upon proof of

the fact to the satisfaction of the county judge of the county wherein such commissioner shall reside, he shall appoint some other person to fill his place, in the manner now provided by law"

—the court said:

"The willful neglect and refusal upon which the order was based was that the commissioners had done an act in violation of their duty, and had been guilty of misfeasance in office, and was not upon the ground of a refusal to perform, or a willful nonfeasance. * * * In order to make out a case within the provisions of the section cited, there must be an absolute refusal or a willful neglect to perform some duty imposed by the act. The statute evidently was not intended to punish the commissioners for positive acts done by them in violation of law, but for contumacy, in refusing to obey the mandate of the law, and for willfully and unlawfully neglecting to do what was required by the plain terms and import of the statute."

In the course of the opinion, the court also says:

"This provision is highly penal in its character, and inflicts a severe penalty upon the delinquent who has violated its requirements. The jurisdiction conferred is limited and special, and the proceeding for the enforcement of the act is of the most summary and rigorous character. The rule is well established that Penal statutes, in declaring that acts shall constitute an offense, and in prescribing the punishment to be inflicted, are to be construed with strictness and rigor."

In the case of *State v. Alcorn*, 78 Tex. 387, 14 S. W. 663, that court, in discussing a statute providing for the removal of officers, says:

"The statute under consideration is one penal in character, and must be construed as though it were one defining a crime and prescribing its punishment.

"If the respondent violated his official duty, whether this resulted from willful act or not, he would be responsible to any person injured thereby for intent with which his act or refusal to act was accompanied would not be an inquiry, but when it is sought to remove him from office on account of official misconduct animus becomes an important inquiry." 78 Tex. 393, 14 S. W. 665.

As was said by the Michigan court in *People ex rel. Metevier v. Therrien*, 80 Mich. 187, at pages 195, 196, 45 N. W. 78 at page 80.

"The right to hold this office is just as sacred in the eyes of the law to Metevier as the right to hold the property he has earned. It is a property right, and one of which he can only be divested by a strict conformity to the statute. * * *

"The people of Mackinac county have rights also, as well as the accused. They have the right, under the Constitution, to elect their county officers, and to have such officers serve out the terms for which they were elected. It was not contemplated by the Constitution that such officers should be removed but for grave reasons."

We do not wish to be understood as holding that the right to hold a public office is a property right. That question is not here for decision.

The very object of this statute is to rid the community of corrupt, incapable, or unworthy officials. There is no suggestion that appellant is not in every way competent to fill the office. So far as this case reveals, his personal character and standing in the community are unimpeached. To say that such an officer is to be removed in disgrace from the office to which he has been elected by the county—conceding that he was guilty of malfeasance or misfeasance in office, for which he is responsible in damages—upon the theory that he is guilty of nonfeasance, is to sanction a shocking misinterpretation and misconstruction of the statute, and is a determination of questions of fact which the court could not rightfully withdraw from the jury. For a clear and concise statement of the principles of law, as hereinabove briefly set forth, we invite attention to the case of *State ex rel. Barker v. Meek*, 148 Iowa, 671, 127 N. W. 1023, 31 L. R. A. (N. S.) 566, and note, Ann. Cas. 1912O, 1075.

The rights of society will not be adequately protected, and the will of the people will be defeated if every executive officer in this state is to be removed at the instigation of an informer, and penalized in the sum of \$500, for failure to take a person arrested immediately before a magistrate, where the arrest is made in a lawful manner and upon a warrant regular upon its face no matter what the circumstances might be, or the condition of the party arrested, upon the theory that such officer is guilty of nonfeasance, and without an opportunity to show that he acted without malice, or in good faith and with an honest intention to perform the duties of his office according to his understanding of his authority under the law.

In the case of *State v. Waller*, 7 N. O. 229, it was held that a person may be arrested for drunkenness, upon view, when it is a public nuisance. The question occurs. What is the officer to do with the offender when he shall have been arrested without a warrant? All authorities agree that he should be carried as soon as conveniently may be before some justice of the peace, and if he is arrested at a time and under such circumstances that he cannot be carried immediately before a justice, the officer may commit him to jail or lock him up, according to the nature of the offense and the necessity of the case.

In the case of *State v. Stalcup*, 24 N. O. 50, it is held that the officer was the judge of the necessity, but if he be guilty of a gross abuse of his authority and do not act honestly, according to his sense of right, but

under pretext of duty is gratifying his malice, he is liable to indictment. The jury must judge of his motive from the facts submitted to them. *State v. Freeman*, 86 N. C. 683.

It was held in *Keefe v. Hart*, 213 Mass. 476, 100 N. E. 558, Ann. Cas. 1914A, 716, that it is the duty of a policeman, arresting one without warrant, to take him before the magistrate as soon as reasonably possible, that the magistrate may determine whether there is ground to hold the prisoner, and that it cannot be determined as a matter of law that a delay of an hour and a half, by officers arresting without a warrant, in taking the prisoner before a magistrate, was reasonable, since such delay might have been beyond the time of adjournment of the magistrate's court, and involved a further delay; the question becoming one of law only when the facts are agreed.

As was said in the case of *State v. Meek*, supra:

" * * * If a county treasurer is to be conclusively held guilty of a willful violation of duty subjecting him to a removal from office for every voluntary act or omission for which we may find no warrant in the statute, no matter how clear his honesty of purpose or how manifest his competency for the position, or how perfectly the public is protected against injury or loss, * * * then there is no place or point to draw the line in the administration of any office short of absolutely perfect observance of the statute, not merely as it apparently reads, but as the court in its wisdom, or lack of it, construe it to read." "That such technical violations against which an ordinary civil action in damages affords a complete remedy should be classed as impeachable offenses calling for the removal of an officer is intolerable. * * * Suppose the clerk to be so delayed by the pressure of other official work that his report is not filed until a day or two after that day is passed; is he guilty of willful misconduct in office? The county auditor is required to make report of certain expenses to the clerk of the district court on October 15th of each year. Suppose that, acting in good faith, he fails to present his report until October 16th, and when he appears for that purpose the clerk says to him, 'I have not yet closed my books and accounts of yesterday's business, and will file your report as of that date,' and, this being done without any wrongful motive and in the belief that they could rightfully do so, are they both chargeable with willful misconduct? Or if an assessor, in the honest, but mistaken, belief that certain property is not taxable, omits it from his roll, is he therefore and as a matter of law subject to removal from his office?"

The statute should be reasonably construed and not arbitrarily. The right of vindication should never be denied, neither should a court assume the prerogatives of a jury. Malfeasance and misfeasance should not be confused with and held to be nonfeasance.

In the instant case, the appellant and the people generally within the bounds of the quarantine district were panic-stricken. Hotels were not open for the reception of guests, nor could they find lodging or entertainment in private homes or at public resorts. Whether the actions of the sheriff, in an action against him for false imprisonment, were such that as a matter of law he would be guilty, or that the conditions and circumstances existing at the time of the arrest of the respondents and their incarceration in the county jail would warrant a mitigation of damages, are questions which should have been properly submitted to the jury, in a proper action by the parties injured. We think this court should take judicial knowledge of the prevalence of the disease known as Spanish influenza, and the various proclamations and orders issued by federal, state, and county health officials, and the fact that the courts of the state were adjourned from time to time, and churches and schools were closed, until the disease subsided.

Conceding that the sheriff and those associated with him acted unreasonably, and even admitting that his acts were wrongful, and that he would be answerable in damages, he did not, under the facts disclosed in the record in this case, refuse or neglect to perform the official duties pertaining to his office, within the meaning of C. S. § 8684, and we are not called upon to decide whether he was subject to removal under the provisions of C. S. §§ 8670, 8671.

There is no merit in the contention made that appellant should be removed under the provisions of section 8684, supra, upon the ground and for the reason that he failed and refused to allow respondents to consult counsel. The record shows that they did consult their counsel, and that a writ of habeas corpus was issued for their release, and it was the duty of the sheriff to obey the writ, for which he may have been subject to removal, and his failure to do so was reprehensible. But the trial court found in his favor, and this matter is not here for review, and should not influence this court in its ultimate conclusions, but should be disregarded in like manner with every other charge made which in the opinion of the trial court was not supported by the evidence and is not here for the purpose of review.

We agree in the statement made in the majority opinion to the effect that the conduct of the sheriff was not such as should receive commendation at the hands of this or any other court, but we are not of the opinion that the judgment should be sustained.

McCARTHY, J., concurs.

MOREHEAD v. ATCHISON, T. & S. F. RY. CO. (No. 2502.)

(Supreme Court of New Mexico. Oct. 22, 1921.)

(Syllabus by the Court.)

Railroads — 327(1)—Automobile driver held negligent in failing to stop, look and listen.

Where one approaching a railroad crossing in an automobile according to his own testimony stopped, looked, and listened at a distance of 57 feet from the track, and did not thereafter again stop, look, and listen, but drove upon the track, he is guilty of contributory negligence, and cannot recover for injury to himself or to his car occasioned by the collision between the train and his car upon the crossing.

Appeal from District Court, Chaves County; Brice, Judge.

Action by Jesse Morehead against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and the defendant appeals. Reversed, with instructions to enter judgment for the defendant.

G. S. Downer, W. C. Reid, and E. C. Iden, all of Albuquerque, for appellant.

W. E. Rogers, of El Paso, Tex., for appellee.

RAYNOLDS, J. This is an appeal from an action instituted by Jesse Morehead against the Atchison, Topeka & Santa Fé Railway Company to recover for personal injuries and damages to property which occurred in a collision between a train and an automobile on the public road crossing in the city of Roswell, N. M., in the lower court appellee, Morehead, recovered judgment for the sum of \$466.50, from which judgment appellant appeals to this court.

As stated by appellant in his brief:

"There is but one assignment of error in this case, which is, in effect, that the evidence showed contributory negligence as a matter of law." "The question is simply whether or not the Supreme Court, after reading the testimony contained in the transcript, considers the evidence upon which appellee must rely as sufficient under the rule often announced by this court that it will not disturb the findings of the lower court or the verdict of the jury when supported by substantial evidence, and, if the court then considers there is sufficient substantial evidence under its former rulings to support the verdict, whether granting that the appellee's story is true, the facts disclosed thereby do not constitute, as a matter of law, contributory negligence barring recovery."

The appellee's story of the collision upon which he must recover, although contradicted in some particular by other witnesses, was substantially as follows: Appellee, with others, had attended an entertainment which

broke up about midnight, when, with the others, he got into a Ford car owned by the appellee and went in search of a place in which to get a lunch. After going to several places which were closed, they went to the Santa Fé Restaurant, located on the south side of Fifth street and about 57 feet west of the railroad's main line of track where it crossed Fifth street. The railroad company's depot is on the opposite side of this street and in the neighborhood of 200 feet from the north edge thereof. When the parties in the automobile saw that the restaurant was closed, they started up again and started across the track to turn around. They were, according to appellee's testimony, at the restaurant probably half a minute. The appellee was driving. He stopped the car entirely and looked to see if the restaurant was closed, saw it was, and started on. He looked and listened for trains at the time he stopped, looked, and listened to see if there were any trains or any light. After starting up about 10 feet from the track, he changed from low to high gear. The first time he noticed the train he was upon the track and the train was about 5 feet from him. He did not look around from the time he first stopped, looked, and listened 57 feet away until he was hit by the train. When he stopped, looked, and listened, he did not hear or see any train. There was no headlight according to his testimony, nor was any bell rung nor whistle blown. At the time he stopped in front of the restaurant and looked and listened he looked and listened carefully, and thought he was safe. In reply to a question as to whether he looked up between the time he started from the restaurant and the time he approached the track, he said:

"Well, I usually look right straight ahead you know when I am driving; after looking both ways and listening, I don't remember anything. I was looking straight ahead."

This is, in substance, the appellee's story, and, although it is contradicted on several points, and the evidence is conflicting, it must be assumed for the purposes of this case that the jury believed it and based their verdict in his favor upon this evidence.

If we make this assumption, in our opinion a case of contributory negligence is made out, and the appellant's motion for a directed verdict in its favor should have been granted by the trial court.

As shown by the above statement, according to appellee's own story, he stopped, looked, and listened, 57 feet away from the track which he was about to cross; he did not look again, but went upon the track where the collision occurred. The cases on similar facts are not numerous, but are uniform in holding that one must look from a point which will enable him to see, and that he must continue

to look and listen until the point of danger is passed.

We do not find it necessary in this case to decide that, when the witness says he did look and did not see an object which in the nature of things he must have seen if he did look, on this question his testimony must be disregarded and cannot be credited; but we decide upon the proposition that, assuming his story to be true and that he stopped, looked, and listened as he said he did, nevertheless he performed these acts at such a time and in such a position that his going upon the track immediately thereafter without further exercising his faculties of sight and hearing makes out a case of contributory negligence and prevents his recovery.

We quote from a few of the numerous authorities upon the principle herein involved.

"The law requires of one going into so dangerous a place the vigilant exercise of his faculties of sight and hearing at such short distance therefrom as will be effectual for his protection, and if this duty is neglected, and injury results, there can be no recovery, although the injury would not have occurred but for the negligence of others. *Continental Improvement Co. v. Stead*, 95 U. S. 161, 24 L. Ed. 403; *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *Schofield v. Chicago, M. & St. P. R. Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Northern Pacific R. R. Co. v. Freeman*, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014; *Chicago, etc., Ry. Co. v. Andrews*, 64 C. C. A. 399, 130 Fed. 65; *Shatto v. Erie R. R. Co.*, 59 C. C. A. 1, 121 Fed. 678; *Ames v. Waterloo, etc., Co.*, 120 Iowa, 640, 95 N. W. 161." *Chicago Great Western Ry. Co. v. Smith*, 141 Fed. 930, at page 931, 73 C. C. A. 164.

"The duty to look and listen requires the traveler to exercise care to select a position from which an effective observation can be made. The mere fact of looking and listening is not always a performance of the duty incumbent upon the traveler, for he must also exercise care to make the act of looking and listening reasonably effective"—and cases cited. *Elliot on Railroads*, vol. 3, par. 1166.

"The doctrine has been repeatedly stated by this court that a traveler approaching a railroad crossing must take notice of the fact that it is a place of danger, and must not only look and listen for the approach of trains before he goes upon the track, but must continue to look and listen until he has passed the point of danger. He must continue his vigilance until the danger is passed, and must look both ways up and down the track." *Choctaw, O. & G. R. Co. v. Baskins*, 78 Ark. 355, 358, 93 S. W. 757, 758, and cases cited.

"One need not be vigilant at extravagantly long range. This would be futile, and precaution might exhaust itself before peril came. Nor does the law expect incessant observation, or exact the performance of the impossible feat of looking both ways at once. But it is plain that care, in order to be effective, must cover the whole field of danger. If risk is inherent in a continuing state of things, the duty to exercise reasonable care is to the same extent a

continuing obligation." *Winter v. New York & L. B. R. Co.*, 66 N. J. Law, 677, 50 Atl. 339.

See, also, *Malott v. Hawkins*, 159 Ind. 127, 63 N. E. 308.

As to what is contributory negligence see *Candelaria v. A. T. & S. F. R. Co.*, 6 N. M. 266, at p. 274, 27 Pac. 497.

For the reason above stated, the motion of the appellant for a directed verdict in its favor should have been granted. As there is no error complained of in the admission or exclusion of evidence, and a new trial would present the same legal proposition upon the testimony, the case is reversed, with an order to the trial court to enter judgment for the appellant; and it is so ordered.

ROBERTS, C. J., and PARKER, J., concur.

LOPEZ v. STATE HIGHWAY COMMISSION et al. (No. 2671.)

(Supreme Court of New Mexico. Sept. 24, 1921.)

(Syllabus by the Court.)

Constitutional law §48(1) — Objection to statute not considered after adoption of constitutional amendment validating statute.

Where an act of the Legislature, authorizing the issuance and sale of debentures, is validated by the adoption of a proposed amendment to the Constitution, an appeal which raises the question of the constitutionality of the statute, which might be meritorious but for the amendment to the Constitution so adopted, will not be considered after the curative amendment has been adopted by vote of the people.

Appeal from District Court, Santa Fé County; Holloman, Judge.

Action by Celso Lopez against the State Highway Commission of the State of New Mexico and others as members thereof and O. U. Strong as State Treasurer. Demurrer to complaint sustained, and the plaintiff appeals. Appeal dismissed.

J. O. Seth, of Santa Fé, for appellant.

H. S. Bowman, Atty. Gen., and A. M. Edwards, Asst. Atty. Gen., for appellees.

ROBERTS, C. J. By chapter 153, Laws 1921, the Fifth State Legislature passed an act authorizing and directing boards of county commissioners to levy taxes for each of the years 1921, 1922, and 1923 for the construction and improvement of public highways, and to meet dollar for dollar allotments to the state of federal funds under the Federal Aid Road Act (U. S. Comp. St. §§ 7477a-7477i), which tax, when collected, was to be paid into the state treasury and cred-

ited to the state road fund. The act in question authorizes the State Highway Commission to anticipate the tax so directed to be levied and collected by the issuance and sale of debentures, which should be payable out of the proceeds of the tax realized under the act in question. The State Highway Commission was proceeding to issue debentures under said act to the amount of \$800,000, when on August 11, 1921, appellant filed suit in the district court of Santa Fé county to enjoin such commission from issuing and selling such debentures. Appellant was a taxpayer and brought the suit on behalf of himself and all other taxpayers similarly situated, alleging that the act under which said debentures were about to be issued was unconstitutional and void, and that the tax levied would be a lien and incumbrance upon the property of the taxpayers in the state. The act was alleged to be unconstitutional because: (1) It violated sections 7 and 8 of article 9 of the State Constitution. Section 7 authorized the state to borrow \$200,000 in the aggregate to meet casual deficits or failures in revenue, or for necessary expenses, etc. Section 8 prohibited the contracting of any other debt save as authorized by section 7 without a vote of the electors of the state, which it was alleged had not been complied with. (2) That the act was void because the same attempted to extend the taxing power beyond the biennial term of the Legislature. (3) That the tax levies provided for by said chapter were levies for state revenues, and void because in excess of the four-mill limit prescribed by section 2 of article 8 of the Constitution. (4) That the act was void because the debentures by it authorized were not mentioned in the title of the act. A demurrer to the complaint was filed and sustained by the court below. Appellant stood on the complaint and appealed. The case was argued and submitted to this court on September 7, 1921.

The same Legislature which enacted the law in question submitted to the people for adoption or rejection constitutional amendment No. 11, proposing an amendment to the Constitution by adding as follows, viz:

"Laws enacted by the fifth Legislature authorized the issue and sale of state highway bonds for the purpose of providing funds for the construction and improvement of state highways and to enable the state to meet and secure allotments of federal funds to aid in construction and improvement of roads, and laws so enacted authorizing the issue and sale of state highway debentures to anticipate the collection of revenues from motor vehicle licenses and other revenues provided by law for the state road fund, shall take effect without submitting them to the electors of the state, and notwithstanding that the total indebtedness of the state may thereby temporarily exceed one

per centum of the assessed valuation of all property subject to taxation in the state. Provided, that the total amount of such state highway bonds payable from proceeds of taxes levied on property outstanding at any one time shall not exceed two million dollars. The Legislature shall not enact any law which will decrease the amount of the annual revenues pledged for the payment of state highway debentures or which will divert any of such revenues to any other purpose so long as any of the said debentures issued to anticipate the collection thereof remain unpaid." See Laws 1921, p. 478.

By an act of the same Legislature it was provided that this proposed constitutional amendment, together with others, should be submitted to a vote of the people at a special election to be held September 20, 1921. The attorney for appellant and appellee herein have this day filed a stipulation in the case, under which it is stipulated and agreed that the election provided for was held upon the date named, and that at such election a majority of the electors voted in favor of the adoption of proposed constitutional amendment No. 11. The official count of the votes has not yet taken place, but it is a matter of common knowledge that the amendment was overwhelmingly adopted, and in view of the stipulation it will be accepted as a fact by the court. Such being the case, and these debentures having been by such amendment validated and ratified, their constitutionality is not open to debate. The debentures thus being unquestionably valid under this amendment to the Constitution. It will serve no useful purpose to discuss the questions raised in appellant's brief. For this reason the appeal will be dismissed; and it is so ordered.

PARKER, J., and T. D. LEIB, District Judge.

IN RE CARDONER'S ESTATE.

BUJAC et al. v. WILSON.

(No. 2486.)

(Supreme Court of New Mexico. Oct. 18, 1921.)

(Syllabus by the Court.)

1. Executors and administrators \Leftrightarrow 15—Actual residence only necessary qualification for executor.

Sections 2222, 2223, 2242, 2243, and 2244, Code 1915, interpreted, and held, that the residence required of a person to entitle him to qualify as an executor is nothing more than actual residence.

2. Executors and administrators \Leftrightarrow 15—Testator's desire as to who may administer controlling in absence of statute.

Aside from the common-law doctrine which excludes idiots and lunatics, the desire of the

testator is a controlling factor in determining the right to administer an estate, and it is only statutory disqualifications which may operate to defeat such desire.

Appeal from District Court, Bernalillo County; Hickey, Judge.

Proceedings for the appointment of Joseph R. Wilson, as executor of the will of A. M. J. Cardoner, deceased, opposed by E. P. Bujac and others. A judgment of the probate court finding Joseph R. Wilson qualified to act was affirmed on appeal to the district court, and objectors appeal. Affirmed.

See, also, 196 Pac. 327, 513.

Marron & Wood, of Albuquerque, for appellant.

A. B. McMillen, of Albuquerque, for appellee.

PARKER, J. Upon a motion to dismiss the appeal we handed down an opinion concerning which, upon motion for rehearing, we have some doubts. In view, however, of the opinion we have of the case, we do not deem it necessary to further discuss this motion, and will withdraw the opinion and dispose of the case upon the merits.

The facts in the case are that a Madame Cardoner died at her residence in Albuquerque, N. M., on the 1st of October, 1918, leaving a last will, in and by which she appointed Joseph R. Wilson as executor to serve without bond, and named her daughter, Bertha Pauchet, of Barcelona, Spain, her sole legatee. The will was produced and filed by the executor in the probate court, together with a petition for the approval of the will and the issuance to him of letters testamentary on October 12, 1918. There was no contest as to the validity of the will, but the appellants, on November 30, 1918, together with said Bertha Pauchet, the said legatee, filed amended and supplemental objections to the appointment of Wilson as executor and prayed as follows:

"Wherefore your petitioners pray that the will of the said Mathilde Cardoner be admitted to probate as prayed for in the petition, but that the application of the said Joseph R. Wilson to be appointed executor thereof without bond be denied and refused by the court, and that Etienne P. Bujac, creditor, be appointed as administrator with the will annexed and manage her said estate upon giving ample security as required by law."

A hearing was had on November 30, 1918, in the probate court, and Joseph R. Wilson was held by said court to be a qualified executor under said will, and letters testamentary were thereupon issued to him. From this judgment of the probate court the objecting parties appealed to the district court of Bernalillo county. Pending appeal from the probate court to the district court

Bertha Pauchet, the legatee, dismissed her appeal, and asked that the said Joseph R. Wilson be allowed to continue to administer the estate, and opposed the appointment of the said Bujac as administrator with the will annexed. The district court on November 26, 1919, found that said Joseph R. Wilson was qualified to act as executor, and that letters testamentary had been duly issued to him by the probate court, and that the said E. P. Bujac was not entitled to appointment as administrator of the said estate.

1. The principal ground of opposition to the appointment of Wilson is his alleged non-residence. It appears from the evidence that at the time of the death of the deceased Wilson was a resident of the city of Philadelphia, state of Pennsylvania. Upon the death of the deceased he went to Albuquerque, N. M., and soon thereafter, and prior to the issuance to him of letters testamentary, he had acquired a place of residence and had removed to Albuquerque and was living there with his family. These facts are undisputed. It is urged, however, by appellants that Wilson's residence was so established in Albuquerque for the purpose of enabling him to serve as executor of the estate, and was not established for the purpose of becoming an actual, bona fide, permanent resident as an executor. Evidence was introduced by appellants to establish the fact that Wilson's residence was established here, not for the purpose or with the intention of making his residence permanent, but for the purpose of enabling him to qualify as executor in this matter, and some evidence along this line was offered which was excluded by the court upon technical grounds. In the view we take of the matter, however, it may be assumed that the evidence offered and tendered would show that Wilson established his residence in Albuquerque and maintained the same during the pendency of the administration of the estate for the purpose merely of qualifying himself to serve as executor, although there is evidence in his behalf to the contrary, which the court might well have been justified in believing.

The question turns upon the proper interpretation of our statutes in this regard, the pertinent provisions whereof are as follows:

"Sec. 2222. Persons capable of making a will may be appointed as executors or administrators, and after having accepted said appointment, they shall impartially and punctually discharge the duties thereof.

"Sec. 2223. The following persons are not qualified to act as executors or administrators: Nonresidents of this state; minors; judicial officers; persons of unsound mind, or who have been convicted of any felony, or of a misdemeanor involving moral turpitude."

"Sec. 2242. If an executor or administrator become a nonresident of this state, he may be removed and his letters revoked in the man-

ner prescribed in the preceding section, except that the notice may be given by publication for such time as the court or judge thereof may direct.

"Sec. 2243. If a person be named in a will as executor who is a nonresident of the state or a minor, upon the removal of such disability he is entitled to qualify as such executor, if he apply therefor within thirty days from the removal of such disability if otherwise competent. If in the meantime, an administrator with the will annexed has been appointed, his powers and duties cease with the qualification of such executor; but if another executor is qualified and is acting as such, they thereby become joint executors.

"Sec. 2244. Whenever it appears probable to the court or judge that any of the causes for removal of an executor or administrator exist or have transpired, as specified in section 2241, it shall be the duty of such court or judge to cite such executor or administrator to appear and show cause why he should not be removed, and if he fail to appear or show sufficient cause, an order shall be made removing him and revoking his letters; and it is the duty of the court or judge thereof to exercise a supervisory control over an executor or administrator, to the end that he faithfully and diligently perform the duties of his trust according to law."

Code 1915.

It will be noticed that, speaking broadly, all persons capable of making a will may be appointed executor, as is provided by section 2222. The general provisions of this section are restricted somewhat by the provisions of section 2223, to the effect that non-residents of the state, together with others specified in the section, shall not be qualified to act. By section 2243, it is provided that, if the executor named in the will is a non-resident of the state, he may, upon the removal of such disability, become qualified to act if he applies for letters within thirty days after the disability has been removed. By section 2242, if the executor, after he has qualified, becomes a nonresident, he may be removed and his letters revoked in accordance with certain procedure laid down in the statutes.

[1] Taking these sections of the statute together, we are of the opinion that it is clear that the residence contemplated as a basis for the qualification of an executor means nothing more than actual residence. The statute seems to contemplate and to provide for cases exactly like the case at bar. It contemplates that wills may be presented to probate courts in this state which name executors who are for the time being non-residents of the state, and further contemplates that, upon the removal of such disability by establishing an actual residence in this jurisdiction, the right to administer becomes perfect. Under such circumstances it cannot be said that the quality or character of the residence necessary to qualify an executor is anything more than an actual res-

idence and presence within the state. So that, in accordance with the provisions of section 2244 above quoted, the probate court or judge may exercise a supervisory control over him to the end that he faithfully and diligently performs the duties of his trust according to law.

Counsel have cited a few cases which have attempted to define the meaning of residence but none of the same seem to us to be applicable in this jurisdiction. Most of the cases cited define the nonresidence necessary in order to confer jurisdiction upon the federal courts under the divers citizenship requirements. One case cited is based upon the distinction between legal and actual residence, and holds that legal residence is required to avoid the necessity of giving a cost bond. Appellants cite two cases which bear directly upon the question. In *Re Petition of Marion Mulford*, 217 Ill. 242, 75 N. E. 345, 1 L. R. A. (N. S.) 341, 108 Am. St. Rep. 249, 3 Ann. Cas. 986, the court held under a statute which provided that "no nonresident shall be appointed or act as executor" that a resident of Ohio who still maintained his homestead in that state and who came to Illinois and testified that he intended to remain in Illinois so long as it might be necessary to perform his duties as executor of the estate, was a nonresident of Illinois, and was not entitled to complain of the action of the court in refusing to issue to him letters testamentary. It is to be observed, however, at least so far as appears from the report of this case, that Illinois has no such provisions of law as we have. There is in Illinois no provision that a nonresident who has been named an executor may remove the disqualification and obtain letters testamentary within 30 days after the removal of said disqualification.

The other case cited is *In re Donovan's Estate*, 104 Cal. 623, 38 Pac. 456. In that case a brother of the deceased, who died intestate in California, resided in the state of Massachusetts at the time of the death of his brother. He, and others entitled to share in the estate, signed and forwarded to the appellant a request for his appointment as administrator and appellant, in pursuance of such request, and later filed his petition praying that letters of administration be issued to him. Three days before the hearing the brother arrived in California. He was put upon the stand and testified in such a manner as to show that it was not his intention to remain in the state. The statute of California requires that a person requesting appointment as administrator, or requesting the appointment of another person, must be a "bona fide" resident of the state. The court very correctly held in that case and under that statute that the residence required was more than a mere

actual residence. The case therefore has no controlling influence upon the determination of this matter.

We are confirmed in this conclusion by the further consideration that the wishes of a testator as expressed in his last will and testament are to be regarded as of controlling force, and are to be overturned only where some positive provision of law prevents the same being carried out. This is a well-known fundamental principle, universally recognized.

[2] 2. Counsel for appellants presented in their objections to the qualifications of Wilson to act as executor certain matters tending to show unfair or dishonest conduct toward the deceased in her lifetime, and here urge the same in a somewhat perfunctory manner. We do not understand them to seriously contend that upon principle or authority, such objections can be successfully maintained. On the other hand counsel for appellee have cited *Kidd v. Bates*, 120 Ala. 79, 23 South. 735, 41 L. R. A. 154, 74 Am. St. Rep. 17; *In re Bergdorff's Will*, 206 N. Y. 309, 99 N. E. 714; *Clark v. Patterson*, 214 Ill. 533, 73 N. E. 806, 105 Am. St. Rep. 127; *Berry v. Hamilton*, 12 B. Mon. (Ky.) 191, 54 Am. Dec. 515—all of which are well-considered cases, and point out that the desire of the testator is a controlling factor in determining the right to administer an estate, and that it is only statutory disqualifications which may operate to defeat the will of the testator, aside from the common-law doctrine which excludes idiots and lunatics.

It follows from all of the foregoing that the judgment of the district court was correct, and should be affirmed; and it is so ordered.

RAYNOLDS, J., concurs.

ROBERTS, C. J. (concurring.) While agreeing that the judgment in this case on the merits should be affirmed, I am unable to give assent to the view of the law as expressed in the majority opinion. As I understand this opinion, it is to the effect that the residence necessary to qualify an executor is simply actual residence or presence within the state at the time application for appointment is made. If by actual residence it is meant to hold that the person must at the time of applying for letters be a bona fide resident of the state, I would give ready assent to that. But the majority opinion, as I read it, does not require actual, bona fide residence within the state, but simply physical presence of the applicant for letters at the time the application is made. I am forced to this conclusion, because the opinion states "actual residence and presence within the state" is all that is required, and an attempt is made to distinguish this case from the case of *In re Petition Marion Mulford*, 217 Ill. 242, 75 N. E. 345, 1 L. R. A. (N. S.) 341, 108 Am. St. Rep.

249, 3 Ann. Cas. 986. I think all who read this opinion will come to the conclusion that it is meant to hold that residence as generally understood is not required of the applicant for letters testamentary under our statute. I do not believe there is any basis for the attempted distinction, for the statute of Illinois (section 66, Ill. Stat. Ann. 1913) provides "that no nonresident of this state shall be appointed or act as administrator or executor," which means substantially the same thing as our section 2223 in this regard. It is true they have no provision similar to our section 2243, to the effect that a person may become a resident of the state after the probate of a will in which he is named as executor, whereupon he is eligible for appointment. But I cannot see how this provision can have the effect upon the other provision ascribed to it in the majority opinion. In the case of *In re Mulford*, 217 Ill. 242, 75 N. E. 345, 1 L. R. A. (N. S.) 341, 108 Am. St. Rep. 249, 3 Ann. Cas. 986, Marion Mulford had been named as executor of the will of Harriet M. Richards. The testator was a resident of the county of Will in the state of Illinois. Mulford was a resident of Ohio. He testified that he was 71 years old, and had a wife and two daughters with whom he resided in Dayton, Ohio, when the said Harriet M. Richards died. That he lived with his family on homestead property owned by himself, and which he had not abandoned; that he had come to Illinois with the fixed purpose and intention of accepting the executorship of this estate and of remaining within the jurisdiction of the court until the estate could be administered upon in accordance with the will, and that he still retained that fixed purpose, whatever time might be required therefor. After reciting the above facts, the court said:

"Nevertheless, the appellant is a resident of the state of Ohio. Residence is lost by leaving the place where one has acquired a permanent home and removing to another place without a present intention of returning. 24 Am. & Eng. Ency. of Law (2d Ed.) 697. 'A temporary sojourn within a state for pleasure or business, accompanied by an intention to return to the state of one's former inhabitation, does not constitute residence.' *Pells v. Snell*, 130 Ill. 379.

"The court did not err in refusing to issue letters testamentary to the appellant."

In an earlier case (*Child v. Gratiot*, 41 Ill. 357), and before the enactment of the provision that no nonresident should be appointed or act as administrator or executor, the court held that a nonresident could not legally be appointed because of the provision of the statute which authorized the removal of an executor who became a nonresident of the state.

Other states have statutes prohibiting the appointment of a nonresident. The majority opinion seems to attach importance to the use

of the word "bona fide" resident in the California statute. I attach no importance to this as I assume that when the word "resident" is used in a statute it necessarily means a bona fide resident.

Arkansas has a statute (section 14, Kirby & Cassell's Digest of the Statutes of Arkansas 1916) which, as our statute, uses the term "nonresident," and provides that a nonresident is not eligible for appointment. Likewise Missouri, section 10, R. S., 1919. Under this statute, in the case of *Stevens v. Larwill*, 110 Mo. App. 140, 84 S. W. 113, the court held that a nonresident coming into the state and being appointed must come with the bona fide intention of becoming a resident of Missouri. Georgia has a similar statute, section 3941, Code 1914; likewise Montana, section 7436, Code 1907. The courts of all these states hold, so far as I am advised, that actual, bona fide residence within the state at the time of appointment is essential.

I cite these for the purpose of showing that the importance attached to the use of the term "bona fide" in the California statute is not justified. Decisions under these statutes will be found collected in the note to the case of *In re Mulford*, 1 L. R. A. (N. S.) 341. See *In re Bailey*, 31 Nev. 377, 108 Pac. 232, Ann. Cas. 1912A, 743.

In our statute relative to venue in civil actions it is provided that transitory actions shall be brought in the county where the plaintiff or defendant, or some one of them, in case there be more than one of either, resides. If this does not require bona fide residence in the county by the plaintiff where he sues in such county, then it will be possible for the plaintiff to temporarily go to some other county in the state and there file the suit. To constitute residence, as I understand the term, there must be an actual home where the person intends to reside permanently, or for a definite or indefinite length of time, and residence depends upon fact and intention.

But, entertaining these views as I do, I am still of the opinion that the judgment in this case should be affirmed. For the court found upon conflicting evidence that Joseph R. Wilson, on the 12th day of October, 1918, which preceded his appointment, and ever since that date, has been an actual and bona fide resident of the city of Albuquerque, county of Bernalillo, and under this finding his appointment as executor was justified. The fact that he came to New Mexico for the purpose of qualifying as executor under the will in question is not material, if in fact he came here with the intention of making Albuquerque his home to the exclusion of all other places. As said by the court in the case of *Stevens v. Larwill*, 110 Mo. App. 140, 84 S. W. 113:

"The rule is well established in every jurisdiction that the motive or purpose of a change

of domicile or residence is not material. The only question is whether the change of residence is made by the party with the bona fide intention of becoming a resident of another state."

Here Wilson testified that he had given up his home in Philadelphia and had come to Albuquerque with his wife and daughters with the intention of making Albuquerque his permanent home, that he had either sold or removed his furniture and effects to Albuquerque, and had permanently abandoned his home in Philadelphia. The court had the right to believe this evidence offered by Wilson. It is true that witnesses testified to conversations with Wilson prior to this time which indicated that at that time Wilson contemplated making the change temporarily only, but it may be that thereafter he formed the fixed purpose and intention of permanently residing in Albuquerque. The evidence justified the finding. I do not attach any importance to the point made by appellants to the effect that the enumeration of certain disqualifications of persons from becoming executors of wills by section 2223, Code 1915, does not conclude the court from refusing letters testamentary upon grounds other than those named in the statute, such as bad character, insolvency, and antagonistic interest, as the court did not refuse the letters. A different question might be here if letters had been refused on some other than statutory grounds.

The only other point requiring consideration is the refusal of the court to admit in evidence a letter written by Wilson to the legatee under the will, but the statement as to the contents of the letter in the offer of evidence, I think, shows that no prejudice resulted by reason of the refusal. The offer was to show that the letter in question written by Wilson to Mrs. Pauchet since the commencement of the proceedings to be appointed executor, and during Wilson's sojourn in New Mexico, stated in substance that he was coming here—obliged to come here—solely for the purpose of protecting the interest of Mrs. Pauchet in this estate, and in connection with the properties of the estate. As I have attempted to show heretofore, the motive prompting his taking up his residence in New Mexico was wholly immaterial.

It is urged that the evidence in this case is of such a nature that it ought not to be held that there was substantial evidence offered to establish the bona fide residence in New Mexico of Joseph R. Wilson. I do not agree with this statement. The court had the right to believe Wilson if it so elected.

I agree that the opinion heretofore filed on the motion was erroneous, and for that reason consent to its withdrawal.

For the reasons stated, I concur in the affirmance.

KERSHNER v. TRINIDAD MILL. & MIN. CO. et al. (No. 2386.)

(Supreme Court of New Mexico. Oct. 11, 1921.)

(Syllabus by the Court.)

1. Mortgages \S 144—Payment of taxes on tax sale gives mortgagee no title, but an additional lien.

A mortgagee of a mill site and mill, upon the payment of taxes upon, or redemption from tax sale of, the mortgaged property, acquires nothing more than an additional lien on the property for the amount paid, with interest, enforceable along with the mortgage debt, and does not acquire a title to the property which he can assert against that of the mortgagor.

2. Mines and minerals \S 27(1)—Location of mill site on existing location void.

A location of a mill site over the ground covered by a subsisting location is void, and cannot ripen into a valid location, even if the senior location becomes forfeited or abandoned.

3. Mines and minerals \S 34—Right to mill site transferable by delivery of possession.

The right to a mill site may be transferred by delivery of possession and retention thereof by the transferee.

4. Mines and minerals \S 18—Erection of quartz mill on nonmineral public land a location of land necessarily occupied.

The erection and maintenance of a quartz mill upon the nonmineral public lands of the United States is a location of the land upon which the mill stands and that surrounding the same for a sufficient space as is necessary for the convenient use and occupation of the mill. In such case the owner of the mill has connected himself with the government, under the terms of Rev. St. U. S. \S 2337 (U. S. Comp. St. \S 4645), and may resist encroachment of others claiming under the mining laws of the United States.

Appeal from District Court, Taos County; Lieb, Judge.

Suit by William D. Kershner against the Trinidad Milling & Mining Company and others. Decree for defendants, and plaintiff appeals. Affirmed.

See, also, 189 Pac. 658.

F. T. Cheetham, of Taos, for appellant.

Bickley, Kiker & Voorhees and H. M. Rodrick, all of Raton, for appellees.

PARKER, J. This is an appeal by the plaintiff below from a decree rendered by the district court for Taos county quieting the title to a certain mill site in favor of the appellee, one of the defendants below, the Trinidad Milling & Mining Company. The action was instituted by appellant by a complaint in the usual form to quiet title to real estate. The appellee company answered, denying the allegations of the com-

plaint and setting up title to the premises adverse to the appellant. It appears that in March, 1909, a so-called location of the Black Jack mill site was made by appellee's predecessors in title, and a location notice was filed for record in the office of the county recorder of Taos county on April 8, 1909. The location notice describes by metes and bounds a piece of land 500 feet in length by 435.6 feet in width, and recites that there is situated upon the ground a quartz mill and reduction works owned by the locators. It is to be observed that this is a location of a mill site not connected with any lode mining claim, and that the location is based upon the fact of the existence on the land of a quartz mill and reduction works. No question is made as to the non-mineral character of the land, or of the actual existence on the ground of the mill and reduction works.

Thereafter the said locators of said mill site on April 12, 1912, executed and delivered in escrow, until a balance of the purchase price should be paid, an instrument conveying to one C. F. Wilson the mill and reduction works heretofore mentioned, and used the following language therein, viz.:

"Have bargained, sold, transferred and delivered and by these presents do bargain, sell, transfer, convey, and deliver to the said C. F. Wilson the following described property, to wit, that certain concentrating mill, known as the 'June Bug mill,' together with all machinery, tools and water rights thereunto belonging, such mill being located in Red River Canyon, about 1½ miles below the town of Red River in the Red River mining district, in the county of Taos, state of New Mexico."

It is to be observed that the document above referred to is nothing more nor less than a conveyance of the quartz mill and reduction works, and has no reference whatever in terms to any rights in the land covered by the location of the mill site. Thereafter said Wilson assigned his rights under the said conveyance to the appellee, the Trinidad Milling & Mining Company, which company afterwards fulfilled the terms of the escrow agreement by paying the balance of the purchase price due for the property, and thereupon became the owner of the quartz mill and reduction works.

After the appellee took possession in 1912 of the milling machinery and mill site, it re-established the corners of the said mill site and re-ran the lines of the claim, blazing trees on the corners and writing notices thereon to the effect that the Red River Mining & Milling Company claimed the site. The mill was upon the site at the time, and the process of reduction was changed from that of concentration to the cyanide system, and new machinery was installed and buildings erected. In 1914 the company installed a concentrating table, made some test runs, and treated a small amount of ore. There

is no question but that up to this time the appellee company was in the exclusive possession of the property. In 1915 the company made some slight repairs to a flume, cut some brush on the mill site, and cut out some mud at the headgate. Reed, a representative of the company, was at that time working a claim of his own near the mill site, but aside from such supervision as he gave the mill site, nothing was done by way of operating the mill that year. No caretaker or watchman was on the premises.

The discrepancy in name between that of the appellee and that of the Red River Mining & Milling Company, as appeared in the notices posted as above referred to, is explained by the fact that at the time of the posting of said notices the appellee corporation had not been organized, and the name of the same had to be changed from Red River Mining & Milling Company to some other name on account of the requirements of the state corporation commission, and the name of the Trinidad Milling & Mining Company as finally adopted. But everything which was done in and about the premises was done for the use and benefit of the corporation which was finally organized under the name of the Trinidad Milling & Mining Company.

In June, 1914, the appellee, the Trinidad Milling & Mining Company, executed to appellant, and two others, a mortgage to secure the payment of \$1,583.39, covering the property in question and describing the same as follows:

"The 'June Bug mill site' together with all flumes, ditches, easements, rights of ways, and privileges used with and in connection with said mill and mill site, together with all water and water rights used with and in connection with said mill, known as the 'June Bug mill,' or used in connection with said mill and mill site being located in Red River Canyon," etc.

—which said mortgage was accepted and acted upon by the appellant.

On July 27, 1915, the treasurer and collector of Taos county sold at tax sale to the appellant the property involved for delinquent taxes of 1914 and described the property as "cyanide mill and crusher." No attempt was made to sell in said tax sale any right or interest in and to the land involved, and the certificate of sale omits the provision in regard to the right of the former owner to redeem from said sale. It was evidently the opinion of the parties concerned that the mill and machinery constituted personal property and that there was no right of redemption from the sale. On the same date the said treasurer and collector sold to the appellant the same property, describing it as personal property and as the "June Bug mill," for the taxes delinquent for the year 1913.

Under these circumstances, the appellant on September 1, 1915, made an attempted

location of the ground embraced within this mill site, with slightly different boundaries, and filed a location notice of the same for record on September 4th following.

[1] 1. We are met at the threshold with the question as to the effect of the tax sale. At the time of the purchase by appellant at tax sale, he was the mortgagee of appellee of the property involved. It was taxed as improvements on a mining claim under the provisions of section 5427, Code 1915, which provides for the taxation of all property in the state, with certain exceptions, and section 5433, Code 1915, which specifically provides that improvements on mining claims shall not be exempt. A mortgagee is authorized to pay taxes on the mortgaged property, or to redeem from tax sale, and the amount paid becomes an additional lien on the property to be enforced with the mortgage. Section 5504, Code 1915. Under such circumstances, can the mortgagee acquire a tax title to the property and thus defeat the title of the mortgagor? There is some diversity of opinion on the subject, but the great weight of authority is that the mortgagee, when he pays taxes or redeems from tax sales, merely acquires an additional lien on the property and may recover the amount paid from the mortgagor along with the mortgage debt, and cannot in that way acquire a title which will defeat that of the mortgagor. See 19 R. C. L. Mortgages, § 174. See, also, *Jones v. Black*, 18 Okl. 344, 88 Pac. 1052, 90 Pac. 422, 11 Ann. Cas. 753, and note, where many cases are collected. See, also, *Cooley, Taxation* (3d Ed.) p. 970; *Burchard v. Roberts*, 70 Wis. 111, 35 N. W. 286, 5 Am. St. Rep. 148; *Shepard v. Vincent*, 38 Wash. 493, 80 Pac. 777; *Jones, Mortgages* (7th Ed.) § 1134. The appellant, therefore, when he purchased at the tax sale, acquired nothing more than an additional lien on the property for the amount paid, and interest, and acquired no title to the property, which he could assert against his mortgagor. When he went upon the property and made his so-called location, he was in no better position than that of the ordinary locator.

[2] 2. We have then a case where a party has upon the unappropriated, nonmineral land of the United States a reduction works or mill for the reduction of ore, not associated or connected with any mining claim, and another, deeming himself so entitled, enters upon the premises, takes possession of the same, and the machinery and improvements thereon, and attempts to appropriate the same to his own use by means of a so-called location of a mill site.

The statute governing the matter of mill sites is section 2337, R. S. U. S. (U. S. Comp. St. § 4645), which is as follows:

"Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or

milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section."

It is to be observed that this section uses the word "location" in connection with mill sites. No method of location is pointed out, as in the case of location of lode claims; but it is fair to assume that the same formalities so far as applicable should be observed as in the case of lode claim locations. Those formalities are prescribed by section 2324, R. S. U. S. (U. S. Comp. St. § 4620), as follows:

"The location must be distinctly marked on the ground, so that its boundaries can be readily traced."

No other requirements of the section are applicable to mill sites.

No requirement of record of any location notice is to be found in this section, but it is provided that when record is made the same shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. This section has been many times considered by the courts, and it has been often held not to require the posting of any location notice in order to effect a valid location. See 5 Fed. Stat. Ann. 19 et seq., where many cases are collected. Additional requirements are to be found in statutes of several of the states. See 2 *Lindley on Mines* (3d Ed.) § 521. But in this jurisdiction we have no statute on the subject of the location of mill sites. Here, all that is required to effect a valid mill site location is that it "be distinctly marked on the ground so that its boundaries can be readily traced." The posting of the location notice, containing the name of the locator, or claimant, and giving the location of the mill site with reference to natural objects or permanent monuments, are not required. It seems strange that such an important matter should have been so long left in such an unsatisfactory condition, but such is the fact.

It appears therefore that the locators of the Black Jack mill site made an appropriation of the ground by marking its boundaries, and such was the condition when they contracted for the sale of the machinery to Wilson, assignor of the appellee, Trinidad Milling & Mining Company. Thereafter on

April 30, 1912, articles of incorporation were executed, and on May 17, 1912, the same were filed with the corporation commission, incorporating the appellee. In the meantime, the date not being fixed, but being stated to be about the last of April, 1912, the persons interested in the organization of the appellee corporation re-established the corners and lines of the mill site, marking the corners as being claimed by the Red River Mining & Milling Company. The corners, as established, were not identical with the old corners, but were practically so; the only change being at the northeast corner, which was moved about 20 feet.

The court found that appellee corporation was entitled to the Red River Mining & Milling Company location and treated the same as a valid location of the ground.

Counsel for appellant invokes the doctrine promulgated by the leading case of *Belk v. Meagher*, 104 U. S. 279, 26 L. Ed. 735, to the effect that a location covering ground already located is void ab initio and can never ripen into a valid location, notwithstanding the senior location is afterwards forfeited or abandoned. He argues that at the time of the location of the Red River Mining & Milling Company mill site, the ground was covered by a valid and subsisting mill site location under the name of the Black Jack mill site, owned by appellee's grantors, and which they had not conveyed to appellee, the conveyance being in escrow, and not delivered until long after the location.

The doctrine is perhaps controlling on this point. While it was true there was a conveyance of the mill and machinery delivered in escrow at the time of the location, it was not finally delivered until long afterward and could not take effect until it was so delivered. A location, under the doctrine, must be valid when made; otherwise it fails absolutely. The court was technically in error, therefore, in holding that the Red River Mining & Milling Company mill site location was valid.

[3] 3. It appears, however, that possession of the Black Jack mill site located by appellee's grantors was delivered by them to appellee and retained by it. All of the circumstances show that appellee's grantors intended to surrender their possession to it and appellee took and maintained the same. Was not this a sufficient transfer of the locator's rights in the Black Jack mill site?

In this connection we are not unmindful of the prevailing doctrine throughout the mining states that a mining location operates as a grant by the government of an interest in land, and, consequently, no transfer thereof can be effectuated except by deed. This is perhaps correct on principle in regard to lode or other claims, where, under the federal and local laws, no possession, use, or occupation of the grant is required in order to maintain the locator's rights. Even in

case of lode claims in early days it was quite generally held that a mining claim might be transferred by delivery of possession and a retention thereof by the transferee. *Union Con. Silver Min. Co. v. Taylor*, 100 U. S. 37, 25 L. Ed. 541; *Table Mt. Tunnel Co. v. Stranahan*, 20 Cal. 198; *Doe v. Waterloo Min. Co.*, 70 F. 459, 17 C. O. A. 190; *Omar v. Soper*, 11 Colo. 389, 18 Pac. 448, 7 Am. St. Rep. 246; *Lockhart v. Rollins*, 2 Idaho, 540, 21 Pac. 414; *Kinney v. Con. Virginia M. Co.*, 4 Sawy. 383, Fed. Cas. No. 7,827. Later, California departed from this doctrine by reason of a statute of that state which required a deed to convey mines. *Garthe v. Hart*, 73 Cal. 541, 15 Pac. 93. Montana by reason of a statute never adopted the doctrine. *Hopkins v. Noyes*, 4 Mont. 560, 2 Pac. 280. Mr. Lindley criticizes the doctrine that a mining claim may be transferred by delivery of possession, but no distinctions are pointed out between mining claims and mill sites. See 2 Lindley on Mines (3d Ed.) § 642. In this connection we may well recur to section 2337, R. S. U. S. It will be seen that in asserting a claim to a mill site in connection with a lode claim, it must be used and occupied for mining or milling purposes. And in the case of an owner of a mill not connected with a mine, the presence on the ground of the mill satisfies the requirement of the statute as to use and occupation. The statute does not seem to contemplate the right to locate a mill site without actually using and occupying the ground. This is the position of the land department of the government. See 2 Lindley on Mines (3d Ed.) § 521. This is not so with regard to mining locations. After a mining location has been perfected, no further possession need be maintained, except to make the required annual expenditure. The nature of the right is inherently different in the two cases. We are not aware that this distinction has been pointed out in other cases, but we conclude that the right to a mill site may be transferred by delivery and acceptance of possession and no deed is required.

[4] 4. There is another consideration which prevents appellant from recovery in this case. Assuming for the time being that the original Black Jack location became abandoned by the locators and never passed by delivery to appellee, and assuming that the Red River Mining & Milling Company's location is void by reason of being premature, the fact still remains that at the time of the intrusion of the appellant upon the premises, appellee was in the lawful possession of a portion of the public domain with a mill and reduction works thereon, which it was maintaining and using for the purposes contemplated by the federal statute. That statute is a grant of a right to take possession of the nonmineral lands of the United States for such purposes and to main-

tain same against all intruders. It follows when appellant intruded and took possession of appellee's mill and made his pretended location, he was a naked trespasser upon the possession of the appellee of the mill and the land upon which the mill stood, and the land surrounding the said mill for such sufficient space as was necessary for the convenient use and occupation of the mill, whether appellee had any location of the mill site at all or not. The only object of the location in such a case is to give notice to others of the claim to five acres and thus prevent encroachment upon the lateral boundaries of the land needed for the operation of the plant. The mill, itself, is notice of the claim to the land upon which it stands and that immediately surrounding it. Its erection and maintenance operates as a location of the land. The owner of such a mill so situated has connected himself with the government and is in a position to resist any subsequent appropriator claiming under the mining law.

As before pointed out, the appellant claims under his location. He does not and cannot claim under his tax title. If his case was founded upon his alleged ownership of the mill under the tax sale, a different question might be presented. In that case the question would arise as to whether the appellee had not lost its right to the possession of the land by reason of its loss of the title to the mill; but no such question is here.

Some other questions are in the case, but in view of our position upon the fundamental rights of the parties, they are of no interest to the appellant.

There being no substantial error in the record of which appellant can complain, and for the reasons stated, the judgment of the court below should be affirmed, and it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

STATE ex rel. EVANS v. FIELD, Com'r of Public Lands, et al. (No. 2434.)

(Supreme Court of New Mexico. Oct. 22, 1921. Rehearing Denied Nov. 26, 1921.)

(Syllabus by the Court.)

1. States \Leftarrow 191(2)—Mandamus to compel commissioner of public lands to issue a deed because in effect action against state.

Mandamus will not lie against the Commissioner of Public Lands to compel him to issue a deed conveying the public lands free from the reservation of the minerals therein, which reservation was contained in the contract of sale, because it is, in effect, an action against the state.

(Additional Syllabus by Editorial Staff.)

2. States \Leftarrow 191(1)—Cannot be sued without consent.

No sovereign state can be sued in its own courts, or any other, without its consent.

Appeal from District Court, Santa Fé County; Holloman, Judge.

Application by the State, on the relation of Arthur J. Evans on a writ of mandamus against Nelson A. Field, Commissioner of Public Lands, and another, to compel delivery of a deed or patent for land previously sold by the State to the relator upon deferred payment plan. Judgment for the relator, and the defendants appeal. Reversed and remanded, with directions to discharge the writ.

Harry S. Bowman, Atty. Gen., for appellants.

Renehan & Gilbert, of Santa Fé, for appellee.

PARKER, J. This is a proceeding in mandamus brought against the commissioner of public lands to compel the execution of delivery of a deed or patent for land previously sold by the state to relator upon the deferred payment plan. The contract of sale was in the usual form adopted by the state land office, and contained, among other provisions, the following:

"This land is being purchased for the purpose of grazing and agriculture only; that while the land herein contracted for is believed to be essentially nonmineral land, should mineral be discovered therein, it is expressly understood and agreed that this contract is based upon the express condition that the minerals therein shall be and are reserved to the fund or institution to which the land belongs, together with the right of way to the commissioner, of any one acting under his authority, to at any and all times enter upon said land and mine and remove the minerals therefrom without let or hindrance."

After accepting and acting upon this contract from August 17, 1917, to March 19, 1919, on that day the relator, desiring to complete his purchase, tendered to the commissioner the total balance of the purchase price of the land, and demanded a deed conveying the same in fee simple. This was refused by the commissioner, on the ground that the minerals in the land were reserved to the state in the contract of sale, and no conveyance which included them could be demanded. The case was heard in the district court upon the petition and writ, and a demurrer to the same, and the demurrer was overruled. The respondent elected to stand on his demurrer, and not to plead further, and a peremptory writ was awarded commanding the commissioner to execute a deed conveying the fee to relator without reser-

vation of mineral rights. This appeal is prosecuted from that judgment.

It is contended by the Attorney General for the respondent that this proceeding is in effect an action against the state, and cannot be maintained without its consent. This proposition was not raised by the demurrer in the lower court and is presented here for the first time under the first assignment of error, which is to the effect that the court erred in overruling the demurrer because the state was a necessary party. This assignment, under ordinary circumstances, in litigation between private persons, would hardly be held sufficient to present the question argued, viz. that this is an action against the state and cannot be maintained. The question, however, is one of jurisdiction, if the argument advanced is sound, and we ought to and will consider it, especially in view of its public nature.

In approaching the discussion the facts should be clearly in mind. It is to be remembered that the lands involved are a portion of the lands granted in trust to the state by the federal government for certain specified purposes. The grant is of the fee, and when the required preliminaries of selection by the state had been performed, and the government had clear-listed the same to the state, it became the absolute owner of the lands, subject only to the trust imposed by the granting act. In order to avail themselves of the grant, the people in their Constitution created the office of commissioner of public lands (section 1, art. 5), and clothed him with power to select, locate, classify, and have the direction, control, care, and disposition of all public lands, under the provisions of the act of Congress relating thereto, and such regulations as might be provided by law (section 2, art. 13). At the first state Legislature an act was passed somewhat amplifying the constitutional provisions (see sections 5178 et seq., Code 1915), and in section 1 of the act (section 5178, Code 1915) his jurisdiction over the land is somewhat more broadly stated, to the effect that it extends to all cases except as otherwise specifically provided by law. It is further to be remembered that the commissioner made a contract of sale of the land in controversy in which the mineral rights were reserved to the state. The state has never contracted to convey the fee of these lands, but has reserved from the sale the mineral rights therein.

The relator bought only the right to the lands for agricultural and grazing purposes, and did not buy the right to the minerals, if any, in the lands. He now seeks to exact from the state something which the state has never contracted to convey. If he were seeking to compel the commissioner to perform the contract as made, a different question would be presented. If the commissioner were arbitrarily, for some illegal rea-

son or no reason, refusing to carry out a contract which he had made on behalf of the state with the relator, the performance of which would be a mere ministerial duty, his action might perhaps be controlled by mandamus. But he is doing nothing of the kind. He is simply standing on the contract as made, while relator is seeking from the state something different from what the contract specified. Under such circumstances it is not the action of the commissioner which is sought to be controlled, but it is the action of the state which it is sought to compel, and thereby secure a property right now held and owned by the state and which it has never agreed to convey. Under such circumstances the proceeding must be considered one against the state.

[1, 2] It is a fundamental doctrine at common law and everywhere in America that no sovereign state can be sued in its own courts or in any other without its consent and permission. See *Smith v. Reeves*, 178 U. S. 436, 20 Sup. Ct. 919, 44 L. Ed. 1140, in which many former decisions of the Supreme Court are referred to. See, also, *Kawanakoa v. Polyblank*, 205 U. S. 349, 27 Sup. Ct. 526, 51 L. Ed. 834. (See, also, 25 R. C. L. "States," § 49. At an early date the Supreme Court of the United States held, that under the constitutional provision granting judicial power to the federal courts extending to controversies "between a state and citizens of another state," the citizens of one state might sue another state in the federal courts. *Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440. This decision met with such popular disapproval that the Eleventh Amendment to the Constitution was immediately proposed, and in due course was adopted by the states. This amendment restrained the federal power in terms, and prohibited citizens of one state from maintaining a suit in the federal courts against another state. See *Hans v. Louisiana*, 134 U. S. 1, 10 Sup. Ct. 504, 33 L. Ed. 842.

While the question as to the jurisdiction of the federal courts under the Constitution and the Eleventh Amendment is not always identical with the question as to the jurisdiction of state courts to entertain actions by its own citizens against the state, it is nevertheless true that the Supreme Court of the United States has been called upon in numerous cases to determine what is and what is not a suit against the state, and the great learning of that court has so illuminated the question as to make those decisions of the highest controlling influence in determining such questions. We believe that the status of opinion of the Supreme Court of the United States may be stated as follows: Where the contract is between the individual and the state, any action founded upon it against defendants who are officers of the state, the object of which is to enforce the specific performance by compelling those

things to be done by the defendants which, when done, would constitute a performance by the state, or to forbid the doing of those things which, if done, would be simply breaches of the contract of the state, is in substance a suit against the state itself, and within the prohibition of the Constitution. See *In re Ayres*, 123 U. S. 443, 502, 8 Sup. Ct. 164, 31 L. Ed. 216; *Pennoy v. McConaughy*, 140 U. S. 1, 9, 11 Sup. Ct. 699, 35 L. Ed. 363; *Reagan v. Farmers' Loan, etc., Co.*, 154 U. S. 362, 389, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. Ed. 805; *Cunningham v. Macon, etc., R. Co.*, 109 U. S. 446, 455, 3 Sup. Ct. 292, 609, 27 L. Ed. 992; *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. Ed. 448; *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. 91, 27 L. Ed. 468; *Louisiana ex rel. New York Guaranty, etc., Co. v. Steele*, 134 U. S. 230, 10 Sup. Ct. 511, 33 L. Ed. 891. The later cases in the Supreme Court of the United States merely amplify and illustrate the principles which have been developed in the cases cited above, and need not be cited here.

On the other hand, where the law directs or commands a state officer to perform an act under given circumstances, which performance is a mere ministerial act, not involving discretion, mandamus will lie to compel the action, notwithstanding performance of the state's contract may incidentally result. In such a case the action is not really upon the contract, but is against the officer as a wrongdoer. He is, under such circumstances, not only violating the rights of the relator, but is disobeying the express commands of his principal, the state. Injunction will likewise lie to restrain illegal action of a state officer, notwithstanding a breach of the state's contract may thus incidentally be prevented. Upon this subject there are many cases, only a few of which need be noticed.

Pennoy v. McConaughy, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363, was a suit in equity to restrain and enjoin the Governor, secretary of state, and treasurer of the state of Oregon from selling and conveying a large amount of land to which the appellee asserted title. The law in that state provided a method for the disposal of the lands, and appellee's predecessor in title made application to purchase a large quantity of these lands in pursuance of the provisions of the act, and paid to the board of commissioners, as required by the act 20 per centum of the price of the lands. After appellee's predecessor in title had made his application, but before he had made his first payment, the Legislature of Oregon passed an act repealing the act under which the application for the lands had been made, and authorized and directed the commissioners to cancel all certificates of sale of the kind held by the appellee's predecessor in title. In pursuance

of this act the board of land commissioners canceled the certificates of sale in question and ordered the lands to be sold, and had actually sold a portion of the same when the action was filed. After an elaborate review of all of the cases up to that time the court said:

"This immunity of a state from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the court. Accordingly, it is equally well settled that a suit against the officers of a state, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the state itself.

"In the application of this latter principle, two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented.

"The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compel it to specifically perform its contracts. [Citing cases.]

"The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the Eleventh Amendment, an action against the state. [Citing cases.]"

Following this statement is an elaborate review of most of the cases in the Supreme Court up to that time, and the decree enjoining the board of land commissioners was affirmed. This case is authority, for the proposition that the fact that the rights ought to be protected or secured arise out of a contract with the state is not determinative of the question as to whether the suit is in fact against the state. If the action sought to be controlled is wrongful, either by reason of being in pursuance of an unconstitutional statute, or by reason of the unlawful action of a public officer, the right to restrain the action is complete, and a proceeding for that purpose is not a suit against the state.

Poindexter v. Greenhow, 114 U. S. 270, 5 Sup. Ct. 903, 962, 29 L. Ed. 185, was an action in detinue to recover possession of personal property seized for taxes under an unconstitutional statute which impaired the obligation of a contract between the state of

Virginia and holders of coupon bonds of the state to receive said bonds and coupons in payment of the taxes. The action was held not against the state. In the discussion it is pointed out that, unless the state is a party in a substantial sense, suits between individuals may be maintained, notwithstanding their determination may incidentally and consequentially affect the state's contract.

In *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623, the decree appealed from was for an injunction to restrain the board of liquidation of the state of Louisiana from using the bonds of the state for the liquidation of a certain debt claimed to be due from the state to the Louisiana Levee Company, and from issuing any other state bonds in payment of said pretended debt. McComb alleged that he was the holder of some of the bonds, and that the employment of the bonds for the purpose proposed would depreciate their value. The defendants demurred, and, the demurrer being overruled, and the defendants refusing to plead further, a decree was entered. These bonds were issued under an act of the Legislature for the purpose of refunding the state debt. Subsequent to the issue of these bonds the Legislature passed an act authorizing the diversion of a portion of the same to the Louisiana Levee Company in liquidation of a debt to it which was not of the character or kind contemplated by the act under which the bonds were issued. The court held that injunction was a proper remedy in such cases, as the state officers, in order to justify their conduct, must rely upon an unconstitutional law, which was no protection, and left them in the position of wrongdoers. In that case it is said that, where a plain official duty, requiring no exercise of official discretion, is to be performed, mandamus to compel action or injunction to restrain illegal action may be had, citing *Osborn v. Bank*, 9 Wheat. 859, 6 L. Ed. 204; *Davis v. Gray*, 16 Wall. 230, 21 L. Ed. 447.

In *Greenwood Cemetery Land Co. v. Routt*, 17 Colo. 156, 28 Pac. 1125, 15 L. R. A. 369, 31 Am. St. Rep. 284, it was held that the court had jurisdiction of an action brought for the purpose of requiring the state board of land commissioners, which included the Governor, to receive money of the plaintiff, and to issue it a deed or patent to be signed by the Governor. This case was followed in *Colorado Fuel & Iron Co. v. State Land Commissioners*, 14 Colo. App. 84, 60 Pac. 367, in which the land commissioners were compelled to issue a lease after it had exercised its discretion and had contracted for the lease; also, in *State Land Commissioners v. Carpenter*, 16 Colo. App. 436, 66 Pac. 165, an action was maintained against the state land commission respecting the reinstatement and cancellation of leases.

In *State ex rel. McEnery v. Nicholls*, 42 La. Ann. 209, 7 South. 738, the relator had contracted with the then Governor of the state in pursuance of an act of the Legislature to recover for the state all lands donated to her by the government as swamp lands, and he was to receive a certain percentage of the lands secured by him as the attorney for the state. The succeeding Governor and the then register of the state land office refused to comply with the contract and to allot to the relator his proportion of the lands. The court awarded a peremptory mandamus to compel the performance of what the court denominates a ministerial duty prescribed by the law authorizing the making of the contract with relator.

In *State v. Toole*, 26 Mont. 22, 66 Pac. 496, 55 L. R. A. 644, 91 Am. St. Rep. 386, a mandamus against the state furnishing board to compel it to enter into a formal contract for furnishing supplies by the relator was sustained. Relator's bid had been accepted, but the board refused to enter into the contract, solely because some labor organizations had protested against the contract. The proposal of the plaintiff was regularly accepted, and the contract let to it as the lowest responsible bidder after a compliance with all the statutory requirements. The state, by its authorized agent, awarded a contract, and the object of the proceeding was to compel the defendants as public officers to sign the formal contract, and thereby perform what is alleged to be their ministerial duty. The court, after quoting from *In re Ayres*, 123 U. S. 506, 8 Sup. Ct. 164, 31 L. Ed. 216, holds that mandamus will lie to compel the execution of the contract, and says:

"If the defendants owe to the plaintiff the performance of an act which the law specially enjoins as a duty resulting from an office—in other words, if the defendants as members of the board owe to the plaintiff a duty, and the performance of that duty is a ministerial act not involving the exercise of discretion or judgment—the writ of mandate will lie to compel such performance, and the state is not thereby subjected to an action or proceeding."

See, also, on this subject 26 Cyc. p. 227; 36 Cyc. 917; 25 R. O. L. "States," § 50; 26 A. & E. Ency. Law, 490, 491; 1 Rose's Code Fed. Proc. pp. 50, 51.

Exhaustive notes are appended to the following cases, where most, if not all, of the cases on this subject are collected. See *Pitcock v. State*, 91 Ark. 537, 131 S. W. 742, 134 Am. St. Rep. 88; *Louisville & Nashville R. Co. v. Railroad Com'rs*, 63 Fla. 491, 53 South. 543, 44 L. R. A. (N. S.) 189; *Miller v. State Board of Agriculture*, 46 W. Va. 192, 32 S. E. 1007, 76 Am. St. Rep. 811; *Cooke v. Iverson*, 108 Minn. 388, 122 N. W. 251, 52 L. R. A. (N. S.) 415.

There is a distinction sometimes pointed out in the cases between the applicability of

injunction and mandamus where the question is as to whether suit is or is not against the state. This distinction is pointed out, and other cases discussed, in *Pennoyer v. McConaughy*, supra. The two remedies largely cover the same field. If the state has commanded, and the duty is ministerial, mandamus may be had to compel action or injunction to restrain violation of the duty. *Board of Liquidation v. McComb*, supra. Neither would be actions against the state. The control of the officer would be, in either case, merely effectuating what the state had already commanded. In case, however, a state is the wrongdoer, and the officer is in no way personally concerned, mandamus to compel action by the officer by way of performance of the state's contract cannot be maintained because it is a suit against the state. On the other hand, where the state is the wrongdoer and the officer is proceeding under the unconstitutional mandate of the state, he may, in a proper case, be restrained, notwithstanding the indirect effect of the injunction is to prevent the breach of the state's contract. This is so because the unconstitutional law is no law and leaves the state officer in the position of a wrongdoer. *McGahey v. Virginia*, 135 U. S. 662, 10 Sup. Ct. 972, 34 L. Ed. 304. The foregoing distinctions do not exhaust the subject, but they are correct so far as they go, and are sufficient for our purposes in this case.

It seems clear from the foregoing cases that, if the relator was seeking to compel the commissioner of public lands to execute a deed in accordance with the contract, there would be no difficulty in enforcing the duty by mandamus, because under the provisions of section 5236, Code 1915, it is made the statutory duty of the commissioners, upon payment of the purchase price for the public lands, to immediately issue a deed for the lands so purchased.

As heretofore pointed out, however, this is not what the relator is seeking. He is seeking to compel the commissioner to execute to him a deed conveying the absolute fee without reservation of the mineral rights in the land. If he is to succeed he is compelling the state to part with something which it has never contracted to sell. He is seeking to compel the state, through its only authorized agent, the commissioner, to make a contract with him, and to execute the same, such as it has never agreed to do. The state had a direct, pecuniary, and prop-

erty interest in the matter involved, and there is no law which can be pointed to making it the official duty of the commissioner to execute the deed as claimed by relator. It seems clear, therefore, that under such circumstances this is a suit against the state of New Mexico to which the state has never given its consent, and which cannot for that reason be maintained.

An argument is presented by counsel for appellee in support of the judgment to the effect that the reservation in the contract of sale was without authority on the part of the commissioner, and is therefore void and of no effect, and does not authorize the commissioner to refuse to him a deed of the absolute fee. The argument proceeds upon the theory that a condition imposed by the executive officers of the land department which is in contravention of, or unauthorized by, law is void, and the purchaser will take his title free from the condition. Counsel relies upon the federal cases, and principally that of *Burke v. S. P. R. R. Co.*, 234 U. S. 696, 34 Sup. Ct. 907, 58 L. Ed. 1527. We do not deem these United States cases as applicable. Whether the commissioner of public lands has power and authority to make the reservation, which he has made in this case, it is unnecessary for us to determine. If he has not the power, when the purchaser takes a deed with the reservation contained therein, there may arise a question as to the effect of the reservation in some controversy which may arise when the commissioner or some one under him begins to explore for minerals; but mandamus is not a proper remedy to try such a question in a case of this kind where the state itself is involved.

It appears from the record that an oil and gas lease has, subsequent to the tender and demand for deed by relator, been executed to Reed, the other respondent. The same considerations heretofore pointed out control in regard to this lease. Mandamus to cancel this lease cannot be maintained if mandamus to convey without the reservation which contemplates the making of the lease cannot be maintained.

It follows from the foregoing that the judgment of the court below is erroneous, and should be reversed, and the case remanded, with directions to discharge the writ; and, it is so ordered.

ROBERTS, C. J., and RAYNOLDS, J., concur.

HUNT v. ELLIS. (No. 2476.)

(Supreme Court of New Mexico. Oct. 22, 1921. Rehearing Denied Nov. 29, 1921.)

(Syllabus by the Court.)

Vendor and purchaser §232(2)—Occupancy of land by one not holding record title must be such as to put a prudent man upon inquiry, to imply notice to purchaser.

Possession or occupancy of land, by one not the holder of the record title, to imply notice of an outstanding title to one purchasing from the holder of the record title, must be such as would under the circumstances put a prudent man upon inquiry.

Appeal from District Court, Union County; Leib, Judge.

Suit by Charles L. Hunt against Dave Ellis. Judgment for the defendant, and the plaintiff appeals. Affirmed.

Hugh B. Woodward, of Clayton, and A. Paul Siegel, of Nara Visa, for appellant.

Toombs & Taylor, of Clayton, for appellee.

RAYNOLDS, J. This is a suit to quiet title to 320 acres of land brought by Charles L. Hunt against Dave Ellis in the district court of Union county. Title is claimed by Hunt under a deed from Frederick Zivansky, patentee from the United States government, dated February 26, 1916, regularly executed, acknowledged, and filed for record in the office of the recorder of Union county, December 26, 1916. Title is claimed by the defendant, Dave Ellis, under a warranty deed from Frederick Zivansky, patentee from the United States government, dated December, 6, 1916, also regularly executed, acknowledged, and delivered and properly filed for record in the office of the recorder of Union county on December 6, 1916. The plaintiff, Hunt, appellant here, on trial sought to prove actual notice to the defendant, Ellis, of plaintiff's deed at the time the defendant, Ellis, received his deed from Zivansky, and sought further to prove such facts as would impute constructive notice to Ellis, the defendant, if he had no actual notice of plaintiff's title. The evidence of actual notice was controverted, and the court found in favor of the defendant, Ellis, on this issue.

The facts relative to the constructive notice were substantially undisputed and uncontroverted, but the court held them insufficient to effect the defendant, Ellis, with notice of the plaintiff's title and entered a judgment that the title of Ellis was paramount. The court also found as a fact:

"That the defendant, Ellis, purchased said lands in question from said Zivansky in good faith and for valuable consideration and without knowledge or notice of the existence of

the unrecorded warranty deed executed by said Zivansky to the plaintiff, Hunt, on February 26, 1916, and without knowledge or notice that said lands had been sold to said Hunt."

The court further found:

"That the defendant, Ellis, had no notice, actual or constructive, of any possession or ownership of the lands in question by the plaintiff, Hunt, at the time he received the warranty deed from Zivansky."

From the judgment in favor of Ellis holding his title paramount the plaintiff, Hunt, appeals to this court.

The facts out of which this controversy arose are as follows:

On February 14, 1916, Frederick Zivansky received from the United States land office at Clayton a final certificate for the half section of land which is the subject of this controversy. Thereafter he listed the land for sale with one Ernest Snyder, who sold the same to the appellant for \$500 and February 26, 1916, Zivansky made a warranty deed to Hunt. This deed on completion of the payment of the purchase price in May, 1916, was sent to Tucumcari, the county seat of Quay county, for record, instead of to Clayton, Union county. The deed was returned by the clerk to appellant's agent, who laid it away in his files, and it was not recorded in Union county until December 26, 1916. The appellant is a rancher engaged in the cattle business in Union county. The land in controversy lies within his pasture and near his home place. The ranch of appellant consists of 12,000 to 13,000 acres. He used the land in controversy for grazing while Zivansky was occupying the same as entryman. Zivansky had lived on this land continuously until the date of his final proof for a period of eight years. After selling the land to the appellant, Zivansky vacated the house, but returned subsequently and lived thereon for a short time while he was working for appellant.

The record shows that Zivansky was the holder of a final receipt from the United States government at the time of Ellis' purchase. It appears in the testimony that Ellis went to the home ranch of Hunt, but that Hunt was not at home, although his wife was. He could see the Zivansky property from Hunt's home place. He made no inquiry of Mrs. Hunt as to Zivansky's claim, but immediately after inspecting the land returned to town, and a few days thereafter purchased the same from Zivansky. On trial of the case Zivansky testified first that he told Ellis he had sold the land to Hunt. This was denied by Ellis. Before he sold the land to Ellis he signed an affidavit, which was introduced in evidence, that he owned the land. He did this in order to get his patent thereto from the

United States government, although at the time it appears that he had already made a deed to Hunt for the property in question. The testimony of this witness, Zivansky, was contradictory and unsatisfactory, and was probably disregarded by the court as he seemed uncertain on every particular about which he testified and contradicted himself numerous times.

Appellant assigns 11 errors, but simplifies the issue before this court by two statements in his principal and reply brief to the effect that the whole case turns upon one question, i. e.: Was the possession of Hunt as proved by the uncontroverted evidence sufficient to charge the subsequent purchaser, Ellis, with knowledge of Hunt's title? Appellant further states that in this case, the court having found the defendant had no actual notice of the unrecorded deed, plaintiff's case fails unless his acts of possession were sufficient to impute constructive notice to the defendant of plaintiff's title. Further appellant states that it is the conclusion of the court, set forth in the second finding above quoted which appellant alleges is error, and submits to the appellate court the question whether the undisputed facts were not such as to effect Ellis with constructive notice of Hunt's unrecorded deed.

As shown from the above quotations from the brief of appellant, the whole question turns upon the proposition of whether or not the possession of Hunt was such as to amount to constructive notice to Ellis and whether the court came to an erroneous conclusion as to such notice. Appellant claims that he exercised the following acts of possession over the land in question after the purchase: First, that he altered the fences thereon; second, that he used the house upon said land as a tenant house for employees; third, that he used the lands continuously as fenced and inclosed pasture for the purpose of grazing cattle bearing his recorded brand to the exclusion of other cattle; fourth, that he used the house on the land in question as a storehouse for cotton seed cake from the middle of October, 1916, continuously until May, 1917, and during these months this house was under lock and key, and that appellant carried the keys; fifth, that he used the vicinity of the house upon the land in question as a feeding place where he fed 270 head of cattle cotton seed cake daily from the first week in November, 1916, until the following May.

In regard to the first proposition that he altered the fences thereon, the appellant testified on cross-examination that the fence to the property was practically in the same position subsequent to the purchase as it had been for years before Zivansky proved up. In regard to the four other acts of possession, they were identical with appellant's action before the purchase; that is, he had used the house for his employees; he had grazed his

cattle upon the land in question; Zivansky had lived in the house subsequent to the purchase; and it is not shown by the evidence that the act of storing cotton seed cake in the house and keeping it under lock and key made any apparent change in the possession of which the appellant had notice.

The general principle as to notice to effect purchaser for value is as follows:

"Knowledge of such facts as ought to put a prudent man upon inquiry as to the title charges a subsequent purchaser with notice, not only of those facts which are actually known, but also of all other facts which a reasonably diligent investigation would have ascertained, provided the inquiry becomes a duty and would lead to the knowledge of the requisite facts by the exercise of ordinary diligence and understanding. * * * In applying the rule each case must be governed by its own peculiar circumstances." "Vendor and Purchaser," 39 Cyc. p. 1703.

This case turns upon the question of possession or occupation by another as being notice to the purchaser from one having the record title.

"The occupation must be of a character which would put a prudent person upon inquiry; it must indicate that some one other than he who appears by the record to be the owner has rights in the premises. What acts may or may not constitute a possession are necessarily varied and depend to some extent upon the nature, locality, and use to which the property may be applied, the situation of the parties, and a variety of circumstances which have necessarily to be taken into consideration in determining the question. Actual residence upon the land is not required to effect constructive notice of title. If the party is in actual possession, and there are continuous acts of ownership, it is sufficient. It has been held that possession must be evidenced by an inclosure, or something equivalent, as showing the extent and fact of his dominion and control in the premises. But this is not necessary where there are other appropriate acts of occupancy." "Vendor and Purchaser," 39 Cyc. pp. 1749 and 1759, and cases cited.

As stated in the above quotation, notice depends upon many circumstances and varies with the particular case. There is a conflict of opinion as to what is actual notice (29 Cyc. 113, "Notice"), and the words "constructive notice" are sometimes used to denote such notice as the law implies from the recording acts and also from acts and circumstances. Distinctions are also made as to implied and express notice. See "Notice," 20 R. C. L. 339, par. 2 and cases cited. It is unnecessary for us in this case to discuss or attempt to reconcile the various definitions or elucidate the distinctions.

It is vigorously contended by the appellant that the case of *McBee v. O'Connell*, 19 N. M. 565, 145 Pac. 123, is controlling, and we agree that, although the facts in that case are different, the principle therein announced

governs this case. In that case the court, after considering the authorities, quotes from the case of *Dickey v. Lyon*, 19 Iowa, 544, as follows:

"A person who purchases an estate in the possession of another than his vendor is in equity—that is, in good faith—bound to inquire of such possessor what right he has in the estate. If he fails to make such inquiry which ordinary good faith requires of him, equity charges him with notice of all the facts that such inquiry would disclose."

The case, however, differs from the present one in the nature of the possession. In that case it was held that the possession of the plaintiff's tenant was such as to put defendants on inquiry as to plaintiff's rights. That situation does not exist in the present case. The subsequent possession of Hunt was not different from that which it had been before the transfer, and there was nothing under the circumstances of this case in his subsequent possession—that is after the making of the deed to him—to put Ellis upon inquiry as to Hunt's rights in the property.

For the reasons above stated, we hold that the conclusion of the trial court was correct.

The judgment is therefore affirmed, and it is so ordered.

ROBERTS, O. J., and PARKER, J., concur.

C. R. SHAW WHOLESALE CO. v. HACK-BARTH.

(Supreme Court of Oregon. Nov. 22, 1921.)

1. Contracts §16—Offer containing promise for consideration, accepted by promisee, completes contract.

An offer containing a promise for a consideration to do an act which the promisor has a right to do, followed by an unqualified and unequivocal acceptance by the promisee, creates a contract.

2. Contracts §16—Offer must intend to create obligation on acceptance.

An offer, to be sufficient, must be one which is intended of itself to create legal relations on acceptance, and must be capable of creating a definite obligation.

3. Contracts §23—Acceptance must be unequivocal and unconditional.

The acceptance of an offer which completes a contract must be positive, unconditional, unequivocal, and unambiguous, and must not change, add to, or qualify the terms of the offer.

4. Contracts §23—Additional condition in acceptance rejects offer and makes counter offer.

A purported acceptance of an offer which contains an additional condition is, in effect, a

rejection of the offer and the making of a counter offer, which becomes a binding contract only when accepted by the maker of the original offer.

5. Contracts §23—Condition is acceptance which would be implied does not reject offer.

The insertion by the acceptor of a condition which does not qualify the offer in legal effect, because it is a condition which the law would imply, does not prevent the acceptance from completing the contract.

6. Contracts §26—Writings alone determine existence of contract by correspondence.

Where it was conceded that all the negotiations for the alleged contract were in writing, the writings alone can be looked to to determine whether a contract resulted therefrom.

7. Sales §22(4)—Acceptance specifying 60-day payment rejects offer fixing no time for payment.

In view of Or. L. § 8205, making payment and delivery concurrent unless otherwise specified, an acceptance specifying payment on 60 days' time was a rejection of an offer to sell goods which stated no time for payment.

8. Sales §22(4)—Acceptance fixing time of delivery rejects offer silent as to delivery.

An offer for the sale of lumber to be manufactured and delivered is rejected by an acceptance thereof which specifies delivery shall be made by a specified date, where there was no evidence that the date so fixed was a reasonable time for delivery.

9. Sales §81(2)—Delivery to be made within reasonable time unless otherwise specified.

Where the time of performance of a contract for the manufacture and sale of goods is not specified, delivery is to be made within a reasonable time, depending on the circumstances.

10. Sales §22(4)—Letter indicating belief contract was completed was not acceptance.

Where an offer to sell goods was rejected by a purported acceptance imposing additional conditions, a subsequent letter by the seller, indicating a belief that a contract existed between him and the buyer, was not an acceptance of the counter offer contained in the conditional acceptance.

11. Contracts §22(3)—Acceptance must be communicated.

To constitute acceptance of an offer to make a bilateral contract, there must be an expression of the intention to accept by word, sign, or writing communicated or delivered to the person making the offer, or his agent.

12. Customs and usages §18—Must be pleaded.

Before a custom can be relied upon it must be pleaded.

13. Customs and usages §11—Can be resorted to to construe contract but not to create it.

Evidence of a general custom in the trade with reference to which the parties are presumed to have contracted is admissible to aid in the construction of the contract which is

proved to have been completed, but is not admissible to establish the existence of a contract not otherwise established.

In Banc.

Appeal from Circuit Court, Wallowa County; J. W. Knowles, Judge.

On rehearing. Original determination set aside, and judgment of the trial court reversed.

For original opinion, see 198 Pac. 908.

Thos. M. Dill, of Enterprise, for appellant.

J. A. Burleigh, of Enterprise, for respondent.

RAND, J. The main, and as we view it the only, question necessary for the determination at this time is whether the written communications passing between the parties, and which are copied in full in the original opinion, constitute a valid offer and acceptance resulting in a binding contract. This question must be determined solely from the language which the parties used in their communications to each other concerning the proposed purchase and sale of the lumber. This is particularly so because it is admitted that all of these communications were forwarded and received in due course of mail, thereby eliminating all questions except the legal effect flowing from the communications themselves.

Before attempting to analyze these communications the legal principles controlling the determination of this question will be considered.

[1] It may be stated, as a general rule requiring no citation of authority for its support, that an offer containing a promise for a consideration to do an act which a person has a lawful right to do, made by one person to another, followed by an unqualified and unequivocal acceptance by the person to whom it is made of the offer as made, creates a contract between the person making the offer and the person accepting it.

[2] The offer, however, must be one which is intended of itself to create legal relations on acceptance, and must be capable of creating a definite obligation. It must not be a communication of information as to certain facts which may interest the party to whom it is communicated, or an offer intended merely to open negotiations which may ultimately result in a contract, or intended to call forth an offer in legal form from the party to whom it is addressed. 1 Page on Contracts, (2d Ed.) § 84; 1 Williston on Contracts, § 37.

[3] The acceptance must be positive, unconditional, unequivocal, and unambiguous, and must not change, add to, or qualify the terms of the offer.

"In order to make a bargain it is necessary that the acceptor shall give in return for the

offerer's promise exactly the consideration which the offerer requests. If an act is requested, that very act and no other must be given. If a promise is requested, that promise must be made absolutely and unqualifiedly. This does not mean necessarily that the precise words of the requested promise must be repeated, but by a positive and unqualified assent to the proposal the acceptor must, in effect, agree to make precisely the promise requested; and if any provision is added to which the offerer did not assent, the consequence is not merely that this provision is not binding and that no contract is formed, but that the offer is rejected."

"The new condition is as fatal when its inconsistency with the offer appears by implication only as when it is explicitly stated. Thus, when an offer is made by mail to sell stock, a reply in terms accepting the offer, and adding 'Ship with draft attached,' adds a new condition, since by implication the place of delivery under the offer was the seller's residence, and the reply transfers it to the buyer's." 1 Williston on Contracts, § 78.

The same principle is stated in 1 Page on Contracts (2d Ed.) § 168, as follows:

"The acceptance of an offer for a promise must, furthermore, correspond to the offer at every point, leaving nothing open for future negotiations. An attempted acceptance which leaves open * * * the time of delivery, or of payment, or an acceptance as to the price only, is without validity."

[4] Where the offeree imposes an additional condition to those contained in the offer, or makes a counter offer or conditional acceptance which amounts to a counter offer, or makes an attempted acceptance which seeks to modify one or more of the terms of the offer, this operates as a rejection of the original offer. Before the counter offer can become a contract it must be accepted by the party who made the original offer. The reason for the rule as stated by Mr. Williston is:

"The counter offer is construed as being in effect a statement by the offeree, not only that he will enter into the transaction on the terms stated in his counter offer, but also by implication that he will not assent to the terms of the original offer." 1 Williston on Contracts, § 51.

See, also, 1 Page on Contracts, § 169, and 6 R. C. L. § 31, p. 608.

[5] The only condition to the offer which can be added in the acceptance is one which does not qualify the offer in legal effect, or as stated in 1 Williston on Contracts, § 78:

"Sometimes an acceptor from abundance of caution inserts a condition in his acceptance which merely expresses what would be implied in fact or in law from the offer. As such a condition does not interfere with the expression of assent to all the terms of the offer, a binding contract is formed. Thus an offer to sell land may be accepted subject to the condition that the title is good. For unless the offer expressly specify that the offeree must take his chance

as to the validity of the title, the meaning of the offer is that a good title will be conveyed."

[6] As all that went to make up the alleged contract is conceded to be in writing, we must look to the writings alone to determine whether a contract resulted therefrom. The language used determines whether the minds of the parties met or not. 1 Page on Contracts, § 73. Or, as stated by this court in *Williams v. Burdick*, 63 Or. 41, 50, 125 Pac. 844, 126 Pac. 903:

"The apparent mutual assent of the parties, which is essential to the formation of a valid agreement, is to be gathered from the language that they have employed."

As all of the correspondence may be found in the original opinion, we will refer only to such part as is deemed material to this inquiry, having in mind the principles of law above referred to.

On March 21, 1917, appellant wrote respondent, stating:

"Regarding the shop lumber would be willing to contract providing I got the price I am holding it for this on a 52¢ rate."

Then, following the dimensions and prices quoted, the letter closes in these words:

"This is only a fair price, and will stay with these prices until I see that conditions changes and I prefer selling 8/4 as I have contracted several hundred thousand of the 5/4 & 6/4 to be shipped Aug. & Sept."

As the words "to be shipped Aug. & Sept." evidently refer to lumber contracted to parties other than respondent, they will not be further considered. On March 22d respondent wrote to appellant, acknowledging receipt of appellant's letter of March 21st, and stated:

"We will be willing to take the shop lumber at the prices you quote. * * * Now you let us know how many thousand feet of each thickness 5/4, 6/4, and 8/4 you will let us have at the prices you name, and we will send you a blanket order for such amounts."

On April 3d appellant wrote respondent as follows:

"Your letter of the 22d received. I would be willing to let you have about 250 thousand 8/4 #3 and better shop at the prices I quoted you * * *. This is not all the shop I will have, but is all I want to contract at the present time."

For the purposes of discussion we shall assume, without deciding, that the language used in this letter contained a definite offer, and was intended by appellant to create a contract when accepted, and that it was not intended merely to indicate a willingness to negotiate, and that if it had been accepted according to the terms of the offer it would have resulted in a binding and enforceable contract.

In respondent's letter of March 22d the respondent had stated to the appellant:

"Now you let us know how many thousand feet of each thickness * * * you will let us have at the prices you name and we will send you a blanket order for such amounts."

Evidently it was intended by both parties that the mailing of the so-called blanket order was to constitute the method by which the acceptance should be made of the offer for the sale of such quantity of lumber as the appellant should communicate to respondent he would sell. The letter of April 3d stated this quantity to be 250 M feet. On April 4th respondent replied as follows:

"Your favor of the 3d at hand and are enclosing order for the 250 M ft. of 8/4 shop."

The order so inclosed is as follows:

	No. 5180.	April 4th	7.
C. R. Shaw Wholesale Co.			
to follow			
By Sept. 15th	53¢ rate	reg.	
	250,000 8/4 #3 shop & better	828	
	#3 at 26.00		
	#2 at 32.00		
	#1 at 40.00		

Lapwai Lumber Co.,
Enterprise, Oregon.

[7] An examination of this so-called blanket order discloses that it contains terms and conditions not included in or made a part of the offer. The letters "reg." found in the order are explained as an abbreviation of the word "regular," and as used are said to mean that the lumber was sold on 60 days' time. The offer as made by appellant contains no such provisions. It merely offered to sell the lumber at a fixed price and specifies no time of payment. "Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions." Section 8205, Or. L.

[8] The blanket order also contains the words "to follow by September 15th." The testimony shows that these words refer to the date on or before which delivery was to be made. This provision in the order imposes another condition not contained in the offer.

[9] Where the time of performance is not specified, unless surrounding circumstances show a contrary intention, the courts will construe the promise as intending performance within a reasonable time, and "if the goods at the time of the bargain are not in a deliverable state a reasonable time for delivery would be a very short time." 1 Williston on Contracts, § 88. If, as in this case, the lumber before delivery had to be manufactured, dried, and prepared for shipment, what would constitute a reasonable time would depend on many circumstances regarding which no testimony was offered. There is nothing in any writing tending to show that this date was assented to by appellant. Hence the fixing of the date when the delivery should be made, being unauthorized and arbitrary, and

as it was not assented to by appellant, was not an acceptance but a rejection of appellant's previous offer, and was a new offer which appellant could accept or reject as he saw fit.

[10] The insertion of these new and additional conditions in the attempted acceptance constituted a counter offer, which in legal effect was a rejection of the offer of appellant, and unless appellant subsequently accepted this counter offer no contract was created. There is nothing in the correspondence showing an acceptance by appellant of these conditions, subsequently, and on May 16th, appellant wrote to respondent, stating:

"I think I will have to raise the price on the shop we mentioned, which is about 250,000 ft. * * * If you have it contracted tell the other fellow the same as we were not figuring on war at that time."

This might indicate that the appellant at that time believed that a contract did exist between himself and respondent as to the sale of the lumber. The language used is consistent with such belief, or it may be explained upon the theory that the appellant believed that the respondent might have contracted the lumber relying upon its ability to subsequently contract with appellant for its purchase. Regardless, however, of what appellant may have believed, the question of whether a contract did exist between the parties is not dependent upon the belief of one or both thereof, but is dependent, as a matter of law, upon the language used by them in their communications with each other.

[11] Under certain circumstances it has been held that silence is an assent to a proposition, but the rule is that to constitute acceptance of an offer to make a bilateral contract "there must be an expression of the intention, by word, sign, or writing communicated or delivered to the person making the offer, or his agent," 6 R. O. L. § 29, p. 606. And "there can be no contract of sale until all the terms are fully agreed upon," 25 Cyc. 55. Therefore the failure of appellant to reply to the communication of April 4th cannot be held to be an assent to the new conditions imposed by respondent in its pretended acceptance.

It is claimed that these provisions which were inserted in the attempted acceptance conformed to the general custom and usage pertaining to the business of selling lumber and that they would be implied as a part of the offer.

"To be regarded as a part of the contract the usage or custom must not only be shown to exist, but it must have both of the following elements: (1) It must be actually or constructively known; and (2) it must be consistent with the contract." 4 Page on Contracts (2d Ed.) § 2057.

"In the absence of a real agreement between the parties, custom cannot impose contractual liability; although if there is a real agreement, many terms for which the parties have made no specific provision may be supplied by custom." 1 Page on Contracts, § 72.

The rule invoked is a rule of construction, and is not a rule governing the formation of contracts, and will not be applied unless the existence of a contract has first been established. The construction of a contract implies its existence and that the contract is valid and enforceable; otherwise there is nothing to construe. 4 Page on Contracts, § 2020.

[12] Custom, to be relied upon, must be pleaded. Oregon Fisheries Co. v. Elmore Packing Co., 69 Or. 340, 343, 138 Pac. 862, and Simms v. Sullivan, 198 Pac. 240, 242. There is no allegation of custom or usage in this case.

[13] Evidence of custom can be given only for the purpose of aiding in the interpretation of an existing contract. It is never admissible for the purpose of proving the agreement itself. Unless there is proof of a contract, evidence of a custom or usage is inadmissible. Oregon Fisheries Co. v. Elmore Packing Co., 69 Or. 340, 343, 138 Pac. 862, and Barnard & Bunker v. Houser, 68 Or. 240, 243, 137 Pac. 227.

For these reasons, we are constrained to hold that the attempted acceptance imposed new and additional terms not to be found in the original offer; that this operated as a rejection of the offer, and the making of a new offer on the part of the respondent, which offer was never accepted by the appellant; and that no contractual relations between the parties came into existence.

Therefore the judgment of the lower court must be reversed.

GRASSER v. JONES et al.

(Supreme Court of Oregon. Nov. 22, 1921.)

Convicts — Limitation of actions — One imprisoned cannot redeem real property under foreclosure after one year; "civil rights."

Where mortgagor was convicted of a felony and imprisoned, and foreclosure was had by reason of default, and sheriff's deed delivered, he was not entitled, after leaving the prison more than one year after the delivery of the sheriff's deed, to give notice and redeem under Or. L. § 248, either by Or. L. § 17, relating to running of limitations, or section 2380, suspending "civil rights" of persons imprisoned; the right to redeem being manifestly a civil right (citing 2 Words and Phrases, Civil Rights).

Department 1.

Appeal from Circuit Court, Marion County; George G. Bingham, Judge.

Suit by Blassius Grasser against J. O. Jones and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Prior to January 16, 1915, the plaintiff gave a note and secured the same by mortgage on his real estate. On that date he was convicted of a felony, and sentenced to imprisonment in the penitentiary of this state for a term of from 1 to 15 years. Default having been made in the payment of the note, suit to foreclose the mortgage was commenced March 11, 1916. This proceeded to decree, sale, confirmation, and sheriff's deed; the date of this latter document being August 3, 1917. The plaintiff was pardoned July 15, 1919. On November 22 following, he offered to redeem in pursuance of formal notice given within 30 days prior thereto. The sheriff, to whom the application was made, refused to allow him to redeem, and he has brought this suit against the officer, with the purchaser at the sale and others, who, he says, claim some interest in the property, the object being to compel the allowance of redemption, for an accounting of the rents and profits of the property, and for damages for the conversion of certain personal property alleged to have been left by the plaintiff on the premises when he was incarcerated in the penitentiary. The circuit court sustained a general demurrer to the complaint, and the plaintiff appeals.

Ronald C. Glover, of Salem (with A. O. Condit, of Salem, on the brief), for appellant.
W. C. Winslow, of Salem, for respondents.

BURNETT, C. J. (after stating the facts as above). The mortgagor or judgment debtor whose rights and title were sold has a right to redeem real property within one year after the confirmation of the sale. Section 248, Or. L. The sale was confirmed July 17, 1916, but the offer to redeem was not made until more than three years later, namely, November 22, 1919. If nothing else were shown, it is plain that the offer was too late. Says the plaintiff, however, quoting section 17, Or. L.:

"If any person entitled to bring an action mentioned in this chapter or to recover real property, or for a penalty or forfeiture, or against a sheriff or other officer for an escape, be at the time the cause of action accrued, either * * * imprisoned on a criminal charge, or in execution under the sentence of a court for a term less than his natural life, the time of such disability shall not be a part of the time limited for the commencement of the action, but the period within which the action shall be brought shall not be extended more than five years by any such disability, nor shall it be extended in any case longer than one year after such disability ceases."

The section is taken from chapter 2 of title I, Or. L., and relates to the time for commencing actions or suits.

It is also said in the language of section 2380, Or. L., that:

"A judgment of imprisonment in the penitentiary for any term less than for life suspends all the civil rights of the person so sentenced, and forfeits all public offices and all private trusts, authority, or power during the term or duration of such imprisonment."

The contention on behalf of the plaintiff is that his civil rights, among them, the right of redemption, were suspended while he was a convict, and that section 17, Or. L., allows him to redeem within one year after his disability as a convict ceased. In other words, he contends that his restoration to citizenship by pardon included the revival of his right to redeem, which hitherto had been suspended.

Section 17, as stated, relates to the time within which a suit or action may be commenced. The plaintiff had no cause of suit or action in any event until the sheriff refused to allow him to redeem. An offer to redeem and a refusal to allow redemption are conditions necessarily precedent to the right to sue. Hence his cause of suit accrued, if at all, after his disability was removed. What the result would have been if the plaintiff had made his offer to redeem before the expiration of the year, and while he was still in prison, is not before us, because no such offer was made. The question turns upon the effect to be given section 2380, supra, suspending the civil rights of the convicted plaintiff.

The right to redeem is manifestly a civil right. 2 Words and Phrases, 1199. The effect of the suspension of the civil rights of a convict under a statute identically like ours had the consideration of the Supreme Court of California in *Re Nerac*, 35 Cal. 392, 95 Am. Dec. 111. The essence of the case is stated thus in the syllabus:

"One sentenced to the state prison for a felony, for a term less than his natural life, is not dead in law. His civil rights in some matters are suspended, but the rights of his creditors are not suspended."

In *Gray v. Stewart*, 70 Kan. 429, 78 Pac. 852, 109 Am. St. Rep. 461, the sale of a convict's land and the consequent deed were held valid. In *Byers v. Sun Savings Bank*, 41 Okl. 728, 139 Pac. 948, 52 L. R. A. (N. S.) 320, Ann. Cas. 1916D, 222, the court sustained the right of a convict to contract to incumber the land to pay his attorney to procure for him a parole, and this under a statute precisely like ours. The court in *Re Deming*, 10 Johns. (N. Y.) 232, said:

"The limitation to the operation of a pardon on his antecedent rights is, that it cannot divest any person of any right, or interest, which the law had permitted to be acquired and vested, in consequence of the judgment."

This language is used in the syllabus of *Coffee v. Haynes*, 124 Cal. 561, 57 Pac. 482, 71 Am. St. Rep. 99:

"A court has jurisdiction to enforce an execution against the property of a defendant in an action, who has been sentenced to the state prison for life, on a charge of murder, though the judgment, in the civil action, was not entered against him until after his civil death."

The subject is extensively treated in *Avery v. Everett*, 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 264, 6 Am. St. Rep. 368. The substance of the doctrine taught in that case is that civil death does not of itself divest the offender of his lands as a general rule; he can be sued, but cannot sue; he can contract, but cannot compel the courts to aid him in the enforcement of his contract. This was the declaration of the court concerning the situation of a convict at common law. In *Gray v. Gray*, 104 Mo. App. 520, 79 S. W. 506, it is said that the civil death which attaches to a person as an incident of his conviction of an infamous crime destroys his right to sue, but not the right of courts to entertain suits against him. The court quotes with approval this language from *Chitty's Criminal Law*, 725:

"This situation of civiliter mortuus is never allowed to protect him (an attainted or convicted person) from the claims of private individuals or the necessities of public justice; so that, though he can bring no action against another, he may be sued, and an execution may be taken out against him."

If, as some of these precedents indicate, any one convicted of a crime can contract, he certainly could give notice and make his offer to redeem, thus fixing the genesis of his right to sue if refused, with the privilege of waiting under the terms of the statute until his disability was removed, before prosecuting the suit. On the other hand, if his civil rights are suspended, as the statute says, they form no obstacle to the proceedings on behalf of his creditors. To hold otherwise would be to punish them, or at least to impair the validity of their contracts. Under the statute, the mortgage creditor has a right to foreclose upon default being made. He may pursue that remedy to its full fruition, ending in the sheriff's deed to the property sold at foreclosure. If it is to be understood that one who otherwise would have a right of redemption for a year after the sale could, by committing a crime, extend that period for five years, or while he is incarcerated as a punishment for his offence, it would impair the value of the mortgagee's remedy, and allow the debtor to take advantage of his own wrong. The suspension of his civil rights is one of the consequences of the crime of which he is convicted, and should have engaged his attention before he committed the offense.

In brief, it is not the rights of the mortgagee which are suspended, but those of the mortgagor convicted of the crime, and it cannot be that his conviction will work out for him a more favorable situation than if he had not been proved guilty of the offense, especially where the result would be to impair the obligation of his contract with the mortgagee. The judgment of the circuit court is affirmed.

McBRIDE, HARRIS, and BROWN, JJ., concur.

HENRICKSEN v. CLARK et al.

(Supreme Court of Oregon. Nov. 29, 1921.)

1. Waters and water courses §227—Notice of contest held sufficient, though directed to officers of irrigation district as individuals instead of by official titles.

A notice of contest, in a proceeding under Or. L. § 7334, to contest the election of directors of an irrigation district, though directed to them individually without the addition of their official titles, *non* obstant as against a demurrer on the ground of a defect of parties, where the notice, which, in such a proceeding, performs the function of a complaint, when taken altogether and construed liberally, as required by Or. L. § 85, disclosed no attempt to assert a cause of contest against defendants in any other capacity than as directors.

2. Waters and water courses §227—Candidates in irrigation district elections need not be nominated to be voted for.

It is not mandatory in irrigation district elections that a candidate be properly nominated by petition or an assembly of electors in order to be voted for, though, to get his name on the official ticket prepared by the election authorities, such nomination is requisite; the voter having the right to vote for whom he chooses for any office.

3. Elections §259—Canvassing board cannot determine elected candidate's eligibility to hold office.

A canvassing board, the sole duty of which is to count the ballots and issue a certificate reciting what those ballots disclose, has no jurisdiction to raise issues in the nature of quo warranto and determine the eligibility of an elected candidate to hold the office to which he has been elected.

In Banc.

Appeal from Circuit Court, Morrow County; Gilbert W. Phelps, Judge.

Proceeding by A. Hendricksen against Clay C. Clark and others to contest their election as directors of irrigation district. Judgment for plaintiff, and defendants appeal. Affirmed.

According to the statement in the defendants' brief, this is a proceeding brought under section 7334, Or. L., by the plaintiff Henricksen, to contest the election of the defendants Clark and Reitmann as directors of the John Day irrigation district.

The cause is entitled, "A. L. Henricksen, Plaintiff, v. Clay C. Clark, Edward Reitmann, and M. D. Clark, Defendants." The notice of contest was directed to the defendants in their proper names without the addition of the official title of "directors of the John Day irrigation district," although in the body of the notice it is particularly alleged that they are the directors of the district. That document sets out with great particularity that at the election held to choose successors to the defendants Reitmann and Clay C. Clark, the voters wrote in the names of Arthur Wheelhouse for the three-year term and C. A. Minor for the one-year term, on the blank lines left on the ballot, in sufficient numbers to give Wheelhouse and Minor a majority of all the votes cast for the respective directorships.

The defendants filed a demurrer against the notice of contest, asserting:

"That there is a defect of parties defendant in the following respect, to wit: Clay C. Clark, M. D. Clark and Edward Reitmann are not made parties defendant as directors of the John Day irrigation district;" and, second, "that the complaint does not state facts sufficient to constitute a cause of action or suit for the reason it is not alleged in said complaint that the said C. A. Minor and Arthur Wheelhouse were nominated, as required by law, for the offices of directors of the said John Day irrigation district."

The trial court overruled the demurrer and the defendants did not appear further. From the consequent judgment declaring Wheelhouse to be elected director for the three-year term and Minor for the one-year term, the defendants have appealed.

F. A. McMenemy and A. J. Fritz, both of Heppner, for appellants.

Sam E. Van Vactor and Woodson & Sweek, all of Heppner, for respondent.

BURNETT, C. J. (after stating the facts as above). [1] The demurrer calls for a construction of the notice of contest which in this proceeding performs the function of a complaint. In this connection we are governed by section 85, Or. L., reading thus:

"In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties."

Taking the paper altogether, it is clear that there is no attempt to assert a cause of contest against the defendants in any other capacity than as directors. To institute a contest against private parties wholly discon-

nected with the district would be utterly futile and ineffectual. But the notice discloses that only the conduct of the defendants as directors is called in question. The complaint is sufficient as against the objection that there is a defect of parties.

[2] It is not necessary that a candidate be nominated for any office under the election system of this state, in order to receive the votes of electors at the free elections prescribed by our Constitution. In order to get his name on the official ticket prepared by the election authorities, it is requisite that a candidate be properly nominated by a petition or an assembly of electors. But this is only permissive. It is not mandatory in irrigation district elections. The voter has a right to vote for whom he chooses for any office.

[3] Moreover, the sole duty of a canvassing board is to count the ballots and issue a certificate reciting what those ballots disclose. Such a board has no jurisdiction to raise issues in the nature of quo warranto and determine the eligibility of an elected candidate to hold the office to which he has been elected.

These considerations dispose of all the issues of law which were raised by the demurrer. They were correctly decided by the circuit court.

The judgment is affirmed.

STATE, to USE of SUETTER, v. CORNWALL et al.

(Supreme Court of Oregon. Nov. 22, 1921.)

1. Pleading \S 369(4)—Defendants, counter-claiming, held not compelled to elect between their claims against plaintiff as surety and as assignee for his principal.

Where the surety of a subcontractor in bond given the contractor sued the contractor for labor, provisions, and materials furnished to the subcontractor at the instance of contractor, who counterclaimed for losses by the subcontractor's breach of the contract, and a subsequent abandonment thereof by the plaintiff surety, who on such breach had taken an assignment of contract and attempted to complete it, the defendants' attempt by the counterclaim to hold the plaintiff surety liable on the bond, and also as assignee of the subcontractor, were not inconsistent defenses between which the defendants might be compelled to elect.

2. Principal and surety \S 39—Alleged misrepresentations as to identity of the obligee in a bond held immaterial.

Alleged misrepresentations to the surety on the bond of a subcontractor that E. C., the obligee in the bond, was one S. C., who was in fact the father of the obligee, was imma-

terial, the obligee having complied with his part of the agreement.

3. Principal and surety \S 81—Surety held liable for overpayments by way of advancements by the creditor to the principal.

Where a contractor's agreement with a subcontractor provided that the contractor would pay the subcontractor certain amounts for earth removed, pay subcontractor's employees, blacksmith bills, and repair work as an advancement to be deducted from the compensation, payments in pursuance thereof were legitimate expenses for which the subcontractor's surety was liable as against the contention that his bond did not undertake to repay, and that it was not an indemnity bond.

4. Subrogation \S 31(1)—Surety taking assignment of contract from principal subrogated to his rights.

A surety, who, on default of his principal, has taken an assignment of contract with the consent of the obligee in the bond in order to complete the contract, assumes all the responsibilities of his principal, and is subrogated to all the rights of the principal.

5. Subrogation \S 31(1)—Surety on subcontractor's bond cannot object on account of work outside the contract settled and paid for at his suggestion.

Where a subcontractor on a portion of a public highway, who had given a bond with surety to the principal contractor, obtained a contract with the county to grade gateways approaching the highway, which work was done at the same time as his other contract work, and by the same men and teams, so that it was impossible to segregate the cost, and on breach of his subcontract, subcontractor refused to assign the subcontract to his surety to complete the contract, unless subcontractor was paid for the county work, to which the surety assented, *held*, that the matter, having been adjusted and paid according to the direction of the surety, was eliminated from the case.

6. Witnesses \S 255(10)—Testimony, and not memorandum, to refresh recollection, is the real evidence.

Where a witness refreshes his recollection by reference to memorandum of account, the proof depends, not upon the itemized account or schedule as primary evidence, but upon the sworn testimony of the witness.

7. Witnesses \S 255(5)—Refreshing recollection from memorandum held permissible.

In an action involving the liability of a surety of a contractor, the obligee, in testifying to payments and advances made to the principal in the bond, was entitled to refresh his memory by reference to a statement prepared from time book, check book, and bills and memorandum of labor materials and expenses usually kept in performance of such work, prepared by the witness.

8. Highways \S 113(4)—Principal contractor held to have complied with his agreement as to payments to subcontractor.

Where the principal contractor on a highway contract agreed with a subcontractor,

for whom plaintiff was surety, to pay the subcontractor 85 per cent. of the monthly estimates of the work done, and also to pay the workmen and repairs for the subcontractor by way of advancements, and it was necessary to forward the engineer's estimates to the state highway engineer for approval, there was no default on the part of the principal contractor as to payment where, though he did not pay the full 85 per cent. during the month, he had, before the return of the estimate on approval, advanced money in payment of labor, etc., in excess of the amount then due.

9. Principal and surety \S 117—Advances to subcontractor held not overpayment by the creditor.

Where a contractor agreed with a subcontractor for whom plaintiff was surety to pay a stipulated compensation for construction work, and also to pay employees of the subcontractor, and to pay blacksmith and repair work by way of advancements on the contract, money so advanced for expenses, etc., though exceeding the per cent. of compensation per month which the subcontractor was to receive, were legitimate under the contract, and not overpayments of which the surety could take advantage.

10. Principal and surety \S 81—Testimony that principal's default on contract during dry season caused additional loss by completion during rainy season held admissible.

In an action involving the liability of a surety on a construction contract on which the principal had defaulted, and which the surety had abandoned before completion, testimony to damages by reason of the delay to carry out the contract within the time specified, which was the dry season, by reason of additional expense in obtaining and hauling the gravel called for in the wet season, was admissible under the rule that the damages were such as were within the contemplation of the parties as a probable result of the breach, such rule including special damages where the special circumstances were known by or communicated to the party at the time the contract was made.

11. Evidence \S 177—Testimony as to contents of alleged assignment admissible where assignment not available.

In an action involving the liability of a surety who had taken an assignment of his principal's contract on the principal's default, testimony of the obligee in the bond to the contents of the alleged assignment was properly admissible where it appeared that the assignment was not available.

12. Principal and surety \S 161—Testimony held to show that obligee's damages were properly measured by market cost of completing the contract.

Where, in an action involving the liability of a surety for a contract not completed, the obligee being obliged to complete the work, the obligee, after testifying to payments made by him for work and material, also testified that he paid the prevailing price for wages and the market price for materials, objection that the verdict was founded on what the obligee

had paid, and not what was the reasonable cost of completion, was without merit.

13. Principal and surety ¶162(3)—Instruction as to surety's liability held properly refused as confusing.

Where, on the default of a contractor, his surety, in an attempt to complete it, took an assignment of the contract from his principal, in an action involving the surety's liability to the obligee in the bond, as well as his liability as assignee, a requested instruction that the liability of the surety was only commensurate with the liability of the principal was properly refused as tending only to confuse.

14. Principal and surety ¶81—Surety completing contract under assignment thereof held not entitled to pay for labor in excess of contract price.

Where a surety on a contract on default of his principal took an assignment of the contract and attempted to complete it, such contract providing for certain advancements for labor, repairs, expenses, etc., it was not error to fail to allow the surety payment for certain labor furnished by him in his attempt to complete the contract, as such allowance to him as contractor would have to be met by an equal charge against him on his liability as surety.

Department 1.

Appeal from Circuit Court, Yamhill County; H. H. Belt, Judge.

Petition by the State, to use and benefit of Philip Suetter, against George Cornwall and others. From a judgment for defendants, plaintiff appeals. Affirmed.

In May, 1919, the state highway commission decided to grade and macadamize the Newberg-West Dayton section of the West side highway in Yamhill county. On May 27, 1919, the state highway commission entered into a written contract with E. E. Cummins to do the work. In compliance with the terms of the agreement, E. E. Cummins gave a bond to the state of Oregon in the sum of \$19,246.50, signed by himself as principal, and by his father, S. E. Cummins, and W. T. Vinton, as sureties. The bond is conditioned on the faithful performance of the contract, and, among other things, that the contractor E. E. Cummins shall promptly pay all laborers, mechanics, subcontractors, and materialmen, and all persons who shall supply such laborers, mechanics, or subcontractors with materials, supplies, or provisions for carrying on such work, and all just debts, dues, and demands incurred in the performance of such work.

On July 11, 1919, E. E. Cummins, by a written contract, sublet a portion of the road work, sections 1 to 242, as per engineer's map to George Cornwall. Cornwall gave E. E. Cummins a bond in the sum of \$4,000, with Philip Suetter and Joseph Bixby as sureties, for the faithful performance

of the subcontract. According to the terms of the subcontract the work was to be completed by October 15, 1919. The contract, among other things, contained the following stipulations:

"The said first party hereby agrees to pay to the said second party, as compensation for the work and labor included in said grading, the sum of 48 cents per cubic yard for each yard of earth moved in said work and the sum of \$1.50 per cubic yard for each yard of rock moved in said work, together with a further compensation of 4 cents per cubic yard for each 100 feet that said earth or rock is moved in excess of 300 feet, and the said first party hereby agrees to pay all persons employed upon said work every second week and to pay all blacksmith bills that may be incurred for repairing equipment and tools used upon said work, said wages and blacksmith bills to be considered as an advancement and to be deducted from the compensation to be paid to the said second party under the terms of this contract.

"It is further understood and agreed that payments under this contract to said second party shall be made every month upon estimates to be furnished by the engineer in charge of the work, at which time said first party shall pay to said second party 85 per cent. of all sums due as shown by said estimates, and the balance of 15 per cent. shall be paid upon completion of this contract.

"And the said second party further agrees to do all grubbing that may be necessary in grading said portion of said highway and said first party shall pay therefor to said second party such sum as said first party shall receive under his contracts with the said (state) county."

The complaint is based upon a claim of \$1,468.69 for labor, provisions, and materials furnished by the use plaintiff, Suetter, to George Cornwall, subcontractor, at the special instance and request of defendants and used in the construction of the work under the contract and bond, between August 14 and September 28, 1919.

Defendants answered, admitting the execution of the contract and bond as alleged in the complaint, and by way of counterclaim in favor of E. E. Cummins and against Philip Suetter, averred in substance the following facts: In compliance with the terms of the contract dated July 11, 1919, signed and sealed by E. E. Cummins and George Cornwall, George Cornwall, as principal, and Philip Suetter and Joseph Bixby, as sureties, on July 11, 1919, duly executed and delivered to E. E. Cummins a bond in the sum of \$4,000, setting out a copy of the bond, which is conditioned upon the faithful performance of the subcontract by George Cornwall. Between July 11 and September 6, 1919, Cornwall performed labor and supplied material on the highway. On the latter date Cornwall abandoned the contract, of which Suetter had notice. Thereupon E. E. Cum-

mins requested Suetter to complete the contract. Suetter assumed the contract, and proceeded with the work. Cornwall, for value and with consent of the other defendants, assigned the subcontract to plaintiff Suetter, including all claims for money for work done under the contract, and Suetter assumed all expenses and debts incurred by Cornwall in connection with the highway. Between July 11 and September 29, 1919, Cornwall and Suetter, as his assignee and surety, performed work on the highway, itemized in answer, amounting as per the contract price to \$6,847.61. E. E. Cummins paid to and on account of Cornwall for the work \$5,821.75, and since September 19, 1919, has paid for labor employed, and materials and supplies purchased by Suetter for carrying on the work the sum of \$1,201.95, making a total of \$7,023.70, or an overpayment of \$176.09. On September 28, 1916, Suetter abandoned the subcontract.

For a second counterclaim the following is averred in effect: In order to complete the construction, which Cornwall and Suetter by the contract agreed to do, from October 4, 1919, to January 29, 1920, Cummins expended for necessary labor and materials in the performance of the subcontract, at the reasonable market value, the sum of \$5,248.92, the contract price for which aggregated \$2,040, making an excess of \$3,208.92 expended over the contract price for such work. It will cost \$1,419.50 to complete the work of construction of the highway embraced in the Cornwall contract. By reason of the delay in the work by Cornwall and Suetter until the rainy season, E. E. Cummins was caused additional expense in obtaining gravel for the grade, and damaged in the sum of \$429, and was damaged in the further sum of \$134.85 on account of the delay and failure of Cornwall and Suetter to perform the work and enable Cummins to complete his contract. E. E. Cummins duly performed all of the conditions of the contract on his part.

The reply denied many of the allegations of the answer, and affirmatively averred that Suetter was entitled to receive pay every second week for his labor performed on the highway in accordance with the Cornwall contract; that Cummins failed so to pay Suetter, and in order to collect the money due he took a formal assignment from Cornwall of all money due from E. E. Cummins; that the defendant did not recognize or accept Suetter as the assignee of Cornwall to perform the work or complete the contract; that by mutual mistake of Suetter and Cornwall the assignment did not correctly express the intentions of the parties, and by mutual agreement it was destroyed; that, owing to the failure of E. E. Cummins to perform the terms of the contract, Cornwall discontinued performing work on Sep-

tember 6, 1919; that thereupon defendant agreed if Suetter would remain at work on the highway, E. E. Cummins would pay him for his labor to date and for all labor thereafter performed; and that Suetter continued the work until September 28, 1919, when he ceased for the reason that defendants failed to perform the agreement.

Plaintiff further averred that the defendants falsely represented to him that S. E. Cummins was E. E. Cummins named in the contract; that, relying upon such representation, plaintiff signed Cornwall's bond as surety after Cornwall had entered upon the performance of his agreement; that E. E. Cummins did not perform his part of the contract with Cornwall in paying for the labor every second week, and 85 per cent. of the monthly estimates of Cornwall's work, so as to protect the sureties on Cornwall's bond; and that by reason thereof such sureties are released.

The cause was tried to the court and a jury, and a verdict and judgment rendered in favor of defendant E. E. Cummins, and against Philip Suetter, for the sum of \$1,688.72. Suetter appeals.

Franklin F. Korell, of Portland (William A. Carter, of Portland, on the brief), for appellant.

Walter L. Tooze, Jr., of McMinnville, and Oscar Hayter, of Dallas, (Vinton & Tooze, of McMinnville, on the brief), for respondents.

BEAN, J. (after stating the facts as above). At the commencement of the trial counsel for plaintiff moved the court for an order requiring defendants to elect whether they relied upon the bond given by Cornwall with Suetter as surety to E. E. Cummins, or upon the assignment of the contract made by George Cornwall to Philip Suetter. The motion was denied by the court, and plaintiff assigns such ruling as error.

[1] It is contended upon behalf of plaintiff that the contract of assignment is inconsistent with the contractual liability of Suetter to the defendants on account of having signed the bond. It is practically conceded that the defendants could not be required to elect, unless the attempt to hold Suetter upon the bond he signed, and also as assignee of the Cornwall contract, are inconsistent defenses.

By the execution of the bond by Suetter as surety he became liable for a breach of the contract on the part of Cornwall. This condition was maintained up to the time that Cornwall abandoned the contract. By the breach of the contract by Cornwall, Suetter was rendered liable for whatever damages E. E. Cummins was caused to suffer thereby. Cornwall's contract called for the payment of 46 cents per cubic yard for excavating earth, and no more, except under the circumstances stipulated in the contract. The con-

tract stipulated that Cummins would pay laborers and blacksmith bills every two weeks, which payments were to be treated as advancements on the payments to Cornwall. In order to perform this condition of the contract Cummins had to pay more than Cornwall earned, or more than Cornwall agreed to do the work for. Cummins was thereby damaged to that extent. Suetter, as Cornwall's surety upon the bond, was liable for such damages. If Suetter had not attempted to complete the contract, and Cummins had then been forced to complete it, the damage Cummins would have suffered would have been the difference in the contract price for doing the work provided for in the Cornwall contract and what it actually cost him at market prices to complete the work. Cornwall would have been liable to Cummins for such damage, as well as the amount of any overpayment made to laborers and for blacksmith bills pursuant to the Cummins-Cornwall contract. Suetter, as Cornwall's surety, would have been liable for the same up to the amount of \$4,000.

It appears from the testimony that Suetter and Cornwall each signed the contract of assignment of the subcontract to Suetter; that by the terms of this contract Suetter was to take over the contract, release Cornwall, finish the work, and pay all bills and expenses incurred by Cornwall in the prosecution of the work up to about September 6, 1919, the time of the execution of the contract of assignment, and in consideration of that Suetter was to receive what might be due Cornwall for the work he had performed. While the liability of Suetter upon the assignment would be in part the same as his responsibility as surety upon the bond, such liability as assignee would not be limited to the sum of \$4,000 as provided in the bond. Such additional obligation assumed by Suetter as assignee was practically in the nature of a supplemental or additional agreement. The undertaking assumed by Suetter by virtue of the assignment was not inconsistent with his obligation as surety. Therefore the defendants could not properly be required to elect as requested by plaintiff, but were entitled to claim under both the bond and the assignment contract. There was no error in the ruling of the court.

[2] Suetter asserts that he was led to believe that E. E. Cummins was S. E. Cummins, the father of the contractor. If Suetter had executed a bond as surety for Cummins this might have been material. George Cornwall was the man for whom Suetter was sponsor. The bond was given to E. E. Cummins, and if he complied with his part of the engagement, as the testimony tends to show he did, it does not matter whether Suetter understood his name was E. E. Cummins or S. E. Cummins. The question of the nonliability of Suetter as claimed is asserted or raised

by the demurrer to defendants' answer, by the motion for a directed verdict in favor of plaintiff, and by an instruction to the jury requested by plaintiff to the effect that Suetter was not liable as surety upon the bond which was refused.

[3] Objection is made by plaintiff that the Cornwall bond does not undertake to repay E. E. Cummins for any overpayments to Cornwall; that it is not an indemnity bond. The contract and bond plainly provide that Cornwall would perform the work of construction within a certain time, and that if he failed to do so the obligation should remain in full force and effect. *Ausplund v. Aetna Indemnity Co.*, 47 Or. 10, 81 Pac. 577, 82 Pac. 12. According to the testimony Suetter well understood the nature of his obligation as surety, and he is bound by the instrument. The jury so found. It is unnecessary to discuss the conflicting testimony. That matter is settled by the verdict. Any payments made by Cummins for labor and blacksmithing, pursuant to the Cornwall contract, were legitimate expenses in the construction of the highway for which Cornwall and his surety were responsible. The claim that Cornwall should receive the benefit of all of the contract price of the work in excess of the cost, if there were such an excess, without being liable for any excess of cost over the contract price, is not tenable. We do not so read the plain letter of the contract and bond.

[4] When Cornwall failed to carry out his contract, and abandoned the work about September 6, 1919, Cummins notified Suetter of the fact, and Suetter said that he would have to take over the contract and complete the work. Thereupon Suetter obtained an assignment of the contract from Cornwall, and assumed the indebtedness incurred by Cornwall in thus far prosecuting the work.

Where a contractor assigns the contract to one of his sureties with the consent of the obligee, the assignee assumes the character and responsibilities of the principal. 32 Cyc. 38; 5 C. J. p. 874, § 44; *Ausplund v. Aetna Indemnity Co.*, 47 Or. 10, 81 Pac. 577, 82 Pac. 12; *Gray v. McDonald*, 19 Wis. 213. Such surety, upon the default of the principal and with the consent of the creditor obligee, may complete the contract, and in such case he will be subrogated to all the rights of the principal, as well as subjected to the liabilities of the principal under the contract. 32 Cyc. 233; *Derby v. U. S. Fidelity & Guaranty Co.*, 87 Or. 34, 169 Pac. 500; *Am. Bonding Co. v. Regents, University*, 11 Idaho, 163, 81 Pac. 604; *Rohde v. Biggs*, 108 Mich. 446, 66 N. W. 331; *First Nat. Bank v. School Dist.*, 77 Neb. 570, 110 N. W. 349. It was therefore appropriate for Suetter to take an assignment of the contract.

In *Ausplund v. Aetna Indemnity Co.*, 47 Or. 10, 81 Pac. 577, Mr. Justice Moore said:

"If such private surety, however, becomes subrogated to the rights of his principal in the undertaking, to which he is a party, because of the latter's failure to keep his agreement, he ought to be subjected to all the liabilities assumed by his principal, regardless of the original contractual relation. In other words, a corporation becoming a surety may, like a private surety, by permitting its principal to make such default as he pleases, insist upon its strict legal right, and in an action to enforce its liability legally interpose any defense that a private surety may invoke under the same circumstances. But when a surety, either corporate or individual, in pursuance of the terms of an undertaking, 'assumes' the performance of the principal's contract, such surety, by being subrogated to the rights of the principal thereunder, must necessarily become subject to all his liabilities."

[5] At the time of the assignment the matter was complicated by the following arrangement. Cornwall had obtained a contract from the county of Yamhill to grade the gateways approaching to the highway, and keep them even with the grade of the highway as constructed. The work for the county amounted to \$225. This work was not included in the Cummins-Cornwall contract. It had been done at the same time as the work of construction of the highway and by the same men and teams, and it was impossible to segregate the labor on the county work from that upon the highway. Cornwall refused to make the assignment unless he was paid for the county work. Suetter assented to this, and directed Cummins to pay Cornwall for the county work, which he paid at that time. Suetter now claims that a portion of the work charged to Cornwall and his surety was not included in the Cornwall-Cummins contract. This matter of extra work which was done for the benefit of Cornwall, and which Suetter was then in a position to obtain the benefit of by requiring the \$225 to be paid to him, having been adjusted and settled by an agreement between the parties and paid for according to the direction of Suetter, is, as we view it, no longer an element in this case. The consent of Suetter the surety, healed any departure from the strict letter of the contract in this respect.

[6, 7] It is claimed by plaintiff that Cummins did not perform his contract in the matter of payments to Cornwall, and on this account Cornwall was unable to continue the work. Objection was also made by plaintiff to the testimony of E. E. Cummins as a witness for defendants, for the reason that, in testifying in order to refresh his memory, he referred to an itemized statement or schedule, prepared by him and furnished to plaintiff, of the several amounts paid for Cornwall during the time he was at work under the contract, of the amounts paid for Suetter while he was carrying on the work after he took charge thereof pursuant to the assign-

ment, and of the items of expenditure made by Cummins toward the completion of the work after Suetter abandoned the work. The statement was prepared from the time book, check book, and bills and memorandums of labor, materials, and expenses such as are usually kept in the performance of such work.

Mr. Cummins testified in part to the purport that while Cornwall was at work he was there every few days and kept a memorandum of how many men were working every day. Cornwall gave him "the time every two weeks from his time book," and he "checked it up." During the first part of the work Cummins and Cornwall would compare the amount of labor, and Cummins would give Cornwall a check for the amount. Later Cummins issued checks direct to the laborers and kept an account of the payments for labor and materials. Over the objection and exception of counsel for plaintiff, Cummins was permitted to refresh his memory from the itemized statement, and to give the total amounts so paid out as follows:

Paid for Cornwall for labor and board of men and blacksmith bills and materials up to September 6, 1919.....	\$5,821.75
Paid for Suetter from the time he took contract from Cornwall until he quit work for the same purposes.....	\$1,201.95
Expended toward the completion of the contract work to January 29, 1920.....	\$5,248.92

The statement furnished to plaintiff contains the names of various persons to whom the several amounts were paid and the amount paid to each. Cummins testified plainly that the various amounts were paid for the construction of the highway embraced in the Cummins-Cornwall contract. The proof does not depend upon the itemized account or schedule as primary evidence, but upon the sworn testimony of the witness. Our attention is not directed to any evidence of double payments, or any prejudice to the rights of the surety by reason of the manner in which Cummins conducted the business; and we find none. Some of the payments for labor and materials for the construction while Cornwall was on the job were paid by Cummins after Cornwall assigned the contract to Suetter. It does not appear that Suetter was in any way injured by reason of this. The testimony indicates, and the jury was warranted in finding, that all of the payments made by Cummins on account of Cornwall were applied for labor, blacksmith bills, and materials for the construction of the highway, in accordance with the terms of the sub-contract and bond.

It was proper for the witness to refresh his memory from a memorandum or summary prepared under his direction and supervision. *Bartels v. McCullough*, 201 Pac. 733, decided November 15, 1921. In view of the many items of account in the case and the manner in which memorandums or records of the

transactions pertaining to the highway improvement were as usual kept, it was necessary and proper for the defendants to introduce in evidence, for reference by the jury, a summary of the items of expenditure, a duplicate of which was furnished plaintiff by defendants prior to the trial. It was the only possible way in which the figures could be given to the jury, so that the jury would understand the same. For a precedent in the use of schedules and summaries of details pertaining to construction work of the nature involved in the present case, see the opinion and record in the case of *Sweeney v. Jackson County*, 93 Or. 96, 178 Pac. 365, 182 Pac. 380. We do not recall that such procedure was challenged by counsel in that case.

[8, 9] Suetter complains because Cummins did not pay Cornwall the 85 per cent. of the monthly estimates of the work made by the district engineer. It is disclosed by the evidence that on August 16, 1919, such an estimate was made, and it appears therefrom that, in addition to the amounts already paid by Cummins for labor as per the contract, 85 per cent of the estimate of work done by Cornwall would include a balance of \$170. It was necessary to forward such estimate to the state highway engineer at Salem for approval. Before the estimate was approved and returned about September 1st, Cummins had advanced to Cornwall in payment for labor, as required by the subcontract, money in excess of the amount then due. Therefore Cummins was not in default in this respect, and Suetter has no cause for complaint in this regard. Suetter also contends that Cummins overpaid Cornwall in violation of the rights of the surety. The testimony purported that the overpayments made by Cummins were for labor and blacksmithing, which by the plain letter of the contract Cummins was required to make as an advancement to Cornwall to enable him to carry on the contract work. There was no violation of the contract or bond in this respect.

The facts in this case, owing to the provisions of Cornwall's contract, differ from those in the case of *Dobbins v. Higgins*, 78 Ill. 440, and in similar cases cited by plaintiff. In the Illinois case the obligee withheld money with which to pay certain labor claims and claims for material, instead of paying the contractor as required by the contract bond. In the present case the testimony tended to show, and the jury evidently found, that Cummins performed his part of the contract. In short, the testimony tended to sustain the allegations of the answer and to support the verdict.

[10] Plaintiff assigns error in the court permitting E. E. Cummins to testify over plaintiff's objection relative to his damages sustained by reason of the delay of Cornwall and Suetter to carry out the contract and complete the work within the time specified.

It is in evidence that the rainy season in that locality commenced soon after Suetter abandoned the work, and on account of the work not being then completed additional expense was caused Cummins in obtaining and hauling gravel for a certain fill covered by the Cornwall contract. It is common knowledge that it is more difficult to transport such material after the fall rains begin in that county, and this was evidently one of the reasons for the stipulation in the contract that Cornwall should perform the work on or before a specified time. We think such damages are such as would naturally arise from a breach of the contract. The circumstances were fairly within the contemplation of the parties at the time of the execution of the contract and bond. The objection is not well taken.

The damages recoverable for a breach of contract are such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as a probable result of a breach of it. *Blagen v. Thompson*, 23 Or. 239, 31 Pac. 647, 18 L. R. A. 315, 8 R. C. L. 455.

In addition to general damages, the injured party is entitled to recover special damages which arise from circumstances peculiar to the particular case, where those circumstances were communicated to or known by the other party at the time the contract was made. *Blagen v. Thompson*, supra.

[11] Plaintiff objected and excepted to the testimony of defendant E. E. Cummins relative to the contents of the alleged assignment between Cornwall and Suetter. It appears from the testimony that the memorandum of the assignment was not available, and the contents thereof were testified to by E. E. Cummins and the attorney who represented Suetter and the attorney who represented Cornwall at the time the same was written. There was no error in admitting such testimony.

[12] Counsel for plaintiff contend that the measure of the defendants' damages was not what E. E. Cummins may have paid toward the completion of the contract work, but was the reasonable cost and expense of procuring the labor to be done, and purchasing the necessary materials in order to make the work conform with the provisions of the contract; citing *Seaside v. Randles*, 92 Or. 650, 180 Pac. 319. Counsel for defendants say that this rule is correct. This raises a question of fact. E. E. Cummins, after detailing the several payments made by him for work and material upon the highway contracted to Cornwall, testified as follows:

"Q. . . . I will ask you how you paid, whether you paid the contract and ordinary price of labor, or whether you paid more than the workmen asked; how did you pay in that respect? A. I paid the rate—the prevailing price for wages. What I could secure men for.

"Q. In reference to materials, state whether you paid the market price or a price in excess to the market price. A. I paid the market price."

"Q. On all these materials? A. All these materials."

The jury had a right to believe the testimony of Cummins. The testimony in the case does not warrant the objection made by plaintiff.

[13] Plaintiff assigns that the court erred in refusing to instruct the jury as requested by plaintiff to the effect that the liability of the surety is only commensurate with the liability of the principal.

In the case at bar it appears Suetter, the surety by virtue of a contract executed by him with Cornwall in consideration of the benefits of the subcontract accruing to Cornwall at the date of the assignment, stepped into Cornwall's shoes, so to speak, and for all practical purposes became the principal in the contract, with the assent of Cummins. Suetter placed a foreman in charge of the work on the highway and proceeded to carry out the contract. He is not in a position to assert that the contract of assignment with Cornwall has been annulled. The requested instruction, under the facts in this case, would only tend to confuse the jury, and was properly refused.

[14] Suetter furnished horses which performed labor on the work, and by a requested instruction claims that he is entitled to be paid for such labor. As heretofore pointed out, Suetter being responsible as surety upon the bond and as the assignee of Cornwall for the completion of the work as per the contract, it would be idle to allow him to be paid as a laborer, and then require Cummins to collect the same amount back from Suetter as such surety and assignee. The instruction was properly refused.

Exceptions were saved to instructions of the court to the jury as to the measure of damages. The court fully explained the issues and charged the jury in plain language, in accordance with the law as above stated, and which in substance is contained in plaintiff's brief. The case was fairly submitted to the jury. We have carefully examined all of the instructions to the jury, and find no error therein. It appears that Mr. Suetter, unfortunately for him, signed Cornwall's bond. There is some conflict in the testimony in regard to the conditions of the assignment. This controversy was thoroughly presented to the jury by the court's charge, and determined by the verdict.

We find no error in the record. The judgment of the trial court is affirmed.

McBRIDE, HARRIS, and BROWN, JJ., concur.

ALLEN, County Assessor, v. CRAIG.

(Supreme Court of Oregon. Nov. 29, 1921.)

1. Taxation ~~§~~838—Statutory penalty for refusal to list property, if paid before suit, is payable to the assessor.

Under Or. L. § 4273, providing a penalty for the refusal of a property owner to give an assessor a list of his property, with its value, if the owner pays the penalty for such refusal before suit is brought, it should be paid to the assessor for use of the county.

2. Penalties ~~§~~9—Informers, suing in his own name for penalties, must be authorized by statute or by necessary implication.

In order to prosecute an action for a penalty in his own name, an informer must be authorized to do so by statute or by necessary implication.

3. Penalties ~~§~~9—Express statutory provision that a county shall prosecute all actions for penalties applies though part goes to an informer.

Where there is a general statute providing that all actions for penalties may be prosecuted by the county, and also a statute providing that a portion of the penalty shall go to an informer, the action must be prosecuted in the name of the county.

4. Taxation ~~§~~845—Assessor cannot maintain action in his own name for benefit of county, unless authorized by statute.

In an action to recover a statutory penalty for failure to give an assessment list of property, as required by Or. L. § 4273, an assessor cannot maintain the action in his own name, unless he is authorized by statute.

5. Taxation ~~§~~845—Statutes do not permit assessor to sue for penalty in his own name, for the benefit of the county, on refusal to list property.

Although Or. L. § 4273, provides that a person refusing to give an assessor a list of his property shall forfeit and pay to the assessor, for the benefit of county, a penalty which may be recovered by legal action, the assessor is not the proper party to prosecute the action.

6. Taxation ~~§~~845—In suit to collect penalties for failure to list taxable property, the county is the real party in interest and should sue.

In an action under Or. L. § 4273, to collect a penalty for refusal to give a list of taxable property to an assessor, the county is the real party in interest, and under section 27, providing that every action shall be prosecuted in the name of the real party in interest, a suit to collect the penalty should be in the name of the county.

7. Taxation ~~§~~845—In suit for penalty for benefit of county, assessor is not trustee of an express trust, so as to sue in his own name.

In a suit under Or. L. § 4273, for refusal to give the assessor a list of taxable property, the

assessor is not a trustee of an express trust, so as to authorize him to bring suit in his own name, under the provision of section 29.

8. Taxation \Leftrightarrow 845—Provision that suit to collect penalty may be in name of county precludes assessor from suing in his own name.

In an action under Or. L. § 4273, to collect a penalty for failure to give a tax assessor a list of taxable property, the express provision of section 857 that a county may sue in its corporate name to recover a penalty precludes the assessor from suing to collect penalty in his own name for the benefit of the county.

9. Taxation \Leftrightarrow 845—Complaint by assessor in action in own name to collect penalty for benefit of county held not to state cause of action.

The right to maintain an action under Or. L. § 4273, to recover a penalty for failure to give a tax assessor a list of taxable property, is not in the assessor, and a complaint in a suit by the assessor fails to state a cause of action.

10. Counties \Leftrightarrow 217—County court can discontinue suit by an assessor for benefit of county.

Under Or. L. § 937, subd. 9, giving a county court the general care and management of the county property, funds, and business, and section 938, giving it the power to control all actions, suits, or proceedings by the county, the determination of a county court to end a suit in the name of an assessor for the benefit of the county to collect a penalty, under section 4273, for failure to give a list of taxable property, is, in the absence of fraud, binding on the assessor.

11. Taxation \Leftrightarrow 490—Determination of board of equalization that a verified list and statement of taxable property was correct binding on the assessor.

Under Or. L. § 4273, providing a penalty for refusal to give the assessor a list of taxable property, the determination of the board of equalization that a verified list and statement submitted to the assessor and refused by him was a true and correct list and statement of the value of the property was a judicial decision, binding on the assessor.

In Banc.

Appeal from Circuit Court, Wallowa County; J. W. Knowles, Judge.

Action by C. H. Allen, County Assessor, against George S. Craig. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

In this action, begun on July 30, 1919, C. H. Allen, the county assessor of Wallowa county, is attempting as plaintiff to recover for the use of the county the sum of \$100, which it is averred Craig must pay as a penalty for his alleged refusal to furnish a statement of the items and value of his taxable property as required by section 4273, Or. L. The complaint recites that Allen is the assessor, and as such "institutes and car-

ries on this action" for the use of the county, and declares that Craig is a resident and inhabitant of the county, possessing real and personal property subject to taxation; and it is then alleged that on June 9, 1919, the defendant refused to furnish to the plaintiff a list of all real and personal property in the county owned by the defendant on March 1, 1919, together with a statement of the values of such property, and that because of such refusal the defendant is indebted to the plaintiff for the use of the county in the sum of \$100.

The defendant demurred to the complaint upon three grounds: (1) That the complaint does not state sufficient facts to constitute a cause of action in favor of plaintiff; (2) that the plaintiff does not have legal capacity to sue; and (3) that the court is without jurisdiction of the subject of the action, or of the person of the defendant. After the court overruled the demurrer to the complaint, and on November 17, 1919, the defendant filed a motion for the dismissal of the cause upon the ground that on November 6, 1919, the county court made an order directing the dismissal and discontinuance of the action. The motion to dismiss was denied, and subsequently on February 24, 1920, the defendant filed an answer.

In addition to admissions and denials the answer contains two further and separate defenses. In the first separate defense the defendant avers that on June 10, 1919, he offered and tendered to the plaintiff a duly verified list of all the real and personal property owned and possessed by him on March 1, 1919, liable to assessment and taxation in Wallowa county, together with a statement of the values of the several items of property amounting to \$2,000; that the plaintiff refused to receive or accept the list as prepared by the defendant, and that thereupon the plaintiff himself proceeded to and did make out a statement purporting to contain a list of defendant's property; that the statement so prepared by the plaintiff "wrongfully listed and assessed to defendant money, notes, and accounts to the amount of \$25,000 for the purpose of taxation," when in truth the defendant's property subject to assessment and taxation in the county did not exceed \$2,000 in value; that afterwards, on September 29, 1919, and upon the petition of the defendant, the county board of equalization, after investigation and consideration, adjudged:

"That the purported list of defendant's taxable property as made out and prepared by plaintiff be rejected and set aside, and that the verified list of such taxable property as prepared by defendant and by him previously tendered to plaintiff be and was thereby received and accepted by said board of equalization as a true statement and list of defendant's taxable property within said county for the year 1919.

and whereby defendant's assessment for said year was duly equalized and reduced to the extent of the difference between said lists, to wit, the sum of" \$23,000.

In the second separate defense it is averred that on November 6, 1919, the county court, while sitting for the transaction of county business, entered an order reciting the fact of the equalization of the assessment, and declaring "that there is not sufficient evidence to justify the further prosecution" of the action, and ordering:

"That said action should be dismissed, and that this county will not be a party any further, either as beneficial plaintiff or otherwise, to the prosecution of said action."

In his reply the plaintiff admits that he—"assessed the defendant's notes and accounts for the year 1919, at \$25,000 for the purpose of taxation on the 9th day of June, 1919, and that the board of equalization for the county of Wallowa, state of Oregon, did on the 29th day of September, 1919, upon defendant's application, reject said assessment and place the defendant's notes and accounts for the purpose of taxation in said year at the value of \$2,000."

The plaintiff further admits in his reply that the county court of Wallowa county, Or., on the 6th day of November, 1919, made an order directing that the plaintiff dismiss the action. The defendant moved for a judgment on the pleadings, but this motion was denied. At the hearing counsel for the defendant informed us that there was a trial by jury. Although the record presented to us does not show whether the trial was with or without a jury, the record does disclose that the action terminated in the circuit court in a judgment in favor of the plaintiff for \$100, with costs and disbursements. The defendant appealed.

D. W. Sheahan, of Enterprise, for appellant.

A. Fairchild, of Enterprise, for respondent.

HARRIS, J. (after stating the facts as above). The defendant contends: (1) That the right to maintain this action is in the county and not in the assessor; (2) that, even though it be assumed that the assessor is entitled to begin and prosecute this action in his own name, he is only a nominal party, while the county is the real party in interest; and that consequently the county is entitled to exercise control over the litigation and can cause the action to be dismissed.

[1] Section 4273, Or. L., commands every assessor to require any person liable to be taxed in his county and to be assessed by him to furnish to such assessor a list of all the real and personal property owned by such person liable to taxation in such county together with a statement of the value of such

real and personal property. The assessor is also commanded to require the property owner—

"to make oath that, to the best of his knowledge and belief, such list, * * * contains a full and true account of all the real or personal property, or both, * * * to be taxed in said county, and the true cash value of such real or personal property."

The statute further provides that if the property owner refuses—

"to furnish such list of real or personal property with the true cash value or values thereof, or to swear to the same when required so to do by the assessor, such person * * * shall forfeit and pay to the assessor, for the use of the county, the sum of \$100, which sum may be recovered by action in any court having jurisdiction of matters of debt or contract to the amount of \$100. Should any such person, * * * when so required, refuse to furnish and to swear to any such list, the assessor shall ascertain the taxable property of such person, * * * and shall appraise the same from the best information to be derived from other sources. Upon the failure of any such person * * * to make such valuation or valuations, the assessor shall be deemed to be the authorized agent of such person, * * * for the purpose of making said valuation or valuations, and the same, as given in the assessment roll, shall have the same force and effect as if made under oath by said person. * * * The assessor may increase any valuation made by any such person * * * for purposes of assessment and taxation."

Does section 4273, Or. L., enable the assessor to begin and prosecute an action in his own name? It is clear that if a recalcitrant property owner pays the penalty before action is begun, he pays to the assessor; for the statute in express terms prescribes that the property owner "shall forfeit and pay to the assessor, for the use of the county." It is also clear that, if the recalcitrant owner refuses to pay the penalty, he can by an action be compelled to pay, for in express terms the statute declares that the penalty "may be recovered by action"; but this statute does not expressly state who can maintain such action. It is not in terms declared that the assessor can maintain an action; and therefore, if the assessor can prosecute the action in his own name, his authority to do so is an implied and not an express authority.

[2] We may appropriately direct attention to the rule prevailing at common law concerning the recovery of penalties. At common law actions to recover penalties were often prosecuted by "common informers." In order to prosecute the action in his own name, the informer must be authorized so to do either (a) expressly by statute; or (b) by necessary implication; and it has been frequently held that where a statute gives a portion of the penalty to an informer such

statute by necessary implication authorizes the informer to begin and maintain an action in his own name. However, the statement that authority may be implied from the fact that a portion of the penalty, when recovered, goes to the informer, has been many times, although not always, held subject to the qualification that, if there be a general statute providing that all actions to recover penalties may be brought in the name of the county or state, the informer has no right to prosecute the action.

[3, 4] It is usually held that, where there is a general statute providing that all actions for penalties may be prosecuted by the county, and there is also a statute providing that a portion of a penalty shall in a given class of cases go to an informer, the express language of the former statute will prevail over any mere implication which might be suggested by the latter statute. *Williams v. Wells Fargo, etc., Express*, 177 Fed. 352, 101 U. C. A. 328, 35 L. R. A. (N. S.) 1034, 21 Ann. Cas. 699; 21 R. C. L. 213; 21 Standard Ency. of Proc. 274-276. It must not be understood that we are treating the plaintiff as one who under the common law is known as "a common informer," for our only purpose is to call attention to the rules which should be applied, if it be assumed that the plaintiff occupies the position of an informer or a position analogous to that of an informer. See 12 O. J. 156. In the instant case the plaintiff is attempting to recover by virtue of his office; but even then he cannot maintain an action in his own name for the recovery of any penalty accruing to the county, unless he is authorized by statute. 16 Ency. of Pl. & Pr. 259.

[5] If section 4273, Or. L., stood alone, and it were the only statute to be considered, it might be held that this statute by necessary implication authorizes the assessor to begin and maintain an action in his own name; but section 4273, Or. L., does not stand alone, and it is our view that, when this section is considered in connection with other statutes to which attention will be directed, the assessor is not the proper party to prosecute the action authorized by section 4273.

[6, 7] The whole of the penalty goes to the county, and none of it goes to the assessor; and hence the county and not the assessor, is the real party in interest. Section 27, Or. L., provides that—

"Every action shall be prosecuted in the name of the real party in interest, except as otherwise provided in section 29."

Upon turning to section 29, Or. L., we find that it reads thus:

"An executor or administrator, or trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted."

The assessor is not an executor or administrator. Although it may be assumed that the assessor occupies the position of a trustee of an express trust, if the penalty is actually paid to him without action, nevertheless it would require an undue expansion of the meaning of the language employed in section 29, when considered in connection with other sections of the Code, to say that the assessor is before payment the trustee of an express trust; and hence, unless the assessor is expressly authorized by statute, the action must be prosecuted in the name of the county, or in the name of some other officer, who is expressly authorized by statute, because the county is the real party in interest. *Malheur County v. Carter*, 52 Or. 616, 619, 98 Pac. 489. See *Hannah v. Wells*, 4 Or. 249; section 1019, Or. L. We do not attempt to decide whether the district attorney is authorized to sue, for it is sufficient here to say that neither section 4273, Or. L., nor any other statute, expressly authorizes the assessor to prosecute the action in his own name; and consequently, if no statutes are considered, except sections 27, 29, and 4273, Or. L., the plaintiff must fail. But there are additional reasons for holding that the plaintiff cannot recover.

[8, 9] It is provided by section 357, Or. L., that—

"An action at law may be maintained by any county * * * in its corporate name * * * to recover a penalty or forfeiture given to such public corporation."

Confronted as we are with this statute, expressly authorizing the county to sue for a penalty accruing to it, is it not manifest that the Legislature did not intend, by a mere implication to be extracted from section 4273, to confer upon the assessor the right to sue when that same right was and is expressly given to the county? If the Legislature had intended to authorize the assessor to sue, such intention could have been easily and plainly expressed. The right to maintain an action to recover the penalty prescribed by section 4273 is not in the assessor, but in another, and consequently the complaint fails to state a cause of action, and the judgment must be reversed. *Crowder v. Yovovich*, 84 Or. 41, 48, 164 Pac. 576; 31 Cyc. 296; 21 R. C. L. 526.

[10] If, however, it be assumed for the purpose of further discussion that the assessor is authorized to sue for the penalty, nevertheless it was his duty to dismiss the action, when directed to do so by the county court. By force of section 937, subd. 9, Or. L., the county court is given "the general care and management of the county property, funds and business, where the law does not otherwise expressly provide"; and in section 938, Or. L., it is declared:

"All actions, suits, or proceedings by or against a county are in the name of such coun-

ty, but the county is represented by the county court, and such court has authority and power to control and direct the proceeding therein, as if it were plaintiff or defendant, as the case may be."

The county court was entitled to control the prosecution of the action, and as between the plaintiff and the county court the latter was, at least in the absence of fraud, supreme, and the assessor ought to have discontinued the action. *Kerby v. Clay County*, 71 Kan. 683, 81 Pac. 503; *Kingfisher County v. Graham*, 40 Okl. 571, 139 Pac. 1149.

[11] Moreover, the adjudication made by the board of equalization on September 29, 1919, was a judicial decision that the verified list and statement which Craig submitted to the assessor and the latter refused to accept was a true and correct list of Craig's property and a true and correct statement of the value of such property. *Steel v. Fell*, 29 Or. 272, 45 Pac. 794; *Oregon & Cal. R. Co. v. Jackson County*, 38 Or. 589, 602, 64 Pac. 307, 65 Pac. 369. The judgment rendered by the board of equalization has not been reviewed, nor revised, nor modified; but, upon the contrary, at the time of the trial in the circuit court, the judgment of the board of equalization stood as a finality and as such was, at least in the absence of fraud, binding upon the assessor, even though it be assumed that the assessor can in his own name prosecute an action for the recovery of the penalty.

The judgment is reversed, and the cause is remanded, with directions to enter a judgment in favor of defendant for his costs and disbursements.

STATE v. WESTON.

(Supreme Court of Oregon. Nov. 22, 1921.)

1. Indictment and information §81(1)—Both Christian name and surname of accused should be stated.

Generally, an indictment should state both the Christian name and the surname of the accused.

2. Indictment and information §81(4)—Use of defendant's initials, instead of full Christian name, held not fatal.

Use of initials, instead of full Christian name of defendant, held not fatal to indictment under Cr. Code (Or. L. tit. 18, c. 7), where defendant stated on arraignment that the name under which he was indicted was his true name.

3. Homicide §135(2)—Indictment, charging that defendant killed deceased by means to grand jury unknown, held sufficient.

Indictment, charging that defendant killed deceased by means to the grand jurors un-

known, held sufficient under Or. L. § 1439; the indictment following form No. 1, p. 1346.

4. Homicide §135(1, 2)—Indictment should allege manner of killing deceased, where shown by evidence before grand jury.

Indictment charging murder should allege manner by which deceased was killed where shown by the evidence before the grand jury, but an allegation that defendant committed the crime by some means and manner to the grand jury unknown, or by some means, instruments, and weapons to the jurors unknown, is sufficient when the circumstances of the case will not admit of greater certainty.

5. Homicide §131—Allegation that deceased was a human being unnecessary.

It is not necessary for indictment charging murder to aver that the person killed was a human being.

6. Criminal law §406(1), 516—Distinction between an "admission" and a "confession" stated.

There is a distinction between admissions and declarations admissible under Or. L. § 727, subd. 1, and confessions within section 1537; admissions being statements by a party or some one identified with him in legal interest of the existence of a fact which is relevant to the cause of his adversary, and confessions being declarations and admissions whereby a person accused of crime acknowledges that he committed it, or that he is an accomplice therein.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Admission; Confession.]

7. Criminal law §406(6)—Testimony as to admissions by defendant held admissible to prove corpus delicti.

In murder prosecution testimony as to defendant's admissions that it would be necessary to get rid of the deceased, since deceased had caught defendant and others moonshining, held admissible as some proof of the corpus delicti, inasmuch as it tended to show the agency of the defendant.

8. Criminal law §680(1)—Order of proof regulated by sound discretion of court.

The order of proof is regulated by the sound discretion of the court.

9. Criminal law §680(2)—Corpus delicti need not be shown before connecting defendant with offense, where two matters are intimately connected.

Though it is the general practice in homicide cases to first establish the corpus delicti and then connect defendant with the killing, and though such practice should be adhered to where the questions of the corpus delicti are clearly separate from that of the defendant's guilt, the court may in its discretion admit testimony as to the corpus delicti and the defendant's guilt at the same time the two matters are so intimately connected that there can be no separation.

10. Criminal law §680(2)—Testimony as to acts and admissions of defendant admissible at any stage of proceeding where corpus delicti is dependent thereon.

Where the corpus delicti in homicide prosecution depends entirely for its existence upon the acts and the intent of the accused, such acts and admissions, if admissible at all, are admissible at any stage of the proceeding.

11. Homicide §228(1)—"Corpus delicti" defined.

The corpus delicti is the body of the offense or crime, and consists in homicide prosecution of the death and the existence of criminal agency as the cause thereof.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corpus delicti.]

12. Homicide §228(2)—Direct evidence not necessary to establish corpus delicti and defendant's guilt.

In a homicide prosecution, direct evidence is not required to prove either the corpus delicti or defendant's guilt, but circumstantial evidence, where relied upon, must be of the most cogent and convincing nature.

13. Criminal law §535(1)—Defendant's confession alone, without corroborating proof of corpus delicti, insufficient to support conviction.

Defendant's confession, taken alone and without corroborating proof of the corpus delicti, is not sufficient to support a conviction.

14. Criminal law §741(1), 742(1)—Jurors sole judges of credibility of witnesses and value of evidence.

Jurors are the sole judges of the credibility of witnesses and the effect or value of the evidence.

15. Homicide §228(1)—Corpus delicti held for jury.

In homicide prosecution evidence held sufficient to establish the corpus delicti.

16. Homicide §250—Evidence held to sustain conviction of murder.

In prosecution for murder, in which it was claimed that defendant killed deceased and burned his body and cabin in which he had resided to prevent deceased from informing authorities that defendant was engaged in moonshining, evidence held to sustain conviction.

17. Criminal law §814(3)—Instruction as to declaration accompanying the crime held erroneous, in absence of evidence as to any such declaration.

In prosecution for murder in which there was no testimony of any declaration accompanying the act of homicide or so closely connected therewith as to be deemed a part of res gestae, court erred in instructing jury as to such declarations.

18. Homicide §166(10)—Evidence as to note given deceased admissible when robbery was motive.

In prosecution for murder, testimony that witness had given deceased a certain note, and

that he had made interest payment thereon to deceased shortly before the homicide, held admissible, where defendant had possession of the note after the homicide, as possession of valuables by deceased may always be shown where the motive is robbery.

19. Homicide §174(5)—Testimony that defendant was seen in possession of note belonging to deceased shortly after homicide admissible.

In prosecution for murder, testimony that a few days after the homicide defendant was seen in possession of note belonging to deceased held admissible; defendant's unexplained possession being a valuable circumstance tending to establish guilt.

20. Homicide §171(2)—Testimony that witnesses saw fire in which deceased was burned to death held admissible.

In prosecution for murder, in which it was claimed that defendant had set fire to cabin in which deceased lived, in which fire deceased had been burned to death, testimony that witnesses saw fire in vicinity of deceased's cabin during the night of the homicide, and that they saw no other fires during such night, held admissible.

21. Homicide §169(1)—Testimony as to position of contents of cabin claimed to have been set on fire by defendant held admissible.

In prosecution for murder, in which it was claimed that deceased was burned to death in fire set by defendant after defendant had bound deceased, testimony as to contents of cabin and position thereof and as to door being unhung held admissible.

22. Homicide §169(6)—Testimony as to condition of building claimed to have been set on fire by defendant held admissible, though remote.

In prosecution for murder in which it was claimed that defendant set fire to deceased's cabin, and that deceased was burned to death therein, testimony as to condition of door of cabin at a time preceding the homicide held admissible; the objection of remoteness going to the weight, and not to the competency of the testimony.

23. Homicide §158(1)—Testimony as to threats made by defendant held admissible.

In prosecution for murder, testimony as to threats made by defendant held admissible to show his animus toward deceased and as circumstances affecting his guilt or innocence.

24. Homicide §231—Considerations affecting weight to be given testimony as to defendant's threats toward deceased.

Weight of evidence as to threats by defendant as showing animus and guilt is dependent on their character, the occasion, nearness in time, and the particular circumstances surrounding the offense.

25. Homicide §174(8)—Defendant's declaration that he did it in self-defense held admissible.

In prosecution for murder, in which defendant denied having killed deceased, testimony

as to defendant's declaration, made while in jail, that "I will show them I done it in self-defense," *held* admissible.

26. Criminal law §695(2)—Canceled check to deceased in payment of interest on note, found in defendant's possession after homicide, *held* admissible over general objection.

In prosecution for murder, in which there was testimony that defendant was in possession of deceased's note shortly after the homicide, canceled check from maker of note to deceased, showing payment of interest shortly before the homicide, but cashed three days after deceased's death, *held* admissible as against general objection.

27. Witnesses §370(1)—Defendant's cross-examination of state's principal witness as to declaration of witness showing hostility toward defendant proper.

In murder prosecution, refusal to permit defendant to cross-examine state's principal witness, who had been arrested for moonshining, as to whether he had stated to named person that defendant had "squealed on me, * * * and I will make him do time," *held* reversible error; such testimony being admissible to show that witness entertained hostile feelings against defendant.

28. Criminal law §323—Presumed to speak truth, but presumption may be overcome.

A witness is presumed to speak the truth, but this presumption may be overcome.

In Banc.

Appeal from Circuit Court, Deschutes County; T. E. J. Duffy, Judge.

A. J. Weston was convicted of murder, and he appeals. Reversed and remanded.

This is a criminal action prosecuted by the state of Oregon against the defendant, accused by the grand jury of the circuit court in and for Deschutes county, state of Oregon, of the crime of murder. The charging part of the indictment reads as follows:

"The said A. J. Weston, on the 24th day of March, A. D., 1919, in the said county of Deschutes and state of Oregon, then and there being, did then and there purposely, maliciously, and feloniously kill and murder one Robert H. Krug * * * by means unknown to the grand jury, contrary to the statutes in such cases made and provided."

This indictment was returned into court on November 8, 1920, about 20 months following the alleged homicide. The case coming on to be heard for the purpose of arraignment, the court informed the defendant that if he had not been indicted under his true name, he must now declare it or be proceeded against in the name under which he was indicted, whereupon defendant answered that A. J. Weston was his true name. After his arraignment the defendant demurred on the following grounds:

"That said indictment does not substantially conform to the requirements of chapter 7 of title 18 of the Code of Criminal Procedure of the state of Oregon.

"That more than one crime is charged, or attempted to be charged, by the said indictment.

"That said indictment does not state facts sufficient to constitute a crime against the laws of the state of Oregon."

This demurrer was overruled. Thereafter, the defendant entered a plea of not guilty, and upon trial was convicted of the crime of murder in the second degree, and sentenced by the court to be punished by imprisonment in the penitentiary during the life of the defendant. From that judgment he appeals to this court, assigning error, among other things, as follows:

In overruling the objection of the defendant to the indictment and permitting the state to offer any evidence under it.

In admitting, over objection, evidence as to defendant's confessions prior to the establishment of the corpus delicti.

In sustaining the objection of the state to the cross-examination of witness George Stilwell.

In permitting witness Wilson on redirect to give explanations as to why he had told certain parties of the alleged confession of the defendant.

In permitting witness W. S. Fullerton, over objection of defendant, to testify concerning a check marked "State's Exhibit," and in receiving in evidence said check.

In permitting witnesses George Stilwell and Joe Wilson to testify to a certain note alleged to have been in the possession of the defendant.

In permitting witnesses H. N. Cobb, Lige Sparks, W. E. T. Wilson, Glen Wilson, Charles Gist, George E. Aitken, Ellis Edgington, John Bruns, T. J. Sanders, E. N. Harrington, Bertha Wilson, Carl Wood, and other witnesses to give certain testimony.

In refusing to permit the defendant further to examine John Bruns as a witness.

In refusing to permit witness Nisewonger, the coroner, to testify as to the condition of the body of deceased at the time of the discovery of the remains.

In rejecting certain evidence and restricting cross-examination.

In refusing to strike certain testimony.

In refusing to grant a motion of defendant to instruct the jury to return a verdict of not guilty.

In giving certain instructions, and in refusing certain other instructions.

Allan R. Joy, of Portland, and N. G. Wallace, of Prineville (E. O. Stadter, of Bend, on the brief), for appellant.

W. P. Myers and H. H. De Armond, both of Bend, (R. S. Hamilton, of Bend, on the brief), for the State.

BROWN, J. (after stating the facts as above). The deceased, Robert H. Krug, met

his death on the evening of March 24, 1919. He was a bachelor, 65 years of age, and resided alone in his cabin situate about 5 miles north of the village of Sisters in Deschutes county, Ore. His nearest neighbor was Joe Wilson, who owned, operated, and resided at a sawmill located about three-quarters of a mile southwesterly from Krug's cabin. Living at the mill and employed by Wilson were the defendant and George Stilwell. Wilson and Stilwell were the state's chief witnesses on the trial of this case.

About 7:45 o'clock on the evening of March 24, 1919, flames of fire arose in the vicinity of the Krug cabin. Owing to the season of the year, the fire attracted notice from a number of witnesses residing as far distant as the little town of Sisters. However, no person made any investigation at that time. On that night, Wilson was away from his mill, but the defendant and George Stilwell were there. Between 10 and 11 o'clock in the forenoon of the following day, defendant telephoned Mrs. H. N. Cobb, in charge of the telephone exchange at Sisters, and said to her that he started from the mill to Krug's cabin that morning after eggs; that when he got in sight of the place he saw a smouldering fire; and that on closer investigation he was positive the body was in the flames. He further stated that:

"I set my bucket down at the gate and came over to the Tones place here to notify the sheriff."

In response to defendant's request, Mrs. Cobb called the sheriff of Deschutes county by telephone, and advised him of the burning of the cabin, and that there was some one burned up in it. The sheriff immediately notified the district attorney and the coroner, and the three went to the scene of the fire. When the sheriff arrived at the Krug place, H. N. Cobb was in charge of the premises, and a number of others, including the defendant, were present. A coroner's jury was impaneled, an inquest held, the body identified as that of Krug, and, so far as the record before us shows, no offense was charged. Before the coroner's jury had left the premises Joe Wilson arrived; George Stilwell already being present.

At the conclusion of the inquest, Wilson, Stilwell, and defendant Weston returned to the mill. A few weeks later George Stilwell left the mill and went to Portland, where he has since resided. Weston continued to work for Wilson from time to time until well along in the autumn of 1919, when Wilson's mill was destroyed by fire. Wilson stated that the burning of the mill ruined his future chances of making whisky where he was working, and that he then got another outfit and went to Crook county, where he manu-

factured whisky until he was arrested in February, 1920, taken to Portland, and incarcerated in jail.

After the destruction of the mill, Weston resided on his place situate about 3½ miles east of Sisters and about 5 miles south and east of the Wilson sawmill. He was arrested in the latter part of September, 1920, and incarcerated in the county jail at Bend, Deschutes county, charged with the killing of Krug.

The theory of the prosecution was that the defendant, A. J. Weston, Joe Wilson, and George Stilwell were engaged in operating a still in the manufacture of whisky at the sawmill owned by Wilson; that Krug had obtained knowledge of the same; that Weston knew that Krug realized what defendant and his accomplices in crime were doing, and, believing there was danger of Krug's making a complaint to the officers, killed him.

From the time of the death of Krug until about the time of defendant's arrest, Joe Wilson and George Stilwell, the state's leading witnesses, kept their knowledge of the homicide from the officers. If their story is true, the killing of old man Krug constitutes an atrocious homicide.

The defendant challenges the sufficiency of the indictment: First, in that it does not substantially conform to the requirements of chapter 7, title 18 of the Criminal Code; second, that the act or commission charged as a crime is not set forth in concise language; further, that the act charged as a crime is not stated with such a degree of certainty as to enable the defendant to make a defense.

[1, 2] It is a general rule that in an indictment both the Christian name and the surname of the accused should be stated. Joyce on Indictments, § 213; 22 Cyc. 322. The authorities tell us that the common-law rule was that the use of initials instead of the full Christian name of defendant was insufficient, unless the accused had no other name. Our statute provides for the correction of the misnomer upon arraignment. The record in this case shows that upon his arraignment the defendant answered that his true name was A. J. Weston.

[3-5] The indictment charges that the defendant killed deceased by means to the grand jury unknown. The form of indictment follows form No. 1, p. 1346, Or. L. That form is a part of the Code of this state.

"The manner of stating the act constituting the crime, as set forth in the appendix in this Code, is sufficient, in all cases where the forms there given are applicable. * * * Section 1439, Or. L.; State v. Dodson, 4 Or. 64; State v. Spencer, 6 Or. 152; State v. Brown, 7 Or. 186; State v. Lee Yan Yan, 10 Or. 365; State v. Farnam, 82 Or. 211, 234, 161 Pac. 417, Ann. Cas. 1918A, 318.

The indictment contains every allegation set forth in form No. 1 of the appendix. This court has held in a large number of cases that when an indictment contains every allegation mentioned in the form given in the appendix to the Criminal Code for the crime charged it is sufficient under the provisions of the statute. *State v. Ah Lee*, 18 Or. 540, 23 Pac. 424; *State v. McAllister*, 67 Or. 482, 136 Pac. 354; *State v. Hosmer*, 72 Or. 57, 142 Pac. 581; *State v. Morris*, 83 Or. 420, 434, 163 Pac. 567. However, in every case where the evidence before the grand jury establishes the manner of slaying the deceased, the indictment should so allege. It is not necessary for the indictment to aver that the person killed was a human being. 1 *Michie*, Homicide, § 131; *People v. McNulty*, 93 Cal. 427, 26 Pac. 597, 29 Pac. 61; *Cremar v. People*, 30 Colo. 363, 70 Pac. 415; *Sutherland v. State*, 121 Ga. 591, 49 S. E. 781; *Kirkham v. People*, 170 Ill. 9, 48 N. E. 465; *Porter v. State*, 173 Ind. 694, 91 N. E. 340; *State v. Stanley*, 33 Iowa, 526; *People v. Gilbert*, 199 N. Y. 10, 92 N. E. 85, 20 Ann. Cas. 769; *Fooshee v. State*, 3 Okl. Cr. 666, 108 Pac. 554; *State v. Day*, 4 Wash. 104, 29 Pac. 984; *Bowers v. State*, 122 Wis. 163, 99 N. W. 447; *Ringo v. State*, 54 Tex. Cr. App. 561, 114 S. W. 119. An allegation in an indictment for homicide to the effect that the defendant committed the crime by some means and manner to the grand jury unknown, or by some means, instruments, and weapons to the jurors unknown, is sufficient when the circumstances of the case will not admit of greater certainty. *State v. Farnam*, supra; *Newell v. State*, 115 Ala. 54, 22 South. 572; *Houston v. State*, 50 Fla. 90, 39 South. 468; *Waggoner v. State*, 155 Ind. 341, 58 N. E. 190, 80 Am. St. Rep. 237; *Commonwealth v. Holmes*, 157 Mass. 233, 32 N. E. 6, 34 Am. St. Rep. 270; *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *State v. Brown*, 168 Mo. 449, 68 S. W. 568; *State v. Williams*, 52 N. C. 446, 78 Am. Dec. 248; *State v. Burke*, 54 N. H. 92; *Harris v. State*, 37 Tex. Cr. App. 441, 36 S. W. 88. The defendant in the instant case was not prejudiced by the inability of the grand jury to state the means by which the life of Krug was taken.

The defendant asserts that the court erred in admitting his alleged confessions as evidence in the trial of the cause before the corpus delicti was established. He also asserts that the ruling of the court was erroneous wherein the introduction of certain admissions, declarations, and acts of the defendant was permitted before proof of the corpus delicti, and that such declarations, admissions, and acts do not constitute competent proof of the corpus delicti. He vigorously contends that the state failed to prove the corpus delicti, and at the trial moved the court for an order directing the

jury to acquit the defendant by returning a verdict of not guilty. To avoid repetition of the evidence, we will discuss these contentions together.

[8] At the beginning, we observe that the defendant confuses the meaning of the words "admission" and "declaration" with that of the term "confession."

In the case of *State v. Stevenson*, 98 Or. 285, 193 Pac. 1032, the following definition of "confession" was approved:

"A 'confession' is a voluntary admission or declaration, made by a person who has committed a crime * * * to another, of the agency or participation which he had in it."

In *State v. Reinhart*, 26 Or. 477, 38 Pac. 825, this court said:

"A 'confession,' in a legal sense, is restricted to an acknowledgment of guilt, * * * and does not apply to a mere statement or declaration of an independent fact from which such guilt may be inferred."

To like effect are *State v. Rogoway*, 45 Or. 610, 81 Pac. 234, 2 Ann. Cas. 431; *State v. Brinkley*, 55 Or. 141, 104 Pac. 893, 105 Pac. 708, on motion for rehearing; also additional authorities therein cited.

Admissions, in the law of evidence, have been defined as concessions or voluntary acknowledgments made by a party of the existence of certain facts, and have been said to be direct or express, implied or indirect, or incidental. They are statements by a party or some one identified with him in legal interest, of the existence of a fact which is relevant to the cause of his adversary. 22 C. J. 296, 297.

"The words 'confession' and 'admission' are not synonymous, the latter relating to the acknowledgment of facts, and the former to the acknowledgment of guilt." *State v. Heidenreich*, 29 Or. 381, 45 Pac. 755.

Our Code provides as follow:

"Evidence of facts which may be given on the trial: (1) The precise facts in dispute; (2) the declaration, act, or omission of a party as evidence against such party." Or. L. § 727, subd. 1.

Section 1537, Or. L., relates to that class of declarations and admissions whereby a person accused of crime acknowledges that he committed it, or that he is an accomplice therein. Such a declaration is denominated a confession. Said section reads:

"A confession of a defendant, whether in the course of judicial proceedings or to a private person, cannot be given in evidence against him, when made under the influence of fear produced by threats; nor is a confession only sufficient to warrant his conviction, without some other proof that the crime has been committed."

It was held in *State v. Brinkley*, *supra*, that:

"Statements of extraneous facts by accused not involving guilt, even when his confession is inadmissible because not voluntary or for any other reason, may be received against him as evidence of such facts, and may be sufficient to prove the corpus delicti." Par. 8, Syllabus.

[7] The declarations and admissions made by the defendant and received in evidence over the defendant's objection are hereinafter set out. That evidence was competent, independent of the confession, and, if believed, afforded some proof of the corpus delicti, because it tended to show the criminal agency of the defendant. *State v. Rogoway*, *supra*; *State v. Brinkley*, *supra*.

[8-10] We will now turn to the contention that the alleged extrajudicial confession made by the defendant to Joe Wilson and George Stilwell was offered and admitted in evidence before proof of the corpus delicti had been made. In discussing this objection, it should be kept in mind that the order of proof is regulated by the sound discretion of the court; Or. L. § 853; *State v. Isenhardt*, 32 Or. 173, 52 Pac. 569; *State v. Remington*, 50 Or. 99, 91 Pac. 473. On the trial of homicide cases, it is the general practice first to establish the corpus delicti, which is done by proving the death and identifying the body as that of the person alleged to have been slain, and showing the criminal agency causing such death. The defendant may then be identified and the crime brought home to him, and the other essential elements of the crime proved. But as provided by our Code, the order of such proof is largely in the discretion of the trial court: *Elliott on Evidence*, § 3023; 7 R. C. L. p. 778. It was held by the court in *State v. Alcorn*, 7 Idaho, 599, 64 Pac. 1014, 97 Am. St. Rep. 252, that while the evidence must be sufficient to prove the corpus delicti before a verdict of guilty can be sustained, such evidence may be put in after the commission of the crime by the defendant and his intentions are proved. The corpus delicti and the criminal agency are so often involved that testimony on both issues is admitted at the same time. *Gay v. State*, 42 Tex. Cr. Rep. 450, 60 S. W. 771.

In *Floyd v. State*, 82 Ala. 16, 2 South. 683, the court held that on the trial of an indictment for murder, if the evidence of the confessions of the defendant is admitted before proof of the corpus delicti, the evidence of such confessions will be rendered admissible by subsequently showing the corpus delicti and the error be thereby cured.

To similar effect is *Holland v. State*, 39 Fla. 178, 22 South. 298. In *People v. Swetland*, 77 Mich. 53, 43 N. W. 779, the court held that where the body of the offense is so intimately connected with the question of

whether or not the accused is guilty of the crime that there can be no separation, and the corpus delicti depends entirely for its existence upon the acts and the intent of the accused, such acts and admissions, if admissible at all, are admissible at any stage of the proceedings upon the trial.

The general rule that confessions are not admissible until after proof of the corpus delicti should prevail where the question of the corpus delicti is clearly separate and distinct from that of the guilt of the defendant: 1 Wharton's Criminal Evidence, § 325f.

"But, in many cases, the two matters are so intimately connected that the proof of the corpus delicti and the guilty agency is shown at the same time; hence, the order of proof in a criminal case is generally within the discretion of the trial court, and this prevails so generally that error committed in admitting testimony as to the guilt before the proof of the corpus delicti is cured where the subsequent testimony establishes the corpus delicti." 1 Wharton, *supra*, and collection of authorities under notes 5, 6, and 7.

From an inspection of the record, we are convinced that the discretion vested in the court by law, relating to the regulation of the order of proof, was not abused.

[11] The prosecution asserts that the corpus delicti was proved by sufficient evidence prior to the admission of the alleged confessions made by the defendant. The defendant denies this assertion, and avers that the corpus delicti was not proved. Counsel, like many of the courts, are not in harmony when defining the term "corpus delicti." By "corpus delicti" is meant the body of the offense or crime. *Black's Dictionary of Law* says:

"The corpus delicti: The body of a crime; the body [material substance] upon which a crime has been committed; e. g., the corpse of a murdered man, the charred remains of a house burned down. In a derivative sense, the substance or foundation of a crime; the substantial fact that a crime has been committed."

The corpus delicti consists of two fundamental facts: First, the death; and second, the existence of criminal agency as the cause thereof.

"The corpus delicti is made up, * * * says Mr. Best, 'of two things: First, certain facts forming its basis; and, secondly, the existence of criminal agency as the cause of them.'" *State v. Rogoway*, 45 Or. 601, 608, 78 Pac. 987, 989 (2 Ann. Cas. 431).

It has often been stated that in murder the corpus delicti has two components; death as the result, and the criminal agency of another as the means.

"The finding of a dead body establishes only the corpus. The finding of such body under circumstances that indicate a crime would indicate the delicti, or felonious killing. When these facts concur, the first element of the cor-

pus delicti, the criminal act, is made to appear. Hence it is not necessary to the establishment of a complete corpus delicti that identity should be shown, because the dead body and the crime against it complete all that is indicated by the corpus delicti." 1 Wharton's Crim. Ev. § 325.

We take the following from note 4, 1 Whar-
ton, supra:

"The idea conveyed by the phrase 'corpus delicti' is not obscure. While it is generally defined as the body of a crime, it is more clearly expressed by calling it the body or thing which is the victim of a wrong. The body of a man produced under circumstances that show a felony is corpus delicti in homicide, but the expression is equally correct applied to all crimes. The bodies of sheep or other domestic animals, with indications of poison feloniously administered, is corpus delicti in malicious mischief. A house partly burned, with evidence of incendiary fire, is corpus delicti in arson. The primary fact is the corpus delicti. When that appears in any crime, then follows the investigation which has for its object the detection and punishment of the criminal agency."

In State v. Millmeier, 102 Iowa, 692-698, 72 N. W. 275, 277, the court said:

"Counsel do not agree as to what constitutes 'corpus delicti,' and we find that courts are as far apart as counsel in defining the term. The expression means, primarily, the 'body of the offense.' But, in applying it, courts and text-writers have not at all times agreed as to what is meant by the 'body of the offense.' In our opinion, the term means, when applied to any particular offense, that the particular crime charged has actually been committed by some one. It is made up of two elements: First, that a certain result has been produced, as that a man has died; * * * second, that some one is criminally responsible for the result. *Ruloff v. People*, 18 N. Y. 179; *People v. Bennett*, 49 N. Y. 137; *Winslow v. State*, 76 Ala. 42; *Pitts v. State*, 43 Miss. 472; *People v. Palmer*, 100 N. Y. 113, 16 N. E. 529."

Now, as to the sufficiency of the evidence to prove the death of Krug as the result, and the criminal agency of another as the means: In discussing the sufficiency of evidence to establish the corpus delicti in a criminal cause such as the case at bar, the courts have frequently and very correctly stated that no universal and unvariable rule can be laid down as to what will amount to proof of the corpus delicti, as each case depends upon its own peculiar circumstances. We quote the following:

"No universal and unvariable rule can be laid down in regard to the proof of the corpus delicti. Each case depends upon its own peculiar circumstances. The body of the crime may be proved by the best evidence which is capable of being adduced, if it is sufficient for the purpose. Such an amount of accompanying or relative facts, whether direct or circumstantial, must be produced as establish the fact beyond a moral certainty, and to the exclusion of every other reasonable hypothesis." *State v. Williams*, 46 Or. 287, 297, 80 Pac. 655, 660.

[12, 13] In this state, direct evidence to establish either of these elements is not required, but where circumstantial evidence is relied upon it must be of the most cogent and convincing nature. It is the settled law of Oregon that the corpus delicti taken as a whole may be shown by any evidence which satisfies the jury beyond a reasonable doubt whether it be direct or indirect. But this is qualified and limited by the rule that the defendant's confession, taken alone and without corroborating proof of the corpus delicti, is not sufficient to support a conviction. *State v. Williams*, supra; *State v. Barnes*, 47 Or. 592, 85 Pac. 998, 7 L. R. A. (N. S.) 181; *Kerr on Homicide*, p. 540, and the numerous authorities there cited under notes 2 and 3.

There are many examples of cases that illustrate the rule that the evidence required to prove the corpus delicti in a case of homicide depends upon the facts peculiar to the given case. The reports afford instances of homicide where the victims have been killed and their bodies destroyed by chemicals, fire, or other agencies, thus concealing, not only the identity of the deceased, but the manner and means of procurement of death as well. The trial of such a case cannot be bound by an inflexible rule relating to the proof of the corpus delicti. The case at bar depends upon its own peculiar facts, and, so long as the corpus delicti is proved by clear, unequivocal, cogent, and convincing evidence, the law is satisfied.

[14] Keeping in mind the principles of law referred to, and, further, that the jury are the sole judges of the credibility of the witnesses and of the effect or value of the evidence adduced upon the trial of this cause, we will set down a synopsis of the testimony for the purpose of determining whether the verdict is based upon evidence, or whether there was a failure of proof as contended by defendant.

H. N. Cobb testified that his wife instructed him to go to the scene of the Krug fire; that when he reached the place "there wasn't very much left, only just a smoldering fire and the body lying there." He said:

"The fire was burning around the body. He was lying on his back, and the feet up to his knees partly burned off. The hands and arms were burned off. When I first went there I believe the head was on.

"Q. How was it later? A. Well, it fell into ashes. The fire kind of fell down, and it went in the ashes."

He testified that defendant came to the scene of the fire, and, while there, said to witness that:

"He came down there after eggs, and the house was burned, and he left his bucket; and he said he was down Sunday night, and he [Krug] was all right Sunday night."

We have previously shown the statement made by defendant to Mrs. Cobb when requesting her, as telephone operator, to notify the sheriff.

E. N. Harrington, George E. Aitken, Bertha Wilson, and Carl Wood testified to their observation of a fire on the evening of the 24th of March at about the hour of 7:45 o'clock, which fire was in the immediate vicinity of Krug's cabin.

S. E. Roberts, sheriff, testified to the fact of his being called to the Krug place after the fire; that he started to walk out to investigate, and had gone about 30 yards with the idea of making a complete circle of the Krug house, when he saw some fresh tracks.

"I stopped and was looking at these tracks, and about that time Jack Weston says: 'Say, sheriff, those are my tracks where I came over this morning to get some eggs. Here is my pail I set down, I was going to get the eggs in.'"

Relating to the body, witness said:

"It was pretty badly burned. The arms and legs were burned off, and the head was gone. The body was 12 or 14 feet from the fireplace. Some portion of clothes was on the body on the back, some little clothing between the legs."

He further testified that:

"After he [defendant] called my attention to the fact of those tracks here, I watched him. I thought he was watching me pretty close."

George Stilwell testified that at the time of the trial he was a resident of Portland, but had resided in Central Oregon for 18 years; that he was at the Krug cabin after the fire; that in March, 1919, he lived at Joe Wilson's sawmill for three or four weeks.

"Krug used to come over to the mill once in a while and talk to us. * * * One particular time he come through there, and we were making whisky. So he come up and caught us making whisky. * * * Weston was there. He came through another time, and Mr. Weston thought he caught us moonshining. * * *

"Q. What did Weston do or say at that time? A. He said: 'We got to work some way of getting rid of Mr. Krug on account he caught us moonshining. If we don't get him, he will get us.' Krug had come up and asked me if I was washing. When he first came there he asked me what I was doing, and I said I was washing. The next time he said: 'I see you are still washing.' I said, 'Yes.' After he went away Weston said: 'He caught us moonshining.' So he wanted me to go over and help kill him. * * * He said Krug must have lots of money. He said: 'We just as well get the money because he caught us. If we didn't get him,' he said: 'while we are getting him we just as well get the money.'"

"On the evening of the 24th he [Weston] left somewhere about dark, and he came back some time in the night, but I was asleep and couldn't say what time it was. * * * Next morning I started a fire in the cook stove. Fifteen minutes or half an hour after, Mr. Weston came down. I smelled fumes of flesh burning;

* * * thought it was cattle. I drew his attention. * * * He said: 'It must be Krug's; it is coming from that direction.' The smoke was very small. It was from the north-east direction. He said: 'It must be Krug.' After breakfast, he took the little bucket and said: 'I will go over and get eggs.' He was gone half an hour. Came back and said Krug's house had burned down, 'and it looks as though he had burned up in it.' He said: 'I will notify the sheriff.'"

Joe Wilson testified that he had lived near Sisters for 18 or 20 years, and that he was engaged in the sawmill business; that he had been acquainted with Weston 10 or 11 years; likewise, that he had known Robert H. Krug, deceased, for 25 or 30 years; that in 1918, witness had built an addition to Krug's old log-house, consisting of a lean-to, and had resingled and refloored the cabin; that he was not at home on the 24th of March, but returned on the 25th, arriving at the Krug place about 2 o'clock in the afternoon, where he saw the ruins of the cabin and the body of a human being that in his best judgment was Krug's body. He further testified to a declaration made by defendant, as follows:

"On our way home to the mill from the Krug cabin on the day of the inquest, defendant said to me: 'Mum's the word.' I said: 'It is all up with us now, Jack.' He said: 'It is all off anyway.' He said: 'Krug caught us making whisky. There had to be something done.'"

Lige Sparks testified that within a few days prior to the burning of the Krug house—

"he [defendant] came there [Cloverdale] and got his pistol and dog and took them away. He said: 'Boys, I am going to keep him off that land and make that whisky if I have to go to the penitentiary for life.'"

Cross-examination by Mr. Wallace:

"Q. What was it he said? A. He come and got his pistol and his dog and took them with him, and said he was going to keep Krug off that land and make that whisky if he went to the penitentiary for life."

W. T. E. Wilson testified as follows, concerning a declaration made by the defendant:

"Mr. Weston came down to my house and stayed all night, and in the morning after breakfast he spoke about running his business up at the sawmill close to Mr. Krug's. Well, he said he could not do anything up there in that business in the line of moonshining on account of Mr. Krug came over there every day or two nosing around and interfered with the business. He said: 'When I go back, I will stop him from coming to that mill.'"

Witness further testified that the defendant took his pistol away with him.

W. S. Fullerton testified that about the 18th day of February, 1918, he made, ex-

ecuted and delivered to Robert H. Krug his promissory note for the sum of \$300, and that on March 18, 1919, he paid the interest then due on the note, by a check in the sum of \$16.60. Within a very few days following the death of Krug, a note answering the description of the Fullerton note was seen by Stilwell and by Wilson in the personal possession of the defendant. Stilwell swore that defendant exhibited to him the note and said:

"Here is a note the Krug estate will never get, unless it is recorded."

T. J. Sanders testified that the defendant said to him the day he was put in jail:

"They have got me in wrong, on the wrong side of the bars; but I will show them I done it in self-defense."

The death of Krug seems to have been proved. The associations, habits, occupation, the place of finding the body, and the life history of Robert H. Krug, together with the many circumstances surrounding the destruction of his home, all tend towards establishing the charred body found in the ruins of his cabin as that of Krug, and of no one else. In fact the defendant, in his brief, admits that the body found in that cabin was Krug's body. For that reason we have omitted much of the testimony relating to the identification of the body.

We will now quote excerpts from the testimony of defendant's confession, made to his two accomplices in the manufacture of intoxicating liquor.

George Stilwell said:

"After the coroner's inquest, we were sitting on the bench, and he said: 'I went over last night and took a club and knocked Krug in the head. * * * Then I tied him up with a rope and tied a rope around his neck and choked him to get his money. The old fellow was so stingy he would not give it. I still believe he has money buried there, but he would rather die than give it up to us. I took his shoes off and stuck his feet in the fire to torture him, to get his money.' * * * We were working at the mill the day the cabin burned; working with the tubs, getting ready for moonshining."

About the 1st of April witness left Wilson's sawmill and went to work for Brooks-Scanlon, and was employed there until the 15th day of December, when he went to Portland. He testified that his memory is not good.

"Q. Who have you talked to about what your testimony would be? A. Bill Wilson.

"Q. Did you make a statement to him similar to what you have stated here to-day? A. Not exactly; no, sir. I told him about Krug coming over there. I don't know just exactly the words I said to him. The talk was a few days after Krug's house burned. * * *

"Mrs. Combs (now Mrs. Weston) asked me: 'Do you think it would be possible Jack done that?' I said: 'I don't know if he could or

not. I don't see how he could. He stayed with me last night.' I didn't intend at that time to tell anybody he did or didn't do it. I didn't explain it."

Joe Wilson's version of the confession by defendant is as follows:

"On Sunday he [Weston] followed him [Krug] down to Sisters and walked through Sisters to see if he made any report down there in regard to catching them making whisky. He said that on Monday he went over to Mr. Krug's house and stayed there most of the day with him; stayed there until it was too late in the day for Mr. Krug to go away anywhere. Then he went back to the mill and got his supper. He went back over again in the evening. Krug * * * was eating his supper. He came out of the kitchen onto the porch. Weston stood by the door, and as he came in hit him with a stick * * * and knocked him down. He had a flour sack that he had made up into a dish cloth or tea towel. * * * He had that with him, and gagged him with the tea towel. Then he took a rope and tied his hands and feet—he didn't say how—and drew on it. He just said he tightened up on him this way (illustrating); that he held him that way, and when he released him he told him he [Krug] had caught him making whisky, and he would have to get out of the country and give him \$500 to leave the country on. Mr. Krug said to him: 'I thought you were my friend.' He would not give up any money, and Weston tightened on him the second time, and also took his shoes off and burned his feet and tried to make him give up the money. * * * Krug said to him not to hurt his crippled knee; that he had rheumatism in his knee. While he (Weston) was talking, I said: 'I suppose he did some manful begging.' He answered: 'No. He said: "If you want to kill me, kill me quick."' Krug told him if he would go and get a little box there, he would find what money he had. Weston went there and got \$16. He took the money. * * * He had it in a tomato can on a table. * * * He said when Krug would not give the money up after he had released him a second time, he just drew on it and in a few minutes it was all over, and he set fire to it. He used magazines and papers under the bed. Said he set them all on fire and went out and sat under a tree until the building fell in and the ammunition was going off, quite a number of cartridges exploded. * * * I said I would always believe that Krug had money there, and Weston said: 'If he did, he would rather go the route than give it up.'"

On cross-examination, Wilson said:

"Q. Didn't you say to Bill Young: 'Krug burned himself up?' A. Likely I did, if we were talking about it, because I was not telling people what I knew about it, at that time."

Witness said:

"I told the sheriff this fall, before the arrest, for the first time. I didn't want to get this into the hands of the officers, because I was making whisky, and I could not very well get this in the hands of the officers without exposing myself. When the mill burned down, it ruined my chances of making whisky. Then I got another outfit, and went to Crook county

and went to making whisky. I was arrested in February."

Again he said:

"I didn't want to tell at that time what we were doing. * * * The moonshining was not exposed yet. I didn't want to tell what we were doing."

[15] We are compelled to find against the contention of the defendant that the evidence is insufficient to prove the corpus delicti. Hence the court did not err in overruling defendant's motion for a directed verdict of not guilty.

[16] By the evidence adduced upon the trial, the state made out such a case that the duty of submitting it to the jury was imposed upon the court. The truthfulness of the witnesses and the consideration to be given their testimony was for the jury, not for the court, to determine. The testimony admitted at the trial, if believed by the triers of fact, authorized them to return a verdict of guilty.

[17] The court instructed the jury that:

"Declarations accompanying the act, or so closely connected therewith, in time, as to be free from all suspicion of device or afterthought, are admissible in evidence as part of the *res gestæ* and subject to be charged and weighed by the jury under the same rules which I have given you for weighing and considering other evidence in the case; that is, the connection of the defendant with the case, his interest in it, if any, whether such declarations are consistent throughout or are conflicting with themselves or other facts."

To the giving of that instruction the defendant reserved an exception. The instruction correctly states a sound principle of law, but it is not applicable to the facts in this case. There is no testimony in the record showing any declaration accompanying the act of homicide, or so closely therewith as to be deemed a part of the *res gestæ*. The giving of this instruction was error. *State v. Branson*, 82 Or. 377, 161 Pac. 689.

"To render declarations made by a party after the commission of an act which is the subject of inquiry admissible in evidence as a part of the *res gestæ*, they must have grown out of and been so intimately connected and contemporaneous with such act as to illustrate its character, affording a mirror which involuntarily reflects the cause, motive, or effect of the particular action. *State v. Glass*, 5 Or. 73; *State v. Anderson*, 10 Or. 448; *State v. Ching Ling*, 16 Or. 419, 18 Pac. 844; *State v. Henderson*, 24 Or. 100, 32 Pac. 1030; *State v. Brown*, 28 Or. 147, 41 Pac. 1042; *State v. Sargent*, 32 Or. 110, 49 Pac. 889." *State v. Smith*, 48 Or. 110, 71 Pac. 973.

[18] Defendant assigns error of the court in permitting W. S. Fullerton, called on behalf of the state, to give testimony, over the objection of the defendant, concerning a certain note, and in refusing to strike the evidence relating to the same upon motion. The

testimony of Fullerton relative to the execution and delivery by him of a promissory note to Krug and to his payment to Krug of interest thereon on March 22, 1919, is relevant. Whenever a motive for slaying another is robbery, the possession of valuables by the deceased may always be shown. In the instant case, the note, when traced to defendant's possession, was also admissible in evidence as affording some evidence towards the identity of the accused as the slayer of Krug.

[19] The court ruled properly in admitting the testimony of witnesses Joe Wilson and George Stilwell, who testified that within a very few days following the 24th of March, 1919, they saw the Fullerton note in possession of the defendant, the same being a note for the sum of \$300, executed and delivered to Krug by Fullerton in February, 1918. The recent, personal, exclusive, unexplained possession of that promissory note by the defendant was a valuable circumstance tending to establish the charge against him.

There was no error in permitting Charles Gist, called by the state, to testify concerning the statement made by defendant on Saturday before the fire; nor did the court err in permitting George E. Aitken to testify over objection of defendant that he saw deceased in Sisters on one day, and that he saw the defendant there the day following.

[20] The testimony of Bertha Wilson, Carl Wood, Glen Wilson, George E. Aitken, and E. N. Harrington, relating to the fire which they saw on the fatal night in the vicinity of the Krug cabin, was competent and relevant, as was their testimony that they saw no fires other than that particular fire.

[21, 22] A number of witnesses gave testimony as to the condition of the house, with reference to the fact that the door was unhung, the position of the bed and table, and as to the facts generally concerning the cabin and its contents, all of which was admissible. Some of the testimony in reference to the hanging of the door is remote from the 24th of March, 1919, yet the objection goes to its weight, not to its competency.

[23, 24] The testimony of Lige Sparks and W. T. E. Wilson is not subject to the objection of defendant, because threats made by defendant are always admissible to show his animus toward deceased and as a circumstance affecting his guilt or innocence of the particular crime charged, their weight being dependent greatly on their character, the occasion, nearness in time, and the particular circumstances surrounding the offense. 1 Michie, § 167, p. 754.

[25] Error is assigned because T. J. Sanders, janitor of the courthouse, and jailer, was allowed to testify, over objections, that defendant, after his incarceration, said to witness:

"They have got me in wrong, on the wrong side of the bars, but I will show them I done it in self-defense."

This objection can afford the defendant no comfort. The testimony was admissible. The objection goes to its weight. Had the state exercised its right to establish the fact, if it be a fact, that the defendant was informed at or about the time he was incarcerated in jail, and prior to his statement above set out, that he was arrested and jailed for the killing of Krug, then such evidence would be of greater value as a circumstance tending to prove guilt.

[26] Error is assigned by reason of the court's ruling, wherein a check from Fullerton to Krug was admitted as evidence. It was permissible to corroborate Fullerton's evidence of payment of interest on his note by introducing the canceled check. The collection of the interest on this negotiable promissory note by Krug was some evidence that he owned and possessed it two days later, when he met his death. It will be remembered that according to Wilson and Stilwell, the note appeared soon after Krug's death, in the possession of defendant, and that fact was urged as a circumstance pointing towards his guilt. That check, showing Krug's indorsement, was cashed three days after his death. Krug may have paid a debt with the check, as did Fullerton, or he may have purchased merchandise. If he transferred the check for money, it was within the power of the state to prove that fact, and it should have done so. The defendant's objection is too broad, for it would strike the check from the record for all purposes. Therefore his assignment must fail. Upon its own motion, the court could have instructed the jury that the check did not, in itself, corroborate the defendant's confession, as related by Wilson and Stilwell, in the matter of the \$16 they say he obtained from Krug; and, had defendant so requested, this instruction should have been given.

[27, 28] Error is assigned because of the action of the court in sustaining an objection made by the state to a question put to Joe Wilson on his cross-examination by the defendant:

"Q. Now, did you not make a statement to J. E. Warner, known as Gabe Warner, on or about the 1st day of February, 1920, in the jail at Portland, Or., being present yourself and the said J. E. Warner, as follows: 'Jack Weston squealed on me and got me in here to do time, and I will make him do time, the s— of a b—;' and also: 'It seemed to me that Krug burned himself,' or words to that effect?"

The object of this inquiry was to impair the force of the testimony of the witness by showing that he entertained hostile feelings against Weston. That such testimony is admissible, see *State v. Welch*, 33 Or. pp. 33, 37, 54 Pac. 213. How can a jury intelligently weigh the testimony of any witness, unless they know his credibility? A witness is

presumed to speak the truth, but this presumption may be overcome.

"Such inquiry necessarily involves a consideration of the relation he sustains towards, or the feelings of friendship he entertains for, the party in whose favor, or the enmity and wrath he nurses towards the party against whom, he testifies. All matters which tend in any manner to show the condition of his mind towards the party who may be benefited or injured by his testimony are proper subjects of investigation, and may be proved by competent evidence, either by the cross-examination of witness himself, or by other witnesses who may be called to testify concerning such facts." *State v. Welch*, supra.

To like effect, see *State v. Bacon*, 13 Or. 143, 9 Pac. 393, 57 Am. Rep. 8; *State v. Ellsworth*, 30 Or. 145, 47 Pac. 199; *Sayres v. Allen*, 25 Or. 211, 35 Pac. 254.

It is said in *State v. Mah Jim*, 13 Or. 235, 10 Pac. 306, that:

"In a criminal case, any question which tends to show a feeling or bias of the witness against the accused is competent."

In *State v. Olds*, 18 Or. 440, 442, 22 Pac. 940, 941, it is said:

"The state had the right, on the cross-examination, to ask this witness anything that would show his interest in the result of the trial."

As provided by section 704, Or. L., the presumption that a witness speaks the truth may be overcome by evidence affecting his motives.

State v. Mackey, 12 Or. 154, 156, 6 Pac. 648, 649, says:

"The ends of justice are best attained by allowing a free and ample scope for scrutinizing evidence and estimating its real value."

In *State v. Bacon*, supra, it is stated:

"There is no doubt that the state of feeling and relationship of a witness towards the party for or against whom he testifies may properly be shown, to be weighed with his testimony."

And the court quotes with approval the following from 1 Greenleaf on Evidence, § 446, page 146:

"The situation of the witness with respect to the parties and the subject of the litigation, his intent, his motives, his inclination and prejudices, * * * are all fully investigated and ascertained and submitted to the consideration of the jury before whom he has testified, and who have thus had an opportunity of observing his demeanor and of determining the just weight and value of his testimony."

The extent of the cross-examination of witnesses rests largely in the discretion of the court. But, as stated in *Sayres v. Allen*, supra:

"As the defendant had the right, on cross-examination, to require that Sayres should give a detail of the circumstances surrounding

the facts to which he had testified, prejudice will be presumed where this right is denied."

The record discloses a tendency, in a number of instances, to restrain the cross-examination of the witnesses Stilwell and Wilson. In sustaining the state's objection to a question upon cross-examination, so relevant as the inquiry put to Joe Wilson by the defendant's counsel, a substantial injury has been done defendant, and that wrong affirmatively appears of record. The defendant cannot lawfully be deprived of his valuable right to cross-examine upon relevant matters, and the hostile feeling, if any, entertained against the defendant, in a case so grave, by the leading witness for the prosecution, is always relevant. His testimony, if believed, shows that they, Wilson, Stilwell, and Weston, were accomplices in crime; that Krug discovered them in the criminal act of making whisky; that the defendant proposed, for their protection, the killing of Krug; also suggested to Stilwell that they rob him—that he had money—that on March 24, 1919, at about 7:45 o'clock, the Krug cabin was burned, and on the following day the lifeless, headless body of the old man was removed from the ashes of his cabin. The defendant and the two witnesses were at the coroner's inquest. As they went their way from the ruins of the Krug cabin to the Wilson mill, the defendant said to Wilson: "Mum's the word." Wilson's only answer was: "It's all off with us now, Jack." As these three friends were preparing their evening meal, the defendant proceeded to tell his pitiless tale of the robbery and murder of their neighbor and of Wilson's friend of 25 or 30 years' standing. When the defendant's recital reached the point of torture in his attempt to obtain money from his alleged victim, Wilson coolly observed: "I suppose he [Krug] did some manful begging." Defendant's story went on and on, and pictured Krug's refusal to give up his money, when Wilson remarked: "I will always believe that Krug had money there." For a year and a half, these two witnesses kept their knowledge of Weston's awful deed from the officers of the law. For as long a time by their silence they aided the defendant in concealing his crime. Only an overt act upon their part stands in the way of constituting them accessories after the fact as defined by our Code.

Under the condition that confronted the court, there was but one course to follow, and that was to allow a full and complete cross-examination of these witnesses upon all relevant matters. No worthy man could keep silent for a year and a half under circumstances as disclosed from the witness stand by Joe Wilson and George Stilwell. To deny the right to cross-examination under the existing conditions, was an abuse of the

discretion vested in the court by law. "Guilty men may have escaped punishment altogether; others may have been punished too lightly for their crimes; others may have unreasonably delayed their punishment;" but none of these conditions, nor all of them together, can excuse the court in denying to a human being upon trial for his life or for his liberty the right that the law of the sovereign state of Oregon gives him, the right to a fair and impartial trial. In weighing the testimony of the witnesses, the jury are entitled to know the hostile feelings, if any, that the witnesses entertain for the defendant, in order to consider what motives may have actuated such witnesses to shade, color, or to give false testimony. Any lawyer of trial experience should know that the denial of the right to cross-examination on all relevant matters is a refusal of a fair trial.

For this error of the trial court, this case must be reversed, and remanded for further proceedings as provided by law.

STATE v. CRAIG. (No. 23027.)

(Supreme Court of Kansas. Nov. 12, 1921.)

(Syllabus by the Court.)

Criminal law §1160—Supreme Court will not interfere with approved verdict sustained by sufficient evidence.

The proceedings examined, and *held*, the district court's conclusion that the jury did not deal with the evidence in an arbitrary manner, and that the verdict was sustained by sufficient competent evidence, must be approved.

Appeal from District Court, Butler County.

O. E. Craig was convicted of grand larceny, and he appeals. Affirmed.

Leydig, Geddes & Grant, of El Dorado, for appellant.

Richard J. Hopkins, Atty. Gen., A. F. Williams, of El Dorado, and Stanley O. Taylor, of Augusta, for the State.

BURCH, J. The defendant was convicted of grand larceny, and appeals.

The sole ground of the appeal is that the defendant gave a clear account of his handling of the property stolen, was corroborated by a credible witness, and consequently the jury must have dealt with the testimony in an arbitrary manner. This court has the judgment of the district court to the contrary, in the order overruling the motion for a new trial. It may be the defendant and his witness, whom the court and the jury saw while on the witness stand, were discredited by their manner of testifying or other circumstance. Besides that, the state's chief wit-

ness was corroborated in respect to important details. Under these circumstances this court is not authorized to interfere.

The judgment of the district court is affirmed.

All the Justices concurring.

CURRAN v. BUCKLES. (No. 23234.)

(Supreme Court of Kansas. Nov. 12, 1921.)

(Syllabus by the Court.)

Reformation of instruments — Evidence in support of reformation held subject to demurrer for ratification, laches, and estoppel.

The proceedings examined, and held, a demurrer to evidence, offered in support of a contention that a deed should be reformed by eliminating assumption of a mortgage by the grantee, was properly sustained on the grounds of ratification, laches, and estoppel.

Appeal from District Court, Wilson County.

Action by John P. Curran against Robert F. Buckles. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Edmundson, of Fredonia, for appellant.

J. T. Cooper, of Fredonia, for appellee.

BURCH, J. The action was one by the holder of a note secured by mortgage, against the grantee of the mortgaged premises, to recover on a covenant assuming the mortgage contained in the grantee's deed. The plaintiff recovered, and the defendant appeals.

On July 10, 1914, Forriss, then owner of the land, contracted to trade it for land belonging to the defendant. A realty company was made depositary of deeds and other papers. The defendant was allowed 20 days from July 10 in which to approve the land he was to receive, and, unless his disapproval were filed within that time, the exchange of property became absolute. Deeds were to be deposited within 20 days, and the depositary was authorized to deliver them. There were two mortgages on the land which the defendant was to receive, a first mortgage for \$4,500, and a second mortgage to the Mackie-Clemens Fuel Company for \$1,150. The deed of Forriss to the defendant was dated and acknowledged on July 29, and was left with the depositary. The deed contained the covenant referred to, and was filed for record on August 5, 1914. The defendant accepted the property. He testified the deed was filed for record by the depositary before he made final examination of the property. Examination of the property on or after August 5, was unimportant, because he was obliged, by the

contract, to file disapproval, should he disapprove, on or before July 30. The defendant admitted he had an opportunity to examine the deed before it was left with the depositary. He testified he did not examine it very thoroughly, and expected to examine it more thoroughly when he looked at the land again. In September, 1915, an action was commenced to foreclose the first mortgage. On November 3, 1915, the fuel company filed a cross-petition, asking foreclosure of the second mortgage. Personal judgment against the defendant was prayed for, based on the assumption clause contained in his deed. The defendant read the pleadings, knew their contents, and on November 30, 1915, moved to set aside the service on him, which had been made by publication. Judgments of foreclosure were entered, the land was sold, and the defendant redeemed from the sale. The present action was commenced to recover the amount due on the fuel company note, which was not satisfied by the foreclosure sale. The ground of the defendant's liability was the covenant contained in his deed from Forriss. On February 9, 1919, the defendant answered. The answer was that the note was assigned to the plaintiff after the defendant had redeemed from the foreclosure sale, and that the defendant had a counterclaim against Forriss. This answer was abandoned, and on November 20, 1919, the defendant filed another, on which the case was tried. The position then taken was that the defendant did not assume the mortgages described in his deed, and that the assumption clause was inserted in the deed through a mistake of the scrivener, which was not discovered until after the foreclosure suit was commenced. The burden of proof was placed on the defendant. He testified that at the time of the trade he discussed with Forriss the subject of assumption of mortgages. He was willing to assume the first mortgage, but he refused to assume the fuel company mortgage. He received the deed and was owner of the land. He did not know the deed provided he should assume the fuel company mortgage, until the foreclosure suit was commenced. His first answer in the case was admitted in evidence as a part of his cross-examination. The court sustained a demurrer to the defendant's evidence.

The burden of proof was properly placed on the defendant. The deed was a formal instrument, delivered by the grantor and accepted by the grantee, and presumptively expressed the intention of the parties. The burden rested on the defendant to overcome the presumption, and, if parol evidence were depended on, he was obliged to produce proof of clear and convincing character, establishing mistake beyond reasonable controversy.

The deed purported to create a liability on the part of the defendant to any holder

of the fuel company note, and indicated the defendant had become principal debtor, while Forriss had become surety only. Relying on the deed, a person might safely purchase the note, ignoring Forriss and the real estate security. The facts which have been stated probably warrant imputing to the defendant knowledge of the contents of the deed when it was delivered and he took possession under it. However this may be, the defendant's primary liability was actually asserted in the foreclosure suit commenced within a little more than a year after the deed was delivered. He was then definitely apprised of the contents of the deed. He did not deny liability, and he redeemed the land from sale as owner by virtue of the deed. He neglected to take steps to have the deed reformed, and he suffered the plaintiff to purchase the note after the real estate security had become worthless. When sued by the plaintiff, he tacitly confessed liability by his first answer. Not until November 20, 1919, did it occur to him to dispute his deed. It is not necessary to discuss the unsatisfactory character of the proof offered in support of the belated call upon the court to rewrite the deed. It is quite manifest that ratification, laches, and estoppel are all disclosed, and the demurrer to the evidence was properly sustained.

The judgment of the district court is affirmed.

All the Justices concurring.

**TODD v. KAW VALLEY DRAINAGE DIST.,
WYANDOTTE COUNTY.**
(No. 23235.)

(Supreme Court of Kansas. Nov. 12, 1921.)

(Syllabus by the Court.)

Drainage § 19—Drainage district held not liable for injury to its servant through negligence of his foreman in absence of statute.

Where a drainage district organized upon the petition of two-fifths of the resident taxpayers, under a statute the purpose of which is to benefit the public by protecting persons and property from injury to floods, is engaged in clearing out the channel of a river, no liability on its part arises by reason of an injury to one of its workmen through the negligence of his foreman; there being no specific statutory provision in reference thereto.

Appeal from District Court, Wyandotte County.

Action by William Todd against the Kaw Valley Drainage District of Wyandotte County. Judgment for the defendant, and plaintiff appeals. Affirmed.

J. L. Smalley and David F. Carson, both of Kansas City, for appellant.

Thos. A. Pollock, of Kansas City, for appellee.

MASON, J. William M. Todd sued the Kaw Valley drainage district alleging that, while working as a deck hand on a dredgeboat used by it in cleaning out the channel of the Kansas river, he was injured as the result of the negligent conduct of the foreman. A demurrer to his evidence was sustained, and he appeals.

The sole question presented is whether a drainage district organized under the Kansas statute by the board of county commissioners, upon the petition of two-fifths of the resident taxpayers, is liable for the negligent acts of its agents while carrying out work of the character indicated.

The prevailing view has been that drainage districts are essentially governmental in their functions, and for that reason are not answerable in damages for the negligence of their officers or employees unless the statute expressly (or by such clear implication as amounts to the same thing) so provides. The plaintiff asserts that a tendency has recently developed to abandon this position. It is true that in Illinois earlier decisions on the subject appear to have been modified in this direction. But the distinctions there made are to some extent at least based upon features of the statute giving the drainage districts a commercial character not possessed by those of this state. A recent Nebraska case, however, seems to support the plaintiff's contention; the statute involved being quite similar to our own. *Bunting v. Oak Creek Drainage District*, 99 Neb. 843, 157 N. W. 1023, L. R. A. 1918B, 1004. The modification of the Illinois doctrine is there referred to, and stress is laid upon the consideration that drainage districts are voluntary corporations existing principally for the benefit of the owners of the land within their boundaries. It has elsewhere been argued that districts of this nature, although brought into being only on the application and with the consent of a certain percentage of the inhabitants, are not properly classed as voluntary, because the organization is forced upon at least a nonconsenting minority of the residents. The present state of judicial opinion on the general question and the reasoning upon which the conflicting views are based are so fully exhibited in a recent note as to make a detailed discussion here unnecessary. L. R. A. 1918B, 1010.

While this court has not heretofore passed upon the specific question now presented, the test of liability of public bodies it has applied and the effect it has given to the statute relating to drainage districts com-

pel the affirmance of the judgment of the trial court upon these grounds: The purpose of the Legislature in providing for the organization of drainage districts like the defendant was to preserve and protect life and property from the ravages of floods. Drainage District v. Railway Co., 87 Kan. 272, 278, 123 Pac. 991; Railway Co., v. Montgomery County, 93 Kan. 319, 144 Pac. 209. It might have created the districts by its own direct action, or it might have provided that districts should be created wherever certain conditions existed. It evidently concluded, however, that the self-interest of those most directly, but not solely, concerned could be relied upon as a sufficient incentive to bring about the desired improvements so far as they are vitally necessary.

"The power [to create a drainage district] is exercised by the Legislature itself by the passage of the drainage act, which is to become operative in any part of the state when certain conditions are found to exist and certain agencies or instrumentalities for which it provides are organized. The operation of the law does not depend on the will of the petitioners, but it is the will of the Legislature which is to be put in force when the board of county commissioners find that the prescribed conditions exist within the district which the petitioners ask to have incorporated. If the conditions are found to exist, a corporation is organized and an election held to choose the officers of the district, who proceed to make the improvements as the Legislature has provided." Railroad Co. v. Leavenworth County, 89 Kan. 72, 79, 130 Pac. 855, 857.

An inference that the owners of property within a district were regarded as the sole beneficiaries of the contemplated improvements cannot be drawn from the fact that the burden of meeting by taxation all the consequent expenses was cast upon them, for the Legislature may, of course, in its discretion, require the entire cost of an improvement designed to promote the public welfare to be borne by those peculiarly benefited. 25 R. C. L. 87. The public character of the ends sought by the creation of the class of drainage districts to which the defendant belongs is sufficiently indicated by the title of the act under which it was created:

"An act in relation to natural water courses, providing for the protection, control, deepening, widening, removing obstructions from, changing, regulating, establishing and maintaining the channels thereof; the construction, maintenance and repair of levees along the same to prevent overflow, and the raising or elevation of railroad tracks and public highways that interfere with the construction and maintenance of such levees; the construction and regulation of drains and other works conducive to the public health, convenience and welfare in districts subject to overflow; and to these ends providing for and authorizing the organization of public corporations to be known as drainage districts, and prescribing the duties and defining

the powers of such public corporations." Laws 1905, c. 215; Gen. Stat. 1915, c. 31, art. 3, preceding running section 3890.

The statute requires an engineer's report to be made before the widening and deepening of a water course is undertaken, and provides that such improvement may be ordered if upon the consideration of the report and other information it is determined:

"That the improvement of any natural water course by the removal of obstructions from the channel thereof or otherwise or the construction of any levee, levees or system of levees will prevent the overflow of such natural water course, and thereby protect all of the lands within such drainage district from injury therefrom, and will be conducive to the public health, convenience, or welfare." Gen. Stat. 1915, § 3906, amended by Laws 1920, c. 40, § 2.

This court has said, in holding that such a drainage district is not required to build or maintain bridges where its ditches cross a highway:

"It is well established that this liability is imposed upon a private corporation by common law. * * * But that principle has no application to a case where the construction of ditches or embankments by a public corporation makes it necessary to improve a highway. The drainage district, like the county, is a quasi public corporation, an arm of the state, created by the Legislature to perform a function of government. * * * In draining the swamps and lowlands of the district, the drainage board performs a public service and promotes the public health and welfare. * * * The fact that the construction of the drains and ditches was intended to and does improve and render more valuable the lands of private individuals, who alone are charged with the cost of the improvement, makes a corporation none the less a quasi public one." Jefferson County v. Drainage District, 97 Kan. 302, 303, 304, 155 Pac. 54, 55.

And it has also characterized as an exercise of the police power the work of this particular district in cleaning the channel of the river. Drainage District v. Railway Co., 87 Kan. 272, 279, 123 Pac. 991.

A city is held liable without express statute for an injury resulting from the negligence of its employees if it is acting in its proprietary capacity, but not if the function undertaken is governmental. See Rose v. City of Gypsum, 104 Kan. 412, 179 Pac. 348, and cases there cited. Difficulty has often arisen in applying this familiar principle, and an apparent exception is made with regard to the maintenance of its streets, which may not be entirely logical. See Everly v. Adams, 95 Kan. 305, 307, 147 Pac. 1134, L. R. A. 1915E, 448, and Hibbard v. City of Wichita, 98 Kan. 498, 501, 159 Pac. 399, L. R. A. 1917A, 399. So the nonperformance by a city of a class of duties described as "ministerial" is held to constitute actionable negligence, even though such duties are connected with the performance of govern-

mental functions. *Bowden v. Kansas City*, 69 Kan. 587, 77 Pac. 573, 66 L. R. A. 181, 105 Am. St. Rep. 187, 1 Ann. Cas. 955. The case just cited has been referred to as repudiating the usual distinction between the private and public functions of a city. Note 25 L. R. A. (N. S.) 97. Whether or not that case departs from the generally accepted theory, the test used with respect to a municipal corporation proper—an organization of wide powers having much in common with a private corporation—is not necessarily applicable to such purely governmental bodies as counties and townships, to which class the drainage district belongs.

The district having been created as a governmental agency of the state for the carrying out of public purposes, and the injury complained of having arisen in the course of work adapted to that end, no liability on the part of the defendant exists; there being no specific statutory provision to modify the general rule.

The judgment is affirmed.

All the Justices concurring.

BARRETT v. BOARD OF COM'RS OF MONTGOMERY COUNTY. (No. 22953.)

(Supreme Court of Kansas. Nov. 12, 1921.)

(Syllabus by the Court.)

1. Registers of deeds \S 3—Held entitled to one-half of excess fees without deduction therefrom for additional clerks.

After the expiration of her term of office as register of deeds, the plaintiff brought suit against the county to recover one-half the excess fees of the office under the provisions of chapter 193 of the Session Laws of 1917. The court gave judgment in her favor for part of her claim, but deducted from her half of the excess fees \$1,245.50, which had been paid for additional clerk hire. It was shown that the county board exercised its discretion and employed these additional clerks, who were paid on verified bills presented by them to the county clerk and allowed by the board. *Held*, following *Voris v. Cowley County*, 103 Kan. 876, 176 Pac. 976, plaintiff was entitled to one-half the excess fees, and it was error to deduct the amount paid by the county for clerk hire.

2. Action \S 53(1)—Officer monthly claiming salary, and not claiming share in excess fees until after term, held not to split cause of action.

Plaintiff presented her claim each month for the amount of her salary and made no claim for excess fees until after her term of office expired. *Held*, that in doing so she was not splitting her cause of action because her right to excess fees was in no sense involved in the monthly settlement for salary.

3. Constitutional law \S 102(1)—Vested right at close of register of deed's term to excess fees held not disturbed by subsequent enactment for deducting clerk hire.

At the expiration of plaintiff's term of office she had a vested right to one-half the excess fees as provided by the act then in force, and the enactment of chapter 198, Laws 1919, providing that, "if any register of deeds has collected fees allowed as clerk hire under the present law, such amount shall be deducted from any salary claimed under this act, and a cause of action shall accrue to the county for the recovery of such fees if the officer is out of office," cannot be given a retroactive effect so as to deprive her of vested rights.

Appeal from District Court, Montgomery County.

Action by Nelle Barrett against the Board of County Commissioners of Montgomery County, Kan. Judgment for defendant, and plaintiff appeals. Reversed, with directions.

S. H. Piper and C. J. Bryant, both of Independence, for appellant.

Alfred G. Armstrong, D. W. Stewart, and Orin Slonaker, all of Independence, for appellee.

PORTER, J. During the years 1917-18 Nelle Barrett held the office of register of deeds in Montgomery county. After the expiration of her term she brought this action against the county to recover one-half the excess fees of the office, under the provisions of chapter 193 of the Session Laws of 1917. The court gave judgment in her favor in the sum of \$1,896.30, but deducted from her half of the excess fees the sum of \$1,245.50 which had been paid for additional clerk hire. Claiming that this ruling of the court was erroneous, she brings the case here for review.

[1] The case was submitted to the trial court substantially upon an agreed statement of facts. The amount plaintiff was entitled to recover depends upon the construction of certain language in the last clause of section 1 of the act of 1917. The language was construed in *Voris v. Cowley County*, 103 Kan. 876, 176 Pac. 976. The provision is in substance that, whenever the fees collected by the register of deeds and paid over to the county treasurer for any quarter exceed the amount of salary and clerk hire paid to him for the quarter, he shall receive "as clerk hire in addition to the clerk hire heretofore provided an amount equal to one-half of such excess." In the opinion in the *Voris* Case this language was held to be "quite ambiguous," but because of the "evident general policy of the section taken as a whole, to grade the personal compensation of the officer, not alone by the actual labor he performs, but also by the extent of responsibility he assumes, as measured by the volume of business transacted, a policy the

fairness of which is obvious," the court held the language to mean that, where the fees collected in any one quarter exceed the quarterly salary and the amount allowed as clerk hire, the officer is to receive for his own benefit one-half of the excess, "the phrase 'as clerk hire' meaning in the nature of clerk hire, or in lieu of clerk hire, implying merely that if an additional clerk is employed he must be paid by the register."

The opinion then proceeds:

"This interpretation having been placed upon the words directly in dispute, the final clause of the section supplements it by providing that, while one-half of the excess fees shall in any event inure to the personal benefit of the register, the commissioners may in their discretion allow any part of the remainder which they see fit to be used for the employment of additional clerical help." 103 Kan. 879, 176 Pac. 977.

In the present case the minutes of the board of county commissioners establish beyond question that the board exercised its discretion and employed additional clerks who were paid the sum of \$1,245.50 on verified bills presented by them to the county clerk; the bills being allowed by the commissioners and paid by the county. It is true, as the appellant argues, that if the salaries for additional clerical help were to be paid by the register, there would be no reason why the commissioners should limit her in the number of additional clerks to be employed and the amount of their salaries.

[2] The main contention of appellee is that an official may not present a claim for part of the salary due, making no claim for the balance until after the term of office has expired, and then maintain an action against the county for the balance. The contention is that by attempting to do this the appellant was splitting her cause of action. The amount of appellant's salary each month was fixed by the statute, while any claim she might have for excess fees was contingent upon the amount collected in excess of her salary and clerk hire in each quarter. Her claim for salary and that for excess fees were not one single cause of action. Her right to excess fees was in no sense involved in the settlement at the end of each month.

[3] Another contention of the appellee is that appellant is not entitled to recover because the act of 1917 was amended by chapter 198 of the Laws of 1919 by the provision that:

"If any register of deeds has collected fees allowed as clerk hire under the present law, such amount shall be deducted from any salary claimed under this act, and a cause of action shall accrue to the county for the recovery of such fees if the officer is out of office."

Before the passage of the act of 1919, the appellant's term of office had expired. When the services were performed, she had a vested right to one-half the excess fees as provided

by the act then in force, and, without attempting to construe the purpose of the Legislature in the amendment of 1919, it is sufficient to say that the amendment cannot be given a retroactive effect so as to deprive the appellant of her vested rights.

The appellant was entitled to one-half of the excess fees, and it was error to deduct from her claim the \$1,245.50 which the county paid for clerical help employed by the commissioners.

The judgment is reversed, with directions to proceed accordingly.

All the Justices concurring.

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HINSHAW v. HINSHAW et al. (No. 23194.)

(Supreme Court of Kansas. Nov. 12, 1921.)

(Syllabus by the Court.)

Trusts \S 365(2)—Beneficiary's laches held to justify refusal to enforce.

Beneficiaries under a written trust agreement must act promptly to enforce their rights when the trust is violated and repudiated. A delay of 14 years after the recording of a deed in violation of the trust is sufficient to justify a trial court in refusing to enter judgment enforcing the trust, where the agreement, executed 30 years previously, has been lost and cannot be produced on the trial so as to inform the court of the nature and terms of the trust.

Appeal from District Court, Lyon County.

Action by L. R. Hinshaw against Fred Hinshaw and others, and from a judgment therein, the plaintiff and some codefendants of Fred Hinshaw appeal. Affirmed.

W. W. Parker and Owen Samuel, both of Emporia, for appellants.

W. L. Huggins, of Topeka, O. T. Atherton, of Parsons, and R. E. Boynton, of Emporia, for appellees.

MARSHALL, J. This action was commenced to set aside a warranty deed, to declare a will void, and to partition real property. On the trial defendant Fred Hinshaw moved for a judgment on the pleadings, the statement of counsel, and the evidence introduced by the plaintiff and the codefendants of Fred Hinshaw, and asked that judgment be entered quieting his title to the land. The motion was allowed, and judgment was so rendered. The plaintiff and some of the codefendants of Fred Hinshaw appeal.

On and prior to June 10, 1890, Andrew Hinshaw owned the quarter section of land in controversy, 153 acres, and on that day, joined with his wife, Sarah Ann Hinshaw, in a general warranty deed conveying the land to her. That deed was recorded August 20,

1891. In 1896 Sarah Ann Hinshaw executed her will by which she bequeathed to defendant Fred Hinshaw the entire quarter section, subject, however, to certain conditions which are wholly immaterial. The will was signed by Andrew Hinshaw also. On April 13, 1900, Sarah Hinshaw and her husband, Andrew Hinshaw, executed and delivered a general warranty deed conveying to Fred Hinshaw 100 acres off the east side of the property. That deed was recorded September 30, 1905. A copy of each deed was attached to the petition, and the will was introduced in evidence. Andrew Hinshaw died November 11, 1911, and Sarah Ann Hinshaw died April 9, 1917.

The appellants contend that when the deed to Sarah Ann Hinshaw was executed a trust agreement was reduced to writing and was signed by her and by Andrew Hinshaw. A copy of the trust agreement was not attached to the petition, and the agreement itself was not introduced in evidence. There was oral evidence which tended to show that there was such an agreement. The plaintiff testified that he saw his father and mother sign it, and there is that in the evidence which tends to show that the plaintiff took the agreement and kept it, but he testified that he had hunted every place for it and was unable to find it. He testified that the land was to be held in trust, be kept intact, be used by the parents during their lifetime and on their death was to descend in equal shares to all the living heirs. Another witness testified that he wrote the deed to Sarah Ann Hinshaw; that at the same time he wrote an agreement restricting the operation of the deed; that he took the acknowledgments to both instruments; and that the agreement provided that Sarah Ann Hinshaw should not dispose of the property so as to place it beyond the reach of the children. There was other evidence which tended to show that there was such an agreement.

The court in passing on the motion of Fred Hinshaw said:

"There is a claim here of a trust agreement entered into between the parties at the time this deed was made, 30 years ago. The deed is a straight, unconditional warranty deed. So far as anything appears, it was absolute in every particular, and the evidence of any trust agreement that it is claimed overthrow this deed should, I think, be very clear to the mind of the court in all its particulars.

"It seems, according to the evidence, that this trust agreement was mislaid or lost and never has been found. We are deprived of that instrument and its contents, whatever they were.

"On April 13, 1900, a deed was executed by Sarah Ann Hinshaw, mother of plaintiff and defendants in this case, conveying 100 acres of this land to Fred Hinshaw. This was recorded in 1905, and all the parties had notice in 1905 that the mother had conveyed this land to the defendant Fred Hinshaw by warranty

deed. After that time no steps were taken to enforce this trust agreement during the lifetime of Andrew Hinshaw and his wife, Sarah Ann Hinshaw, who undoubtedly knew all about this transaction. A cause of action on account of the violation of that claimed trust agreement arose immediately upon the conveyance of that land, and an action could have been commenced at that time to impress the land with the trust that it is claimed it was conveyed under.

"It seems to me that the plaintiff has been guilty of such laches in not beginning this suit in the lifetime of his parents, when this action could have been brought and when their testimony was available, that the court is justified in finding that the plaintiff and the codefendants, for whose benefit this trust is claimed, ought not to be here in court claiming this property. If the suit had been brought in due time, the court would have had the benefit not only of the trust agreement, and could have determined the matter to an absolute certainty. That this court cannot do.

"Having reached this conclusion and with this view of the case, I can see no other course to follow than to give judgment as prayed for to the defendant, Fred Hinshaw, including the quieting of the title."

This action was commenced in 1919. Fred Hinshaw, in his answer, pleaded laches and the statute of limitations. The appellants, to avoid these matters, argue that no cause of action accrued until after the death of Sarah Ann Hinshaw. If there was a trust agreement, the deed of Sarah Ann Hinshaw and Andrew Hinshaw to Fred Hinshaw and the will of Sarah Ann Hinshaw were made in violation of the trust and in repudiation thereof. Whatever interest the trust agreement gave to the appellants vested in them at the time it was made and did not depend on any subsequent contingency. They had the right to bring an action to set aside the deed and enforce the trust immediately after the deed was executed. This action was not commenced until 19 years had elapsed, and almost 15 years after the deed had been recorded. Because of the loss of the trust agreement and because of the time that had transpired since its execution, it was difficult to ascertain its terms. These things justified the court in finding the appellants guilty of laches and in refusing to give them relief. In *Rehl v. Likowski*, 33 Kan. 515, 6 Pac. 886, this language was used:

"Equity requires that suitors should be prompt and diligent in the pursuit of their rights, and, where there has been great delay in suing to enforce a trust, courts sometimes hold a party to have waived his rights under the trust; but so long as the trust is treated by both parties as subsisting, the right of recovery of the *cestui que trust* cannot be defeated by mere delay." Syl. 4.

The burden of proof was on the appellants. Their evidence did not satisfy the court concerning the terms of the trust agreement. The presumption is that the deeds recited

all the facts connected with the transactions in which they were made, and this court cannot say that the presumption was overcome.

The case was submitted for judgment on the evidence of the appellants, and the court found that they were guilty of laches and determined that their evidence did not establish a right of action.

The judgment is affirmed.

All the Justices concurring.

STATE v. POLLMAN. (No. 23660).*

(Supreme Court of Kansas. Nov. 12, 1921.)

(Syllabus by the Court.)

1. Criminal law §530—Admission of written confession held not error.

On the trial of the president of a bank charged with the crime of forgery, *held*, upon the facts stated, it was not error to admit in evidence against him a written confession of guilt signed by him; there being no evidence to substantiate the claim that the statement was obtained by promise of immunity or other inducements.

2. Criminal law §1064(1)—Errors not urged in motion for new trial not considered on appeal.

Errors occurring at the trial, but not urged as grounds for the motion asking a new trial, will not be considered on appeal.

3. Forgery §5—State need not establish that defendant's primary purpose was to injure or defraud.

In a criminal prosecution on the charge of forgery in the third degree, an instruction is *held* not improper which charged that it was not necessary for the state to establish that the primary purpose of defendant was to injure or defraud and that his real purpose may have been to benefit himself.

4. Criminal law §400(7)—Secondary evidence of contents of forged instruments held admissible, where defendant gave them to his brother, who took them from state.

In such a case secondary evidence of the contents of the forged instruments is admissible, where the state has accounted for the failure to produce the originals by showing that they were turned over to the defendant, who gave them to his brother, and that his brother took them outside of the state.

Appeal from District Court, Linn County.

Fred W. Pollman was found guilty of forgery in the third degree, and he appeals. Affirmed.

John H. Crain and A. M. Keene, both of Ft. Scott, for appellant.

Richard J. Hopkins, Atty. Gen., and John O. Morse, of Mound City, for the State.

PORTER, J. The appellant was charged on four different counts with forgery in the third degree. He was found guilty on the first count, and appeals.

The appellant was president of the Linn County Bank and owned more than 150 shares of the stock; his brothers and a sister owning the rest, except a few shares held by outside parties. The appellant was born and raised in Linn county, and from the age of 17 had been connected with the bank, filling all the positions from bookkeeper and janitor to president. Besides his interest in the bank, he owned several farms and considerable personal property in Linn county, and a large tract of land in Texas. In the community where he lived he was regarded as a law-abiding citizen.

[1] It is not seriously argued, and cannot be contended, that the defendant was not guilty as charged in the information. His complaint is that by reason of certain errors he was prevented from having a fair trial. The main contention is that the court erroneously admitted in evidence a written confession of his guilt which he had signed; that the statement was obtained by promises of immunity and other inducements held out to him by E. V. Wood, a deputy bank commissioner who discovered the forgeries.

The first count of the information charged the appellant with forging the name of W. W. Calvin to a note for \$5,000 which he carried as one of the assets of the bank. Wood testified that among other notes listed in the individual ledger, and which he found in the notebook handed to him by the appellant, were three notes purporting to be signed by Calvin, and, on being questioned, appellant told him that Calvin had signed them. Wood accepted his word at the time, but went further into the examination and found the same situation in respect to other notes. The next morning he told Pollman to call the directors for a meeting at the bank. Pollman said, "Come in the back room a minute, Wood; I want to speak to you." They went into the bookkeeper's room, and after the door had been closed their conversation, in substance, was:

"There is no use going any farther, Wood; you have got it on me on those notes;" and I said, "Do you mean, then, that you signed all these then yourself?" and he said, "Yes." I said, "Where did the money go?" and he swore, and said it went into those farms, and told me he had a lot of property, enumerating a good share of it, and he wanted a chance to clean it up without his family or the directors finding it out. He asked to be given permission not to call the directors. I said I had no arrangements or any authority to say that he could take up those notes, but I would do this: We could agree between us that he would sign this statement covering the situation and that we

would not call the directors that day, or until we had time to go to Topeka, and I would go with him and let him say the whole matter before the bank commissioners, and he said he would like to do that. I asked him, 'Is this all of the notes?' and he said, 'I will go through the case and give them all out for you, for there are others.' After he had picked out these notes and said they were the ones he had signed the money to, I placed them with the state, and gave the typewriting and made the statement which he signed."

After examining the examination of another bank in that vicinity, the witness met Polmann by previous arrangement at the depot, and they went together to Topeka.

The paper marked "Voluntary Statement," signed by the appellant, read as follows:

"I, E. W. Polmann, president of the Linn County Bank, of La Crosse, in the interest of perfect candor, do hereby make the following statement: That I have placed in the assets of the Linn County Bank, and carried the name as genuine notes, the following, which I have falsely signed in the names of other individuals, and purporting to be the notes and obligations of these others, as follows."

"Then followed a list of 13 notes aggregating over \$30,000.

"The appellant was a witness, and his testimony shows that there is no merit in the contention that any advantage was taken of him in procuring the written confession. He testified, in substance:

"I told Mr. Wood that the W. W. Calvin note was his. The next morning I saw him comparing the signature of those notes with the signatures on the canceled checks. I don't know what notes and canceled checks they were, and after he asked me to call the board in for a meeting, at about 11 o'clock, I suppose I was satisfied then that that was the reason he was asking me to call the directors, and when I reached that conclusion I took him in the back room. I said in substance to him, 'There is no use going any further, Mr. Wood; I signed the notes.' He hadn't then made me any promise of any kind, and in carrying out this statement I made and set it out fully on the sheet. I told him that I didn't know whether all the notes that he had in his hand were all the notes that I had signed. I told him I would look through the note file and see. I looked through the note file and found some additional notes on which I had written the names. I think they were included with the ones he had already picked out and listed in the statement. I told him what I had done with the money, and I think I told him I spent it on farming operations and putting out a 1000-acre wheat crop and harvesting two crops that I hadn't been able to harvest. In a way I had taken the money out of the bank for my own private use, and put these notes on which I had signed the name of W. W. Calvin and E. L. Calvin in the bank in place of the money I had taken out."

"The appellant's testimony to the effect that before inducements of any character were made to him he took the bank examiner aside

and confessed to substantially the statements that are contained in the statement makes it plain that there could have been no prejudice in the admission of the written confession. There was nothing improper in the bank examiner's agreement to do as he subsequently did—go to Topeka with the appellant and lay the matter before the bank commissioners. He had no authority to promise any immunity, and there is no claim that he made such promise.

[2] It is next contended that appellant was entitled to a new trial because of misconduct of the county attorney. The record shows the following: When the state was about to close its testimony the county attorney said, "I would like to have him [meaning appellant] sworn to answer one question." Appellant's counsel objected on the ground that it was prejudicial and contrary to law. Thereupon the county attorney withdrew the request. The state then rested, and the first witness called for the defense was the appellant, who testified at considerable length. The matter was not of sufficient importance to furnish the basis for a serious claim of error; besides, it was not urged as a ground for the motion asking a new trial. For that reason it cannot be considered. *State v. Brower*, 75 Kan. 823, 88 Pac. 884.

The appellant had attempted to show by the makers of some of the forged notes that they were on intimate and friendly terms with him; that he had represented them in business; that he had indorsed checks for them in order to give them credit at the bank for money paid there. The evidence of this character was somewhat prolonged, and the court took occasion to say that the question was whether or not they had given the appellant authority to sign their names to the notes, and that if he had such authority it was a proper matter of inquiry. Counsel for appellant insisted that this authority might be shown indirectly, and the court remarked:

"I am awfully friendly with several bankers, but I would be considerably otherwise if they signed my name to a note."

This is urged as another reason why the state should be put to the expense of another trial. There was no objection to the statement of the court at the time it occurred, and, besides, we discover nothing prejudicial in what was said.

[3] Complaint is made of instructions, one of which charged that it was not necessary for the state to establish that the primary purpose of the appellant was to injure or defraud, and that his real object may have been to benefit himself. One of the elements of forgery in the third degree is that the act be performed "with intent to defraud." The instruction correctly stated the law and was particularly appropriate to the facts in this

case, because the appellant had introduced evidence to show that his family restored to the bank the money represented by the forged notes. To constitute forgery in the third degree it is sufficient if an obligation, claim, right, or interest shall be, or purport to be, created or in any manner affected.

[4] The appellant was not prejudiced by the failure to produce the original forged instruments. The state had accounted for the failure to produce these by showing that they were turned over by the bank examiner to the appellant, who gave them to his brother, and that his brother took them outside of the state. The contents of the instruments were fully established by evidence; the fact that they were forgeries was not only admitted by the appellant but was shown by the evidence of the alleged makers.

We discover no ground for the claim that appellant was deprived of any of his rights, or that he did not have a fair trial.

Judgment affirmed.

All the Justices concurring.

BUSHEY v. COFFMAN. (No. 22727.)

(Supreme Court of Kansas. Nov. 12, 1921.)

(Syllabus by the Court.)

1. Trial \S 199—Instruction leaving to jury whether action is for damages for fraud, or for rescission of contract and restoration of property, erroneous.

It is the duty of a court to interpret the pleadings and instruct the jury as to the issues presented by them, and an instruction, leaving to the jury the question of whether the action is one for the recovery of damages because of the fraud of the defendant in inducing the plaintiff to enter into a contract, or one for a rescission of the contract and restoration of property or its value, is erroneous.

2. Fraud \S 41—Petition held to state election to sue for fraud.

The petition examined, and it is held to state an election by the plaintiff to affirm the contract in question, retain what had been received under it, and to demand damages sustained by reason of the alleged fraud.

3. Fraud \S 35—Right of action held not waived by affirmation of contract.

A party, induced by fraudulent representations to enter into a contract which had been partly performed before the discovery of the fraud, does not waive the fraud by an election to affirm the contract, complete its performance, and retain what was received under it, and is not precluded from recovering damages sustained by reason of the fraud because of delay, if his action is begun within the period fixed by the statute of limitations.

4. Evidence \S 568(4)—Instruction that testimony of bankers and business men as to responsibility of note signers was not conclusive approved.

No error was committed in giving an instruction to the effect that the testimony of bankers and business men as to the financial responsibility of the signers of notes was not conclusive, but was to be considered in connection with the other evidence in the case, direct and circumstantial, and given the weight and force to which it was justly entitled.

5. Evidence \S 113(4)—Instruction that value of bank stock at time other than sale was only relevant as to value at sale held proper.

An instruction, advising the jury that the value of the bank stock and assets was to be determined as of the date of the sale, and that evidence of its worth or worthlessness at any other time could only be considered so far as it threw light as to its value on the day the sale was made, is held to be without error.

6. Evidence \S 601(4)—Bank commissioner's requiring charging off of notes as worthless is not conclusive of their value.

An instruction, that evidence of the fact that the state bank commissioner required the charging off of certain notes as worthless would not be conclusive on the question of their value if upon all the evidence the jury should find that the signers of the notes were solvent, and that the notes were good and collectible, was not incorrect.

Appeal from District Court, Labette County.

Action by Allen H. Bushey against George M. Coffman. Judgment for the defendant, and plaintiff appeals. Reversed and remanded for new trial.

Fred A. Sabin, of La Junta, Colo., S. H. White, of Denver, Colo., and Madden, Cooper & Madden, of Wichita, for appellant.

H. P. Farrelly and T. R. Evans, both of Chanute, and W. D. Atkinson, of Parsons, and W. R. Cline, of Erie, for appellee.

JOHNSTON, C. J. This case was here before upon an appeal from a ruling sustaining a demurrer to plaintiff's evidence. It was then determined that the uncontradicted evidence of the plaintiff was sufficient to overcome the demurrer, and the judgment was therefore reversed. *Bushey v. Coffman*, 103 Kan. 209, 173 Pac. 341. Upon a remand of the case for another trial, the defendant with leave of the court filed an amended answer, alleging that the plaintiff had waived any claim he may have had for damages by taking charge of the bank and operating it for many months without complaint, and by purchasing additional shares of stock long after the purchase of the controlling interest in the bank, and, further, that by failing to tender a return of the stock he was estopped to complain of the acts of the defendant. On second trial a vast volume of conflicting

evidence was received as to the representations made in the negotiations and as to the character and value of notes and other assets of the bank at the time of the transfer of the stock to the plaintiff. While evidence was offered tending to show misrepresentations as to the condition of the bank and the value of its assets, there was abundant evidence that the defendant acted fairly and honestly in the negotiation, and in the transfer of his stock in the bank. Because of the conflict in the evidence the instructions given by the court in the submission of the issues to the jury were of vital importance.

Complaint is made of several instructions, and particularly of one relating to the remedies available to a defrauded party. It may be said that plaintiff's petition was in two counts, the first of which charged that the sale of the bank stock was procured through the misrepresentation and fraud of the defendant, and for his loss and damage he asked judgment for \$23,700. The second count was for a rescission of a contract for the purchase of certain real estate and water rights for \$2,500, obtained under duress, and asking that a promissory note executed by plaintiff and delivered to defendant for \$2,500, in payment of the property, be canceled. In this connection the plaintiff tendered a deed of the property acquired under the purchase. On the second count the verdict of the jury was in favor of the plaintiff, and thereon judgment canceling the note was rendered. Of this part of the judgment there is no complaint. Upon the first count the verdict and judgment were in favor of the defendant, and the present review is confined to the rulings and judgment upon that count.

[1, 2] The contention of the plaintiff is that the court erred in defining the issues and submitting the case to the jury. Instead of treating the count as an action for the recovery of damages sustained by reason of the fraud, it is claimed that the court confused the issues and misled the jury by submitting an instruction relating to the rescission of the contract. The first count was a charge of fraud and a demand for the recovery of the loss and damage sustained by reason of the fraud. There was no averment by plaintiff of a purpose to disaffirm or rescind the contract, no tender of that which had been received under it, nor of the taking of the steps essential to a rescission. The averments of the petition all tended to show that plaintiff had elected to retain what he had received under the contract which had been executed and to sue for the damages sustained by reason of the deceit and fraud of the defendant. On the former appeal the first count was regarded and treated as a cause of action for damages and not of rescission. *Bushey v. Coffman*, supra. When the pleader reached the second count he made it very plain that plaintiff was asking for a

rescission and restoration. The instruction complained of did not interpret the pleading and define the issue submitted, but left the jury to determine what remedy had been chosen by plaintiff and presented in the petition.

In instruction 31 the trial court referred in general terms to the several courses open to one who has been induced to enter into a contract through the fraud of another: First, that he may elect to rescind and be restored to his former position; second, that he may affirm the contract, retain the property received under it, and recover his damages for any loss sustained because of the fraud; and, third, he may waive the fraud and take such action as will estop him from asserting fraud and claiming a recovery on account of it. The instruction proceeds:

"If plaintiff desired to rescind the contract between himself and the defendant, and recover the consideration paid by him for the bank stock then it was obligatory upon him, the plaintiff, to return, or offer to return, the bank stock to the defendant, Coffman, before he instituted his action, or he would not be entitled to recover herein, but if you shall find that he elected to retain the bank stock at its fair and reasonable value and recover the difference between such fair and reasonable value and the price paid therefore as his damages sustained, then and in that event, he, of course, would not be required to tender a return of the bank stock before he would have a right of recovery against the defendant, but in either event he is required to act promptly after discovering that fraud has been practiced upon him by the defendant, or he cannot recover in this case. The law does not permit a person who has been defrauded, and who has knowledge of the fact, to retain possession of the property without complaint, and hold it to suit his own convenience with the thought and expectation of gaining a profit thereon, before exercising his right of rescission or action for damages, and for the reason that this would give him an undue advantage of the other party, for after waiting, if the market should prove favorable, he could sell and thus secure a profit, while, on the other hand, if the market should prove unfavorable, then he would escape all possibility of loss by looking to the party who had defrauded him for a return of all the consideration paid, or at least to the amount of damage sustained. The law does not permit a person to play fast and loose in such a manner. He must act promptly if he would look to the party who has defrauded him, or retain it beyond the period of prompt action, and thus affirm the contract and be bound thereby as though no fraud had been committed. By the term 'acting promptly' as used herein is meant that one must have taken action to protect his rights within such a period of time after discovering that he had been defrauded as a reasonably prudent person surrounded by the circumstances of this particular case would have done. In this case if you shall find and believe from the fair weight or preponderance of the evidence that the defendant George M.

Coffman made any false and fraudulent representations to plaintiff, A. H. Bushey, that said Coffman at the time of making them knew that they were false and untrue, that Bushey actually relied upon them and believed them to be true, and was thus damaged, but you shall further find and believe from the evidence herein that after the discovery of the fraud thus practiced upon him, the plaintiff, A. H. Bushey, paid the defendant for several shares of the bank stock theretofore purchased by him; that he made new loans for the bank on his own account as president of the bank; that he renewed and increased, on his own account, some of said bank stock; that he, on his own account, as president of the bank, released from some of the banks paper sureties that were financially responsible in taking renewal of such paper; that he, after a lapse of more than one year, with the bank under his exclusive management and control, sold his stock therein at a considerable profit, and if you further find that he did not exercise his right under the law in instituting his action with that degree of promptness which an ordinarily prudent person situated as he was should have done, but instead held and retained the bank stock and the management of the bank, without any complaint of the fraud thus known to him, and with the intention and for the purpose of gaining a profit out of the transaction, and after an unreasonable delay lost on the transaction, instead of gaining a profit thereon, and then for the first time sought a recovery from the defendant of all the consideration paid by him, then and in these events plaintiff would, by such acts on his part, have waived the fraud and affirmed the contract, notwithstanding the fraud, and he would be thereby estopped from claiming a right of recovery herein, and your verdict must be for the defendant."

It was the duty of the court to determine from the pleadings the relief that was sought by the plaintiff, and to advise the jury as to the rules of law applicable to the enforcement of that remedy. The instruction covered the different remedies open to the plaintiff, but the jury could not go to the pleadings to ascertain the election that had been made by the plaintiff, nor could they look to the evidence to determine what the issues in the case were. The averments of the petition proceeded on the theory that the plaintiff was affirming the contract, retaining the property purchased, and asking a recovery for the loss sustained because of the fraudulent representations of the defendant, and the jury should have been instructed that the plaintiff had elected this remedy, and was required to produce evidence essential to recovery of damages. That portion of the instruction as to rescission and the restoration or tender of the stock sold was not within the issues, and was confusing and misleading.

[3, 4] Another feature of the instruction is open to objection. It was laid down with considerable emphasis that plaintiff could not recover damages if he affirmed the contract by an act in performance of it; that is, if he

retained the property purchased and did not promptly complain and ask for damages upon learning of the fraud, no recovery could be had because of the fraud. The court applied the same rule to a demand for damages as to one for rescission. However pertinent the instruction might have been, if the plaintiff had elected to rescind the contract, it was not applicable to the remedy sought. Plaintiff had paid full consideration for the stock first purchased. It was a considerable sum, \$23,700, and under the purchase he had obtained and held the control of the bank some time before the discovery of the alleged fraud. Performance of the contract was practically complete before that time. The rules applicable to a contract imposed on a party by fraud, while it is purely executory, do not apply where the contract is partly or completely performed before the discovery of the fraud.

Some of the courts have held that if a defrauded party learns of the fraud while the contract remains wholly executory, and thereafter voluntarily does any acts in performance of the contract, he will be deemed to have condoned the fraud and waived his right to sue for the fraud. 20 Cyc. 92; 12 R. C. L. 413.

In *Van Natta v. Snyder*, 98 Kan. 102, 157 Pac. 432, L. R. A. 1918A, 102, it was held that a party who had been induced by fraudulent representations to enter into a contract which had been partly performed before the discovery of the fraud was not precluded from recovering damages for the fraud. The fact that she did not repudiate the contract or promptly complain of the fraud, it was held did not bar her right of action. The contract being partly performed, she was at liberty to affirm the contract, retain what she had received under it, complete her part of the performance, and then sue for the damages suffered from the fraud, and her action therefor might be brought at any time within the period fixed by the statute of limitations. In such a situation an affirmation of the contract is not deemed to be a waiver of the right to recover damages.

In the later case of *Geiger v. Cardwell*, 99 Kan. 559, 163 Pac. 613, it was said that:

"This court has disavowed the rule that a discovery of the fraud in an early stage of performance puts the injured party to an election between on the one hand stopping operations under the contract and seeking remedy for the fraud and on the other going ahead under the agreement and condoning the wrong"—citing the *Van Natta Case*.

It was decided that:

"Where one who has contracted to buy certain property for about \$15,000, the transaction involving his assumption of an obligation which he discovers, after having paid \$1,000 on the purchase price, to be about \$500 larger than the seller had represented, he does not

waive his right to recover damages on account of the fraud by accepting the property and completing the payment."

The instruction questioned directly conflicts with the rules announced in these cases, and must be regarded as material error.

Complaint is made of instruction 32, relating to the testimony of bankers and business men as to the responsibility of the makers of the notes which were alleged to have been represented to be good, but were of little value. The jury were told that the opinions of the bankers and business men were admissible, but their evidence was not conclusive on the jury. It was to be considered in connection with other evidence, direct and circumstantial, and given such weight as it was justly and fairly entitled to. Although the bankers and business men were sometimes erroneously referred to in the instruction as experts, the court was speaking of opinion evidence, and the instruction, only a summary of which has been given, gave the correct measure of opinion evidence.

[5] Nor is there any reason to complain of instruction 33, which advised the jury that the value of the bank stock and assets of the bank alleged to have been misrepresented by the defendant was to be determined as of the date the sale was made. The court rightly instructed the jury that evidence of its value or worthlessness at any other time could only be considered as throwing some light on its value on the day the contract was made, and that if the assets and notes were good upon that date, it could make no difference that they may have depreciated in value or have become worthless at a later time. There was no error in the instruction.

[6] It appears that the bank commissioner of Colorado visited the bank more than 16 months after the plaintiff had purchased it, and some time after he had sold it to others for a price higher than he had paid the defendant for the stock, but with a guaranty of the notes then in the bank. The bank commissioner required that quite a number of the notes which were in the bank when the defendant sold it should be charged off as worthless. In this connection the jury were instructed that if the makers and sureties of the notes held property not exempt from sale under execution, and were in fact solvent, the notes were to be regarded as good, notwithstanding they had been charged off under the direction of the bank commissioner. Plaintiff contends that the commissioner is a sworn officer of the state, with authority to investigate the condition of banks and the values of the notes, securities, and assets held by banks, and that the instruction of the court minimized the weight and force of the evidence of such an officer. There is nothing conclusive in the inferences or action of the

commissioner as to the value of the paper in the bank, or of the solvency of those indebted to the bank. His opinion and order that the makers of notes were insolvent and the notes worthless would not be entitled to credence if it were shown by other competent and convincing evidence that the makers were solvent and the notes were good. It appears that he called and held a midnight meeting of the directors, and apparently with little inquiry directed the charging off of many of the notes in the bank. Whatever may have been the extent of his inquiry and information as to the value of the notes, his opinion and action did not foreclose inquiry by the court as to the financial responsibility of the makers and sureties of the notes when the sale was made by the defendant.

Other instructions are criticized by the plaintiff, but we find nothing erroneous in them, nor anything requiring special comment.

For the error pointed out in the instruction, the judgment will be reversed, and the cause remanded for a new trial.

All the Justices concurring.

RAINEY v. SMITH et al. (No. 22980.)

(Supreme Court of Kansas. Nov. 12, 1921.)

(Syllabus by the Court.)

1. Physicians and surgeons \S 18(8,9)—Malpractice held for jury under evidence.

It is held that there was sufficient evidence, expert and otherwise, to compel the court to overrule the demurrer to the plaintiff's evidence and to submit the case to the jury for determination.

2. Pleading \S 237(1)—Amendment to correspond to evidence permissible where parties not misled.

Where parties are not misled, pleadings may be amended to correspond to the evidence introduced.

Appeal from District Court, Allen County.

Action by Vinney M. Rainey against Deros-tuse E. Smith and another. Judgment for defendants on demurrer to the evidence, and plaintiff appeals. Reversed, and new trial directed.

Cullison & Forrest, of Iola, for appellant.
E. D. McKeever and Arch. M. McKeever, both of Topeka, and Oyler & Anderson, of Iola, for appellees.

MARSHALL, J. The plaintiff seeks to recover damages from the defendants, physicians and surgeons, for malpractice. On the trial, the court sustained the defendants' de-

murrer to the plaintiff's evidence, and she appeals.

[1] 1. The plaintiff introduced evidence which tended to prove the following facts: She was pregnant, in ill health, and consulted defendant Nevitt on a number of occasions. He made examinations from time to time, and first informed the plaintiff that she had a tumor in the mouth of the uterus; and later, after the plaintiff had informed him she was pregnant, said that her condition was not due to natural pregnancy, but that, if she were pregnant, the fetus was in the Fallopian tube, and must be removed by an operation or her condition would result in her death. Defendant Nevitt requested the plaintiff to go with him to defendant Smith in Kansas City for an X-ray examination which would reveal the cause of her trouble. She went to Kansas City with defendant Nevitt for that purpose, and they consulted defendant Smith, who made a digital examination, and said that an X-ray was unnecessary; that a blind physician could tell what was the matter; that the ailment was pregnancy outside of the uterus; and that it was necessary to have an operation at once. No X-ray examination was made. The plaintiff went to her home at Mildred in Allen county, remained there a few days, and returned to Bethany Hospital in Kansas City, where an operation was performed, and it was discovered that the plaintiff was pregnant, but that the fetus was in the uterus and not in the Fallopian tube. The incision was closed, and in a short time, the plaintiff returned to her home. Afterward she gave birth to a normal, healthy child. After the operation, the defendants reported to the plaintiff that they had discovered a number of tumors in and about the uterus, and that after the birth of the child they must be removed. When the child was born, a hernia developed in the incision that had been made. Some months later the plaintiff returned to Bethany Hospital, and was operated on by Dr. Steman for the purpose of reducing the hernia. He made an incision, examined the abdominal viscera, and found that the Fallopian tubes and the appendix were in bad condition. They together with the ovaries were removed by him. He discovered no tumors about the uterus, but did discover some scars and adhesions on the omentum, some of which might be called tumors.

On the cross-examination of one of the plaintiff's witnesses, a physician and surgeon, he testified that there are pregnancies where unusual and extraordinary symptoms appear that are hard to diagnose, but that it is not hard to ascertain whether the condition is serious; that the conclusion might be reached that the condition is serious without knowing exactly what it is; and that then is the time to make an explorative operation. In their brief, the defendants say:

"It is conceded here that if the defendants made a wrong diagnosis, they did not operate in pursuance to this mistaken diagnosis, but so far as the hazy evidence of the plaintiff throws any light on the subject, it appears that they made an explorative operation, on account of the seriousness of plaintiff's condition, a method which is approved by the best surgeons according to the testimony of Dr. Charles Christian, the plaintiff's own witness."

The defendants further say:

"It appears that the defendants * * * opened up the abdominal cavity for the purpose of ascertaining whether their first diagnosis was true and correct."

Recapitulating the evidence thus far briefly stated, we have this situation: An examination by one of the defendants; his conclusion therefrom that the plaintiff was suffering from extrauterine pregnancy; his advice that an X-ray examination be made; a trip for that purpose to Kansas City, where a digital examination was made by the other defendant; the latter's conclusion expressed in the following language:

"We need no X-ray here. Why, a blind physician could tell what is the matter with this woman."

—and then, according to the argument of the defendants, an exploratory operation to ascertain her condition.

Another physician and surgeon testified in response to questions as follows:

"Q. Tell whether or not the skeleton of a six months old baby would appear clear upon an X-ray in the abdomen of a woman bearing the baby? A. A six month old child would show shadow I think. * * * Q. So if you diagnosed a case by an abdominal condition and were convinced beyond a doubt, without an X-ray, that it was a case of immediate surgery, a serious case, you wouldn't bother with an X-ray? A. If I felt positive, I wouldn't. * * * Q. There are pregnancies where unusual extraordinary symptoms appear? Hard to diagnose? A. Yes, but not hard to ascertain whether the condition is a serious one. Q. And, Doctor, if the case is so clear and the diagnosis so plain that, to use the language of the man diagnosing it, a 'blind doctor could tell what was the matter,' an exploratory operation wasn't justified, was it? A. Not under that circumstance."

It is the rule in this state that negligence of a physician or surgeon must be proved by expert evidence. *Sly v. Powell*, 87 Kan. 142, 123 Pac. 881; *Paulich v. Nipple*, 104 Kan. 801, 806, 180 Pac. 771. The evidence just quoted was sufficient to satisfy the rule.

It is unnecessary to make any extended comment concerning the manner in which the defendants treated the plaintiff as their patient. It is enough to say that they made a serious mistake in their diagnosis, and that the evidence tended to show that they were negligent in not making an X-ray examina-

tion. The demurrer should have been overruled, and the evidence should have been submitted to the jury.

[2] 2. The defendants say that—

"There is no allegation in this petition of failure to use the X-ray, although part of plaintiff's case is based upon that complaint, and counsel for plaintiff in the trial objected to testimony on that subject."

An examination of the petition of the plaintiff shows that the contention of the defendants is correct; but, if the plaintiff's evidence establishes a cause of action, she should not be precluded from recovering by reason of her failure to make that allegation. The defendants were not misled thereby. The petition may readily be so amended, and is now considered as amended.

The judgment is reversed, and a new trial is directed.

All the Justices concurring.

ERHARDT v. CITY OF ROSEDALE et al.* (No. 22976.)

(Supreme Court of Kansas. Nov. 12, 1921.)

(Syllabus by the Court.)

1. Attorney and client §166(1)—In attorney's action for services, evidence held to support a verdict for the defendants.

The evidence examined, and held to support the verdict and findings of the jury.

2. Attorney and client §166(2)—In attorney's action for services in securing options, evidence of his payments held competent.

Criticized rulings touching the admission of evidence held to have been proper.

3. Counsel's uncomplimentary remarks held not prejudicial.

Certain uncomplimentary remarks of counsel held not to have been materially prejudicial.

4. Appeal and error §758(2)—Attorney and client §167(3)—Objection to instructions as unsupported by evidence held not well taken; refused requested instruction not considered where no reason assigned.

The instructions complained of, one for no assigned reason, and others because unsupported by evidence, held to have been properly given.

5. Attorney and client §167(3)—Requested instruction in action for services held properly refused.

Refusal to give a certain requested instruction approved.

Appeal from District Court, Wyandotte County.

Action by Philip Erhardt against the City of Rosedale and others. Judgment for the defendants, and the plaintiff appeals. Affirmed.

David F. Carson and James T. Cochran, both of Kansas City, for appellant.

L. R. Gates and Rush Fisetta, both of Rosedale, for appellees.

WEST, J. Philip Erhardt sued to recover for services as attorney, alleging, in substance, that the city of Rosedale needed certain land for the purpose of diverting Turkey creek from its course in order to prevent floods; that the city of Rosedale contracted with Kansas City, Mo., touching the matter, and also contracted with its co-defendants touching the expense of such divergence, and in pursuance thereof passed a certain ordinance providing therein, among other things, that L. R. Gates, then city attorney of Rosedale, and James S. Gibson be given general charge of the improvements specified in the ordinance; that, pursuant to such authority, James S. Gibson proposed to the plaintiff that he obtain an option on a certain tract of land desired, and that he would be paid for his services and reimbursed for any money he might expend in obtaining it; that Gibson was at the time agent of Rosedale, and duly authorized to negotiate with the plaintiff for obtaining such option, and the plaintiff was with the acquiescence and consent of the defendants authorized to do the things necessary to obtain it; that the plaintiff entered upon such employment and did obtain an option for \$25,000, paying down thereon \$1,000 himself, which was acknowledged by one of the counsel for Rosedale and a deed executed and recorded.

[1, 2] The answer denied the authority of Gibson to employ the plaintiff, and denied that the city had in any way ratified the contract for the alleged option, and averred that the plaintiff settled with Rosedale on the theory and understanding that controversies growing out of such land were being settled, adjudged, and compromised, and that he made no assertion of the claim sued upon.

The jury found for the defendants and answered special questions to the effect that the plaintiff was not employed as agent for Rosedale, that he reported to the city his alleged purchase of the land, and that the purchase price was \$50,000 and appeared before the condemnation commission as representing the parties from whom such purchase was made, and appeared as attorney therefor in the appeal from the condemnation.

It is contended that he gave no notice of his claim against the city, and that he received for his services for the land company \$4,000, that he was not authorized by the city to procure such right of way, and that

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

*Rehearing denied December 16, 1921.

he endeavored to induce the agent of Rosedale to pay \$50,000 therefor.

Plaintiff contends that Attorneys Gates, Park, and Gibson had authority under the ordinance of Rosedale to appoint agents and attorneys to assist in carrying out the enterprise. As we have not been favored with a copy of the ordinance, we are unable to say whether or not it contains such authority. It is argued that the admitted facts indicate the appointment of the plaintiff. We find in the record, however, the usual conflict in testimony, and are unable therefrom to say that the findings of the jury in this respect were not properly sustained.

Counsel insist that it was incompetent to admit evidence that the plaintiff had settled with the land company. That was a part of the defense set up in the answer and was competent as one of the circumstances showing the relation of the plaintiff to the defendant city.

Counsel assign as error the refusal of the court to admit testimony offered by the plaintiff, but do not in their brief call attention to what such evidence was.

[3] Fault is found with counsel for the defendants touching statements and remarks in the presence of the jurors alleged to be prejudicial, but those set forth in the abstract are not, in our view, serious enough to amount to prejudicial error. A lawsuit is frequently marked by observations less courteous and considerate than might be desired, but those complained of are not vicious enough to undo the work of the court and the jury and the conclusions reached by them.

[4] Plaintiff requested an instruction to the effect that, if after his services for the city had terminated, he sought and obtained employment from the land company, he had a right so to do, and in the settlement of any controversy between the city and such company it would be no defense in this action. Counsel do not enlighten us in their brief as to why they think this instruction was improperly refused, and we will therefore assume the refusal was not error.

The only other alleged error argued in the brief was the admission of prejudicial testimony and the rejection of competent testimony. Plaintiff was required to state on cross-examination over his objection that he and his co-counsel drew between \$8,000 and \$10,000 under their contract with the land company, and that they divided this fee between them, and the plaintiff was now seeking to recover for the very same land against the city. It is contended that this

was entirely outside the issue, but it seems to be fairly well within the allegations of the answer, and hence its reception was not error.

Notwithstanding the few specifications of error relied on in the statement of errors complained of in the brief counsel go further and complain of the seventh, eighth, and ninth instructions. The seventh was merely to the effect that, if the plaintiff obtained the contract for his own profit, and not as agent for the city, he could not recover. We see nothing wrong with this instruction. No. 8 was that, if the plaintiff permitted the city and land company to settle their controversy without any knowledge of his claim, and gave the city no notice thereof and permitted such settlement to be made, he must be held estopped. This is a correct statement of the principle of law, but counsel argue that, because the plaintiff testified he was not present at such settlement, the instruction was erroneously given; there was, however, other testimony given indicating that the settlement was made with his knowledge, and hence no error appears in this respect.

[5] In the ninth instruction the jury were told that, if after the execution of the contract by the plaintiff and the land company he attempted to sell the right of way to the defendants and asked therefor \$50,000, he could not recover. This was merely saying that, if when in fact agent and attorney for the city of Rosedale he was trying to make \$25,000 from the other side instead of the fee he now claims, he could not recover, and this seems axiomatically correct. The plaintiff requested the court to instruct that, if after his services for Rosedale were terminated he sought and obtained employment from the land company, he had a right to do so, and any settlement of any controversy between Rosedale and the land company "would be no defense to this cause, and your verdict should be for the plaintiff, as to that defense." The quoted part seems to make the instruction one of such doubtful propriety that it must be held to have been properly refused.

The reply brief of the plaintiff reargues the proposition that the evidence was insufficient to sustain the verdict and findings. But the record contains an abundance of evidence, conflicting though it be, to substantiate all the conclusions reached by the jury.

Finding no material error, the judgment is affirmed.

All the Justices concurring.

STATE v. BELL. (No. 23290.)

(Supreme Court of Kansas. Nov. 12, 1921.)

(Syllabus by the Court.)

1. Larceny \S 68(1)—Evidence of guilt held to justify overruling of defendant's demurrer.

The evidence, tending to establish the guilt of a defendant charged with the theft of an automobile, examined, and *held*, to justify the overruling of defendant's demurrer to the state's evidence.

2. Larceny \S 64(8)—Fact of possession of stolen automobile held sufficiently shown.

The evidence which tended to show that the car had been in the possession of the defendant shortly after it was stolen until he delivered it to a confederate to be sold, examined, and *held* sufficient to prove the fact of such possession, although no eyewitness thereto was produced by the state.

3. Larceny \S 50 $\frac{1}{2}$ —Possession by defendant of dies for altering engine numbers of stolen automobiles properly shown.

Where the numbers on an automobile engine of a stolen car are altered after the theft, it is admissible in evidence to show that dies for altering such engine numbers had been seen at the home of the defendant.

4. Criminal law \S 1169(5)—Error in admission of evidence not reversible, where objection sustained and instruction to disregard given.

Error cannot ordinarily be predicated by a defendant in a criminal case on the admission of evidence to which he makes timely objection, when his objection is promptly sustained, and the jury is directed to disregard such evidence.

5. Criminal law \S 561(2)—Unexplained possession of stolen automobile held sufficient to convict.

The instructions touching the evidential significance attaching to the possession of recently stolen property examined, and held to be a correct statement of pertinent law.

6. Larceny \S 64(6)—Defendant must combat *prima facie* case made by showing recent possession of stolen property.

When the state has established a *prima facie* case against a defendant charged with larceny, and a part of the state's case is the proof of defendant's recent possession of the stolen property, the defendant is under the necessity of combating that *prima facie* case by a reasonable and creditable explanation of his possession of the property consistent with his innocence, and his failure to make such explanation subjects him to the risk of conviction.

7. Larceny \S 64(1)—Instruction as to possession of stolen automobile held proper.

Where possession of a stolen automobile had to be established by the circumstances shown in evidence, the trial court correctly instructed the jury that "possession * * * does not require that the defendant be actually or physically in said automobile, or that he have hold of it, but does mean the exercise of dominion or control

over said automobile to the exclusion of the owner, with such proximity to the said automobile as renders it possible to physically and actually possess it."

Appeal from District Court, Smith County.

Dan Bell was convicted of grand larceny, and he appeals. Affirmed.

Richard J. Hopkins, Atty. Gen., Miles Elson, of Smith Center, and Turner & Stanley, of Mankato, for appellant.

N. C. Else, of Osborne, and Relihan & Relihan, of Smith Center, for the State.

DAWSON, J. The defendant was convicted of grand larceny for the theft of a Ford automobile.

The state's evidence, in brief, disclosed that the car in question belonged to Guy Chase, a resident of Smith county. Chase and his family attended a show in Smith Center one evening in September, 1919, leaving their car near by. After the show their car was missing. The defendant, Dan Bell, and one Parsons, who had previously discussed the possibilities of the business of dealing in stolen automobiles, met some time after the theft of the Chase car, and defendant told Parsons that he had a car for him.

"Q. What was that conversation? A. Well, he told me he had a car for me.

"Q. Did he tell you where this car was? A. Yes, sir.

"Q. Well, go ahead and state what he said about it. State fully. A. This car was near or at the home of his mother."

Parsons and Bell went to the farmhouse of Bell's mother some 10 miles from town. They carried with them a can of paint, procured at Bell's home in Smith Center. After supper Bell left the house, and a few minutes later Parsons heard a motor running, and walked out and met Bell coming from its direction. Bell said to him: "Your car is ready." The car was sitting out in the road about 100 yards from the house. Parsons found the engine running, and the paint which they had carried from Bell's house in Smith Center was in the car. Parsons drove the car to Glade (in Phillips county), where he stopped and painted it. Then he drove it to a place near Jennings (in Decatur county), where he traded it to a man named Hahn for a Liberty Bond, a motorcycle, and a check for \$125. Parsons left the motorcycle with an acquaintance near Lenora, and deposited the check in a bank in Oronoque, with instructions to the banker to pay the proceeds to "Charles Smith." Parsons then returned to Smith county, and told Bell what he had done with the car and some days later he and Bell drove out to Oronoque, and Bell called at the bank, representing himself to be "Charles Smith," and the proceeds of the check were paid to

him. Parsons and Bell then went to Lenora and got the motorcycle and put it in their car and drove to Norton, where they tried to dispose of it. Failing in that, they carried it home with them to Smith Center. Another significant incident was the fact that another Ford car belonging to a man named Coleman, of Downs, had been stolen about the same time as the Chase car, and this Coleman car was proved to have been in Bell's possession. The tires and top of the Coleman car were on the Chase car at the time it was made ready by Bell for Parsons' run with it to Glade and Jennings, and the tires of the Chase car were on the Coleman car when the latter car was in defendant's possession.

[1] The first specification of error relates to the overruling of defendant's demurrer to the state's evidence. In view of the foregoing brief summary of the evidence, that contention cannot be sustained. It is argued that there is no evidence that Bell stole the car, or that he was aware of its theft for some days after it was stolen. Bell's guilt was proved in the common and usual way that the guilt of most thieves is established—by showing it to have been in his possession shortly after it was stolen, with no satisfactory explanation of such possession forthcoming from Bell consistent with innocence on his part. *State v. White*, 76 Kan. 654, 92 Pac. 329, 14 L. R. A. (N. S.) 556.

[2] It is urged, however, that the state did not prove that Bell ever had possession of the Chase car. It is true that no witness saw Bell in possession of the car, but it was shown that shortly before the theft he was disposed to consider the business of dealing in stolen cars; the car was stolen; a few days later the car had the tires and top of another stolen car which had been in Bell's possession; it was first seen after its disappearance in front of Bell's mother's house, where Parsons had come to get it pursuant to Bell's statement that he had a car ready for Parsons. It was found with the paint furnished by Bell to disguise it. It was made ready by Bell to be driven away and disguised and disposed of by Parsons. Under such circumstances a jury would be dull or derelict if they failed to discern the fact of Bell's possession of the car.

[3] It is next urged that error was committed in permitting a witness to testify that at the home of Bell there were dies suitable for cutting or altering the numbers on automobiles engines. The numbers on the Chase car were altered after it was stolen; and this testimony, while perhaps of slight probative value standing alone, was competent and admissible. 1 Wigmore, § 149.

[4] Complaint is also made of the admission of the testimony of Parsons touching the conversations he had with Bell relative to the business of buying stolen cars in Kansas

City, Mo., and trading or selling them out in Western Kansas. Whether or not the trial court ruled altogether correctly on this matter, the defendant is in no position to complain, because defendant's objection thereto was sustained, and the trial court directed the jury to disregard this phase of the evidence. *Griffith v. Railroad Co.*, 100 Kan. 500, 506, 166 Pac. 467.

[5] Fault is found with the trial court's instruction:

"(9) The possession of property proved to have been recently stolen is usually regarded in law as a criminating circumstance, tending to show that the possessor stole the property, and as sufficient evidence upon which a conviction may be founded, unless the facts and circumstances surrounding and connected with such possession are such as to produce in your mind a reasonable doubt as to whether or not the property might have been acquired honestly or through mistake. But this rule only pertains when such possession is in such person, or exclusively in the common possession of such person and others."

But this instruction must be read in connection with another, also given by the court:

"(10) When recently stolen property is found in the possession of another, still if the attending circumstances, or from any explanation made, or in view of the evidence or from the lack of evidence, if any, there remains a reasonable doubt as to whether or not such person stole the property, he should not be convicted."

[6] Appellant contends that these instructions erroneously shifted the burden of proof by requiring him to show that he came rightfully into the possession of the property. His counsel say:

"We do not think that the court can at any stage of the trial of a criminal case shift the burden of proof to the defendant."

It is of course correct that the court cannot shift the burden of proof to the defendant in a criminal case, but when the state has established a complete *prima facie* case against him, the defendant is under the necessity of combating the *prima facie* case or of incurring the risk of conviction. He can take his choice. If this be properly characterized as a shifting of the burden of proof, it arises from the stern necessities of defendant's predicament, and not because of any arbitrary rule of law imposed on him.

In *State v. Cassady*, 12 Kan. 550, it was said:

"(5) The possession of stolen property, recently after it is stolen, is *prima facie* evidence of guilt, and throws upon the possessor the burden of explaining such possession, and if unexplained may be sufficient of itself to warrant a conviction."

See, also, *State v. McKinney*, 76 Kan. 419, 91 Pac. 1068; *State v. White*, 76 Kan. 654, 92 Pac. 329, 14 L. R. A. (N. S.) 556; *State*

v. Jewell, 88 Kan. 130, 127 Pac. 608; State v. Rice, 93 Kan. 589, 144 Pac. 1016; 4 Wigmore on Evidence, §§ 2485-2513.

[7] Complaint is also made of the trial court's instruction touching the matter of possession of the car by defendant. The instruction reads:

"(11) Possession as used in these instructions does not require that the defendant be actually or physically in said automobile, or that he have hold of it, but does mean the exercise of dominion or control over said automobile to the exclusion of the owner, with such proximity to the said automobile as renders it possible to physically and actually possess it."

The evidence touching Bell's possession was established, if at all, by the facts and circumstances narrated above, and fully warranted the giving of this instruction, and it was a correct statement of pertinent law.

The other matters urged for defendant have been carefully noted, but nothing of merit or requiring further discussion can be discerned in this appeal. The record contains no error, and the judgment is affirmed.

All the Justices concurring.

HAYMAKER v. ALFORD et al. (No. 23053.)

(Supreme Court of Kansas. Nov. 12, 1921.)

(Syllabus by the Court.)

1. Vendor and purchaser ⇨44—Finding that land contract was signed by vendor misunderstanding contents sustained.

The evidence is held sufficient to justify a finding that a contract for the sale of land was signed by the vendor under a wrong understanding as to its contents, brought about in such a way that she was entitled to have it set aside, whether the basis of such relief is described as actual fraud, constructive fraud, or excusable mistake.

2. Judgment ⇨256(2)—Special findings held to support judgment setting aside contract for sale of land.

The special findings are held to support a judgment setting aside the contract referred to in the foregoing paragraph.

3. Cancellation of instruments ⇨53—Finding that no contract was consummated held not outside of pleading or evidence.

A finding that the minds of the parties never met, and therefore that no contract resulted, is held not to be outside the pleadings or evidence.

4. Appeal and error ⇨1071(6)—Refusal of finding on issue of actual fraud not prejudicial error in view of special findings relating to mistake.

In an action to set aside a written contract for fraud or conduct having the effect of fraud, where special findings were requested and those

made were sufficient to require judgment for the plaintiff on the ground that she signed the contract under a mistake as to its contents induced by the conduct of the defendant, it is held not to have been prejudicial error for the court to refuse to make a further finding upon the issue of actual fraud, or upon an unimportant detail regarding the drafting of the contract.

5. Vendor and purchaser ⇨44—Evidence of value of property held admissible upon conflicting testimony of parties.

Where the vital controversy is over the price agreed to be paid for a tract of land, the testimony of the parties to the agreement being in conflict, it is competent to show the value of the property for its bearing upon the probability of the respective versions.

Appeal from District Court, Neosho County.

Action by May C. Haymaker against Charles E. Alford and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Jones & Allen and James W. Finley, all of Chanute, for appellants.

H. P. Farrelly and T. R. Evans, both of Chanute, for appellee.

MASON, J. May C. Haymaker, a widow, was the owner of a quarter section of farm land, subject to a mortgage of \$2,800. She had a talk with Charles E. Alford, who had been occupying it as a tenant, with regard to its sale to him. Her version is that an oral agreement was reached that he was to have it for \$6,500, he assuming the payment of the mortgage in addition to paying her that amount. His version is that the agreement was that he was to pay \$6,500, less the amount of the mortgage, which he was to assume. The next day Alford, accompanied by Byrd H. Clark, a real estate agent, called upon her at a place where she was employed as a nurse, and a written contract was executed by Alford and Mrs. Haymaker by the terms of which he was to receive a deed upon paying her \$3,700 and assuming the mortgage. Five days later she brought this action against Alford, Clark also being made a defendant, asking for the cancellation of the written contract on the ground that she had signed it with the understanding induced by Alford that it provided for the payment to her of \$6,500, the provision that she was to receive but \$3,700 being due to a mistake of Clark, the scrivener, or made by design with the purpose of defrauding her. The defendants answered, each denying generally the allegations of the petition, and Alford adding that the written contract was entered into by the plaintiff with full knowledge of its contents. On a trial judgment was rendered in favor of the plaintiff, and the defendants appeal.

[1] 1. The defendants contend that the issue involved was one of fraud, and that the plaintiff should have been denied relief because there was a total failure to prove fraud. The petition alleges actual fraud; but if the plaintiff showed that she signed the written contract under a mistake as to its contents brought about by such means that equity should relieve her from liability thereunder, there would be no such variance as to preclude her recovery, even if the conduct of the defendants was not proved to amount to intentional, active fraud. Conduct of one of the parties justifying the rescission or reformation of a contract by reason of its having been signed by the other under a mistake of fact is not always characterized as actual fraud. Thus it has been said:

"Where the party's error as to the contents of his signed document is known to the second party, the first party may, of course, by the general principle (*ante*, § 2413), insist upon the terms as supposed by him, because these are identical with those which he appeared to the second party to be intending to utter. In other words, the actual and therefore the reasonable consequence of his volition to express himself in certain terms was precisely what the second party understood to be that expression. (1) The ordinary instance is that of fraudulent misrepresentations of the document's terms by the second party. * * * (2) Where the first party's error is merely known to the second party, without fraudulent means by the latter, the result is still the same, for the latter cannot claim that the first party's expressed words were reasonably so accepted by him; the only difference ought to be that in this case the first party should be satisfied with having the document reformed, while in the case of fraud he ought to be entitled to repudiate the entire transaction, by way of penalty upon the trickster. (3) Where the first party's error was not known to the second party, but was induced by the latter's own conduct, here also the first party may not be bound; for in such case it may well be that the terms actually expressed did not come to be expressed as the natural consequence of the first party's volition, but were due rather to the second party's own conduct. In that event the latter is not entitled to charge the former with them. * * *" 4 Wigmore on Evidence, § 2416.

Of one of the situations referred to this court has said:

"Furthermore, if indeed the 40 acres was to be reserved for the full duration of the lease, and the defendant noticed the mistake of the scrivener at the time the lease was executed, and if he purposely or thoughtlessly kept silent about it, the want of mutuality in the matter of the mistake would not stay the hand of a court of equity to correct the writing, as the attitude of defendant in such case would be treated as a constructive fraud on his part." *Atkinson v. Darling*, 107 Kan. 229, 231, 191 Pac. 486.

Likewise the term constructive fraud seems appropriate where the mistake of one

of the parties is brought about by the conduct of the other, where a deliberate fraudulent intent is not established. The phrase to be used in describing the conditions that warrant rescission on account of the mistake of one party known to or induced by the other is not of vital importance.

There was evidence tending to show these facts: In the original talk between Mrs. Haymaker and Alford it was agreed that she was to receive \$6,500. The contract was signed while she was the sole nurse in charge of a patient who was seriously ill, requiring her attendance at the bedside practically all the time. She was called from this service to sign the contract, which the defendants told her conformed to the oral agreement. She signed it in that belief without reading it, having confidence in both defendants; Alford being an old acquaintance and personal friend. She had had but little business experience. She told Clark she was to receive \$6,500 cash, the mortgage to be assumed by Alford. Clark undertook to read to her the written contract, but did not read the clause stating that she was to receive but \$3,700. This evidence was sufficient to sustain a finding of actual fraud. It also gave room to hold the contract voidable even without that finding, upon the ground that the plaintiff signed the contract under a misunderstanding as to its provisions brought about in such a way that she was not concluded by it, whether the element that relieves her is described as constructive fraud or excusable error.

[2] 2. The defendants further contend that the judgment was contrary to the special findings made by the court, particularly on the ground that they showed affirmatively that no fraud had been practiced upon the plaintiff. The findings recited these facts, about which there had been no dispute:

The written contract was supposed to have been drawn and executed in duplicate. The two copies, however, were not identical in terms. They were made by Clark, who filled in the blanks in typewritten forms which he carried with him. In these forms the recital of the agreement to sell, for an amount to be named, real estate to be described, was followed by the words: "First party agrees to execute warranty deed to the above premises free and clear of all incumbrances whatsoever." The blank for the agreed price in dollars was filled in in both copies with the figures "6,500," and in each the land was properly described. In the copy left with the plaintiff, however, but not in the other one, the words above quoted were followed by this insertion: "Except mortgage in sum of \$2,800 and interest from March 1, 1919." (The court found that this part of the written contract left with the plaintiff stated her understanding as to the consideration, while the corresponding part of the other copy stated the understanding of the defendants in that regard.)

A subsequent clause in both copies was filled in so as to read:

"Payments are to be made as follows: \$100 cash in hand which is hereby acknowledged by first part, and assume present mortgage of \$2,800 and interest at 6 per cent. from Mch. 1st 1919 and to pay the balance in cash of \$3,600.00 on or before 90 days, making a total of \$6,500."

The court found that at the time the plaintiff signed the contract she did not understand the clause just stated or the effect it had on the consideration as provided in the earlier paragraphs already described, and that this clause was not as she understood the oral agreement to be.

The court's findings that the first part of the copy of the written contract left with the plaintiff stated her understanding as to the consideration, while the corresponding part of the other copy stated the defendant's understanding in that regard, are interpreted by the defendants as referring to the understanding of the respective parties concerning the effect of the oral agreement. From this the defendants argue that as they were found to have understood the effect of the writing to be the same as that of the oral agreement, they were acquitted of bad faith or any attempt to deceive the plaintiff or take advantage of her. We interpret the findings referred to as meaning that the first part of the plaintiff's copy stated her understanding of the effect of the written contract and the corresponding part of the other copy stated the defendants' understanding thereof, and under this interpretation the argument fails.

Alford testified that in the first talk with the plaintiff she suggested to him the price of \$42.50 an acre. The court obviously discredited this testimony outright, for a price named on that basis cut off the opportunity for a misunderstanding growing out of the existence of the mortgage.

Another finding read:

"That the defendants told the plaintiff that the written contracts dated June 7th, were the same as the oral agreement of June 1st, which was not true, because of the difference in the written contracts it could not be true, and neither of said contracts were as the plaintiff understood them to be."

The defendants interpret this as meaning that the only reason the court believed the defendants to have spoken falsely when they said the written contracts were the same as the oral agreement was that such statement could not have been true inasmuch as the two copies of the written contract differed. The defendants argue that the court's conclusion was necessarily unsound because the two copies of the written contract in spite of verbal differences were of the same legal effect. Again we disagree with the defendants' interpretation of the finding. The court did

not say that the statement made by the defendants was untrue because the two copies were not alike, but that the statement was not true, and because of the difference in the writings it could not be true. The sentence introduced by the word "because" is complete in itself. We need not pass upon its correctness because, if inaccurate, it does not vitiate the rest of the finding. The provision of the copy of the written contract left with the plaintiff that in consideration of \$6,500 she was to execute a deed to the property clear of incumbrance excepting a mortgage for \$2,800 standing by itself would indicate that she was to receive \$6,500 for her equity. The subsequent provision that the buyer was to pay \$3,700 and assume the mortgage for \$2,800, "making a total of \$6,500," by reason of its greater definiteness might control; but the earlier recital was of importance because of its tendency to lead the plaintiff to understand that the written contract meant that \$6,500 was to be paid to her.

Another finding read:

"The plaintiff understood by the oral contract that she was to receive \$6,500 for her property and defendant to assume the mortgage of \$2,800, and never intended to sell her farm to the defendant for \$6,500 and pay the mortgage of \$2,800 out of that, while defendant claims that he understood he was to get the farm for the total sum of \$6,500, as provided for in his written contract."

The defendants interpret this as deciding that Alford understood the oral agreement to provide for the payment of but \$3,700 in addition to assuming the mortgage. This interpretation fails to take account of the language used by the court, which is that the plaintiff understood by the oral contract that she was to receive \$6,500, while the defendant (Alford) "claims" that he understood she was to get but \$3,700.

[3] 3. The defendants assert that in another finding the court went outside of the pleadings and of the theory upon which the evidence had been introduced, and thereby committed error. This finding read:

"These written contracts above referred to are so different in their terms regarding the consideration that in fact and in equity the minds of the parties to this action never came together. They really never agreed to the same thing, and no enforcing contract was made between them for the sale of the land. Their minds never met on the amount of consideration."

If the statement that the parties never agreed to the same thing is taken to mean that even in the preliminary conversation there was no agreement as to price, the finding is not outside the pleadings or evidence. The plaintiff pleaded and testified that the oral agreement was that she should receive \$6,500 for her interest in the land. The de-

defendant Alford testified that the oral agreement was that he was to pay but \$3,700 besides assuming the mortgage. Although the parties agreed that an oral contract had been made and differed only as to its terms, it would obviously be competent for the court to find that no contract had resulted from the oral negotiations because one understood the matter one way and the other the other. However, we read the finding as referring to the written contracts and as meaning that no valid contract resulted from the writings because, while the defendants understood that on their face they called for a payment to the plaintiff of but \$3,700, she supposed they provided for her getting \$6,500, and was led to that understanding by circumstances (one of which was the difference in the language of the two copies) such that she was not precluded from questioning the effect of the writing, and therefore there was no meeting of the minds in legal contemplation as there was none in fact.

[4] 4. After the findings had been read, the defendants asked a finding upon the question of fraud as alleged in the petition, and also findings as to the source of Clark's information at the time he wrote the contract and upon which he prepared it. The court refused to make any additional finding, and this refusal is complained of. For reasons that have already been sufficiently indicated, we think the findings made by the court required the judgment that was rendered, because they involved a decision that the plaintiff had signed the contract under a mistake as to its contents induced by the conduct of the defendants. They clearly imply that her omission to read it before signing and her error as to its provisions were due to Alford's statement that it was in accordance with the oral agreement, aided by the circumstances under which it was presented to her. If the facts found compel the judgment that is rendered, a reversal is not required

by the omission to make further findings. *McCandliss v. Kelsey*, 16 Kan. 557. If it were established that the defendants did not deliberately and purposely defraud the plaintiff, this would not change the result. "If one of the parties does anything that influences the other party to enter into the transaction, through a mistake as to the true facts, the conduct of this party, whatever the spirit that may have actuated it, will not stand the scrutiny of the chancellor." 1 Story's Eq. Jur. (14th Ed.) § 168. In view of these considerations, we do not regard the court's refusal to pass upon that phase of the matter (for that is what the ruling amounted to) as prejudicial error. Nor do we see that it was important that findings should have been made as to the source of Clark's information upon which he prepared the written contract. He testified that he asked the plaintiff what consideration was to be placed in the contract, and she told him she was to get \$6,500, Alford to assume the mortgage and pay her the difference. He also testified that Alford and Alford's mother had already told him the substance of the deal, although Alford's testimony was that he had not done so. The plaintiff testified that she told Clark that she was to get \$6,500 cash and the \$2,800 was to be assumed by Alford. A finding that Clark received his information from Alford and the plaintiff, or from Alford's mother and the plaintiff, which would have been as favorable for the defendants as their own evidence would justify, would not have affected the result.

[5] 5. Complaint is made of the admission of evidence of the value of the farm. The court found that it was worth at least \$8,000. We consider the evidence competent as having some bearing upon the probability of the plaintiff having agreed to sell it for \$6,500.

The judgment is affirmed.

All the Justices concurring.

MEMORANDUM DECISIONS

PEOPLE v. STERLING. (Cr. 933.) (District Court of Appeal, First District, Division 1, California. Sept. 27, 1921.) Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge. Louis Sterling was convicted of murder in the first degree, and he appeals. Affirmed. Edmond H. Lomasney, of San Francisco, for appellant. U. S. Webb, Atty. Gen., and John H. Riordan, Deputy Atty. Gen., for the People.

PER CURIAM. Defendant was charged with killing his wife. He was found guilty of murder in the first degree, and his punishment was fixed at imprisonment in the state's prison for life. From a judgment entered on the verdict he has appealed. The matter comes before this court on an order to show cause why the judgment should not be affirmed for lack of prosecution of the appeal. Ordinarily in such matters we would not consider the record further than to determine whether or not due diligence had been exercised in perfecting the appeal. Owing to the nature of the charge and the gravity of the sentence imposed on the defendant, however, we have gone further than is usual in such cases, and have permitted appellant on this hearing to advance reasons why the judgment against him should be modified. After consideration we find no error in the record which substantially affects the rights of the defendant. This narrows the issues presented by this appeal to the principal point urged by the defendant in support of his motion, which is that the evidence fails to show that the homicide was premeditated, and therefore is insufficient to support the verdict of murder in the first degree. There is evidence in the record, however, which, if believed by the jury, as undoubtedly it was, is sufficient to support its findings. The motion to modify the judgment is denied. The judgment and order are affirmed.

SWARTZ v. MILLER. (No. 10066.) (Supreme Court of Colorado. Nov. 7, 1921.) Department 2. Error to Boulder County Court; E. J. Ingram, Judge. Proceedings by Eva Miller against Mrs. Laura B. Swartz, to contest the will of the former's mother, Katharina Haldi. Judgment for contestant, and contestee brings error. On application for supersedeas. Supersedeas granted, reversal of case directed, and judgment for the contestee. Rinn & Archibald and Martin, Newcomer, Fitzgerald & Tinglof, all of Boulder, for plaintiff in error. Grant A. Halderman and C. B. Garbarino, both of Boulder, and Frank A. Kemp, Jr., of Denver, for defendant in error.

DENISON, J. This case is a contest by Eva Miller of the will of her mother, Katharina Haldi, who left a legacy of \$500 to Mrs. Swartz, plaintiff in error, the residue to said Eva Miller, who is sole heir; it is before us on motion for supersedeas. The attack upon the will was made upon the grounds of undue influence and mental incapacity. The court, we think rightly, withdrew from the jury the question of un-

due influence and submitted only that of mental incapacity. The verdict for the contestant must therefore be regarded as based wholly on the latter point. This case differs from the ordinary contest of a will on the ground of insufficient mental capacity in that usually the claim is made that capacity has failed at or before the execution of the instrument attacked, while here we have a claim that there never was sufficient capacity for testamentary purposes. At the date of the will Mrs. Haldi's mind was as good as it ever was. The principal ground urged for reversal is that the verdict is against the evidence, and this ground we think is well taken. We think that the verdict is contrary to the direct, positive, and undisputed evidence of the testatrix's mental capacity, as shown by what she actually did during her many years' residence in Boulder county, and that she was so shown to be of sound and disposing mind: our conclusion, therefore, is that the verdict is not sustained by the evidence. This makes it unnecessary to consider other questions. Both sides ask us to decide the case finally, and not grant a new trial. We therefore grant the supersedeas, and direct the reversal of the case, and judgment for the contestee.

TELLER, Acting C. J., and WHITFORD, J., concur.

BENNETTS v. McDONALD et al. (Nos. 4777, 4778.) (Supreme Court of Montana. Jan. 8, 1921.) Appeal from District Court, Silver Bow County; J. V. Dwyer, Judge. W. E. Carroll, of Butte, for appellant. W. D. Kyle, of Butte, for respondents.

PER CURIAM. On motion of respondents, the appeals herein are dismissed.

BYRNE v. MANGER. (No. 4255.) (Supreme Court of Montana. Jan. 7, 1921.) Appeal from District Court, Broadwater County; John A. Matthews, Judge. Earl F. Angell, of White Sulphur Springs, for appellant. Ford & Linn and N. B. Smith, all of White Sulphur Springs, for respondent.

PER CURIAM. On motion of appellant, the appeal herein is dismissed.

CORNELL v. MURRAY et al. (No. 4265.) (Supreme Court of Montana. Jan. 8, 1921.) Appeal from District Court, Madison County; Wm. A. Clark, Judge. C. W. Robinson, of Dillon, and M. M. Duncan, of Virginia City, for appellants. Lew L. & E. J. Callaway, of Dillon, for respondent.

PER CURIAM. Pursuant to stipulation of the parties, the appeal in the above-entitled action is dismissed as settled.

FOWLER v. PARSONS et al. (No. 4791.) (Supreme Court of Montana. Feb. 1, 1921.) Appeal from District Court, Dawson County;

A. A. Grorud, of Helena, and Jens Rivenes and H. J. Haskell, both of Glendive, for respondent.

PER CURIAM. The motion of respondent herein to dismiss the appeal, on the ground that the record on appeal was not filed in the Supreme Court within time, is granted, and the appeal is dismissed.

HARRISON v. RIDDELL et al. (No. 4816.) (Supreme Court of Montana. April 16, 1921.) Appeal from District Court, Silver Bow County; Edwin M. Lamb, Judge. Walker & Walker and C. S. Wagner, all of Butte, for appellants. Harry Meyer, of Butte, and Lester H. Loble, of Helena, for respondent.

PER CURIAM. The order heretofore made on April 4, 1921, overruling respondents' motion to dismiss the appeals herein is vacated, and the appeals are dismissed.

HIGHLAND OIL CO. v. SOUERS. (No. 4810.) (Supreme Court of Montana. March 2, 1921.) Appeal from District Court, Musselshell County; George P. Jones, Judge. Carl N. Thompson, of Roundup, for appellant.

PER CURIAM. Pursuant to motion of appellant, the appeal herein is dismissed as settled.

HOLT v. LEWISTOWN STATE BANK et al. (No. 4672.) (Supreme Court of Montana. Jan. 8, 1921.) Appeal from District Court, Fergus County; Roy E. Ayers, Judge. Chas. J. Marshall and R. S. Harrington, both of Lewistown, and Howard C. Gee, of Winifred, for appellant. Belden & De Kalb and Merle C. Groene, all of Lewistown, for respondents.

PER CURIAM. Pursuant to stipulation of the parties, the appeal herein is dismissed.

SECURITY STATE BANK OF HAVRE v. WHEELER et al. (No. 4774.) (Supreme Court of Montana. Jan. 4, 1921.) Appeal from District Court, Hill County; Norris, Hurd & Hauge, of Havre, for appellant.

PER CURIAM. The motion of appellant to dismiss the appeal herein is granted, and the appeal accordingly dismissed.

SNELLING v. CITIZENS' STATE BANK et al. (No. 4595.) (Supreme Court of Montana. Jan. 8, 1921.) Appeal from District Court, Musselshell County; George P. Jones, Judge. E. K. Cheadle, of Lewistown, for appellant. V. D. Dusenberry, for respondents.

PER CURIAM. On motion of respondents, the appeal in the above cause is dismissed.

STATE v. BRADY. (No. 4690.) (Supreme Court of Montana. March 8, 1921.) Appeal from District Court, Silver Bow County; J. J. Lynch, Judge. Wellington D. Rankin, Atty. Gen., for the State. George Bourquin and Nolan & Donovan, all of Butte, for respondent.

PER CURIAM. Pursuant to præcipe filed by the Attorney General, the appeal herein is dismissed.

STATE v. KIDMAN. (No. 4768.) (Supreme Court of Montana. May 2, 1921.) Appeal from District Court, Hill County; Frank E. Carleton, Judge. Wellington D. Rankin, Atty. Gen., for the State. J. P. Donnelly, of Havre, for respondent.

PER CURIAM. Pursuant to præcipe filed by the Attorney General, the appeal in the above-entitled cause is dismissed.

STATE v. YEGEN. (No. 4673.) (Supreme Court of Montana. Jan. 4, 1921.) Appeal from District Court, Yellowstone County; A. C. Spencer, Judge. Walsh, Nolan & Scallon, of Helena, and Snell & Arnott, Nichols & Wilson, and G. C. Cisel, all of Billings, for appellant. S. C. Ford, Atty. Gen., for the State.

PER CURIAM. Upon motion of counsel of both respondent and appellant, the appeal is dismissed; the appellant having been granted an unconditional pardon, approved by the board of pardons.

STATE ex rel. BERGESON v. DISTRICT COURT et al. (No. 4840.) (Supreme Court of Montana. March 21, 1921.) Original application for writ of supervisory control, directed to the District Court of Fergus County and Roy E. Ayers, a Judge thereof. Norris, Hurd & Rhoades, of Great Falls, for relator.

PER CURIAM. The application of relator for supervisory control, this day presented, is, after due consideration by the court, denied.

STATE ex rel. BISHOP v. DISTRICT COURT et al. (No. 4860.) (Supreme Court of Montana. April 3, 1921.) Original application for writ of prohibition, directed to the District Court of the Twelfth Judicial District and John W. Tattan, Judge thereof. W. S. Townner, of Ft. Benton, for relator.

PER CURIAM. The application of relator for writ of prohibition is, after due consideration by the court, denied.

STATE ex rel. CITY OF BUTTE et al. v. DISTRICT COURT et al. (No. 4822.) (Supreme Court of Montana. March 2, 1921.) Original application for writ of prohibition, directed to the District Court of Silver Bow County, and Jos. R. Jackson, a Judge thereof. R. L. Clinton, of Butte, for relators.

PER CURIAM. Relators' application for a writ of prohibition is, after due consideration by the court, denied.

STATE ex rel. FORD, Atty. Gen., v. WESTERN LOAN & BLDG. CO. (No. 4337.) (Supreme Court of Montana. April 4, 1921.) Action in quo warranto, commenced in the Supreme Court under sections 6943 to 6967, Revised Codes, to determine the right of defendant corporation to do business within the state of Montana. Wellington D. Rankin, Atty. Gen., for plaintiff. Galen & Mettler, of Helena, for defendant.

PER CURIAM. Pursuant to præcipe filed by the Attorney General, the above-entitled action is dismissed.

STATE ex rel. HADDOCK v. DISTRICT COURT et al. (No. 4857.) (Supreme Court of Montana. April 16, 1921.) Original application for writ of supervisory control, directed to the District Court of the Sixteenth Judicial District and Stanley E. Felt, Judge. H. S. Hepner, of Helena, for relator.

PER CURIAM. The application of relator herein for writ of supervisory control is denied.

STATE ex rel. MANGUS v. BOARD OF COM'RS OF JUDITH BASIN COUNTY. (No. 4786.) (Supreme Court of Montana. Jan. 6, 1921.) Original application for writ of mandate. John A. Coleman, of Lewistown, for relator.

PER CURIAM. Upon motion of relator, the application for writ of mandate herein is dismissed.

STATE ex rel. RANKIN, Atty. Gen., v. NORTHERN PAC. RY. CO. et al. (No. 4797.) (Supreme Court of Montana. Jan. 27, 1921.) Application for leave to file complaint in Supreme Court. Wellington D. Rankin, Atty. Gen., pro se.

PER CURIAM. The application of relator herein for permission to file in this court an original complaint, seeking an order to show cause and a temporary restraining order enjoining defendant railway companies from putting into effect any and all laws of the state of Montana relating to rates, fares, etc., is, after due consideration, denied, for the reason that the court refuses to take jurisdiction of the cause.

STATE ex rel. ROGERS LAND & CATTLE CO. v. DISTRICT COURT et al. (No. 4865.) (Supreme Court of Montana. May 4, 1921.) Original application for writ of certiorari, directed to the District Court of the Thirteenth Judicial District and Robert C. Strong, Judge. C. F. Gillette, of Hardin, for relator.

PER CURIAM. The application of relator herein for writ of certiorari is denied.

STATE ex rel. SCANLAN et al. v. DISTRICT COURT et al. (No. 4842.) (Supreme Court of Montana. March 29, 1921.) Original application for writ of supervisory control to annul an order of the District Court of Lewis and Clark County. A. J. Horsky, Judge, restraining relators, as members of the Republican State Central Committee, from holding any meeting under the provisions of section 2, chapter 1, of the Laws of the Extraordinary Session of the Seventeenth Legislative Assembly, from selecting a Republican National Committeeman, and from exercising any of the powers, rights, or privileges to be conferred upon them, by said section, until the further order of the court. T. B. Wier, of Helena, W. E. Moore, of Phillipsburg, H. C. Crippen, of Billings, and J. C. Lyndes, of Hysham, for relators. Henry C. Smith and C. A. Spaulding, both of Helena, for respondents.

PER CURIAM. On application of relators herein for a writ of supervisory control, after

argument of counsel, it is, after due consideration, ordered that the writ issue. The court below and its judge are directed to modify the restraining order issued by it on Friday, March 25, 1921, so as to permit the relators and those associated with them, constituting the Republican State Central Committee, to hold the meeting for which they have assembled in the City of Helena, to transact the business for which the meeting has been called, and to elect a member of the Republican National Committee, provided that the relators and their associates shall not certify such election to the Republican National Committee until the action in which the restraining order was issued by the court below shall have been finally determined.

STINEHAGEN v. DUNCANSON. (No. 4834.) (Supreme Court of Montana. April 4, 1921.) Appeal from District Court, Fergus County. Blackford & Huntoon, of Lewistown, for respondent.

PER CURIAM. The appeal herein is dismissed, on motion of respondent, for the reason that the record on appeal was not filed within time.

WHEELER v. MCINTYRE. (No. 4775.) (Supreme Court of Montana. Jan. 4, 1921.) Appeal from District Court, Hill County. Norris, Hurd & Hauge, of Havre, for appellant.

PER CURIAM. On motion of appellant, the appeal in the above-entitled cause is dismissed.

WINNETT v. FIRST STATE BANK OF WINNETT. (No. 4710.) (Supreme Court of Montana. Jan. 11, 1921.) Appeal from District Court, Fergus County; Roy E. Ayers, Judge. Wm. M. Blackford, of Lewistown, for appellant. Fritz Harri, of Lewistown, for respondent.

PER CURIAM. On motion of appellant, the appeal in the above-entitled cause is dismissed.

GILBERT v. STATE. (No. A-3780.) (Criminal Court of Appeals of Oklahoma. Nov. 22, 1921.) Appeal from County Court, Tulsa County; W. B. Williams, Judge. Charles Gilbert was convicted of a violation of the prohibitory liquor law, and he appeals. Affirmed. D. G. Elliott, of Tulsa, for plaintiff in error. The Attorney General and E. L. Fulton, Asst. Atty. Gen., for the State.

PER CURIAM. Plaintiff in error, Charles Gilbert, was tried and convicted in the county court of Tulsa county on an information charging that in said county, on the 11th day of August, 1919, he did unlawfully have in his possession certain intoxicating liquor, to wit, 36 pints of Choctaw beer, which said Choctaw beer contained more than one-half of 1 per cent. of alcohol, measured by volume, and capable of being used as a beverage, with the unlawful intent to barter, sell, and otherwise dispose of the same, and his punishment fixed at confinement in the county jail for 6 months and a fine of \$500. From the judgment rendered in

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accordance with the verdict on the 26th day of March, 1920, he appealed by filing in this court on May 22, 1920, a petition in error with case-made. The errors assigned are that the verdict is contrary to the law and the evidence; that the court erred in admitting incompetent testimony, and erred in overruling the motion for a new trial. The defendant is not represented by counsel in this court, but we have examined the record and find no material error, and we think the testimony, without any doubt, is ample to sustain the conviction. The judgment of the lower court is therefore affirmed.

KING v. STATE. (No. A-4053.) (Criminal Court of Appeals of Oklahoma. Nov. 23, 1921.) Appeal from County Court, Caddo County; C. B. Case, Judge. Tom King was convicted of a violation of the prohibitory liquor law, and he appeals. Appeal dismissed. Morgan & Osmond, of Anadarko, for plaintiff in error. The Attorney General, for the State.

PER CURIAM. Plaintiff in error, Tom King, was convicted on a charge of selling one quart of whisky to Ira Hamilton, and was sentenced to be confined in the county jail for 30 days and to pay a fine of \$50. From the judgment he appealed by filing in this court on August 17, 1921, a petition in error with case-made. His counsel of record has moved the court to dismiss the appeal. The motion to dismiss is sustained, and it is ordered that the appeal herein be dismissed.

STATE v. RAMSEY et al. (No. A-3262.) (Criminal Court of Appeals of Oklahoma. Nov. 15, 1921.) Appeal from District Court, Washington County; R. B. Boone, Judge. A. L. Ramsey and A. T. Smith were charged with Sabbath breaking, by conducting a moving picture show on Sunday. Demurrer to information sustained, and the state appeals. Affirmed. The Attorney General and A. O. Harrison, Co. Atty., of Bartlesville, for the State. Craven & Heyl, of Bartlesville, for defendants in error.

BESSEY, J. A. L. Ramsey and A. T. Smith were, by information filed in the district court of Washington county on January 9, 1918, charged with Sabbath breaking by conducting a moving picture show on Sunday. The defendants filed a demurrer to said information, on the ground that the allegations in said information did not state a public offense against the laws of the state of Oklahoma. This demurrer was by the court sustained, and the state appeals. The question here involved is identical to that in the case of State v. Clint Smith, 198 Pac. 879, and for the reasons stat-

ed therein the ruling of the trial court, sustaining defendants' demurrer, is affirmed.

DOYLE, P. J., concurs.

MATSON, J., disqualified, and not participating.

Ex parte TAYLOR. (No. A-4118.) (Criminal Court of Appeals of Oklahoma. Nov. 16, 1921.) Application by Frances Taylor for writ of habeas corpus to be admitted to bail in a pending cause charging applicant with murder. Bail allowed. Walter Mathews, of Cushing, for petitioner. S. P. Freeling, Atty. Gen., and E. L. Fulton, Asst. Atty. Gen., for respondent.

PER CURIAM. On the 4th day of November, 1921, petitioner filed in this court her verified application for writ of habeas corpus to be admitted to bail in a cause pending and to be tried in the superior court of Creek county, Okl., wherein she, the said Frances Taylor, is charged with the murder of one Tennessee Watson. Petitioner alleges that she is now confined in jail in Creek county, Okl., by D. V. Livingston, sheriff of Creek county, Okl., and that she is held in custody by virtue of commitment issued by George Ham, of Creek county, as examining magistrate, upon a preliminary examination wherein the petitioner was charged with said offense. Attached to the application is a transcript of the evidence introduced at the preliminary examination of petitioner, and also affidavits in additional support of her application, and petitioner further alleges that the proof of her guilt of the murder is not evident, nor the presumption great, as appears from the evidence introduced at the preliminary examination and the additional affidavits. Petitioner further alleges that on the 1st day of November, 1921, she made application to the judge of the superior court of Creek county, Okl., for writ of habeas corpus to be admitted to bail on said charge, and that on said hearing said judge denied bail. Without entering into discussion of the evidence introduced against the petitioner at the preliminary examination and of the additional evidence in the form of affidavits that the petitioner has presented to this court in support of her application to be admitted to bail, we deem it sufficient to say, that a careful examination of this application convinces this court that petitioner is entitled as a matter of legal right to be admitted to bail in said cause. Wherefore it is considered and adjudged that petitioner be admitted to bail in the sum of \$15,000 for the appearance of said Frances Taylor to answer said charge in the superior court of Creek county, Okl., under the terms and conditions provided by the law, said bond to be approved by court clerk of said Creek county, and upon approval the said defendant (petitioner) to be discharged from custody by the sheriff of Creek county.

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